Observations on Latin American Constitutionalism

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OBSERVATIONS ON LATIN AMERICAN CONSTITUTIONALISM *

Latin American Constitutional Weaknesses

Scholars are in substantial agreement that Latin American constitutionalism leaves much to be desired.

First, there is the wide gap between constitutional formulations and actual political practice. No one would contend that any constitution, Latin American or otherwise, corresponds exactly to reality.[1] There are provisions in the United States Constitution which are no better observed than are those of the Latin American documents.[2] Even so, there can be little doubt that the gulf between theory and reality is far wider in much of Latin America than it is in many other parts of the world. Though many provisions of other constitutions do not correspond to actual political practice, Latin American stipulations on significant principles of government are often so much at variance with

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[1] George I. Blanksten, "Constitutions and the Structure of Power," Chapter 9 in Harold Eugene Davis, *Government and Politics in Latin America* (New York: Ronald, 1958), p. 228.

[2] In the case of the United States, the doctrine of implied powers as well as grants-in-aid and other devices have broadened the scope of federal legislation beyond constitutional recognition. The powers of the President extend far beyond the parsimonious statement in Article II. The practice of judicial review to determine the constitutionality of legislation is nowhere mentioned in the Constitution and has brought the judiciary into realms, such as apportionment of state legislatures, which were probably undreamed of by John Marshall, founder of the doctrine. Contrary to Article IV, full faith and credit is not always given in each state to the public acts, records, and judicial proceedings of every other state; nor are persons escaping from confinement necessarily delivered up by one governor upon request of another. The people, contrary to Amendment II, do not have an unlimited right to keep and bear arms. Despite Amendment IV, many trials are anything but speedy. Despite Amendment X, there is serious question whether the states have successfully reserved all the powers not delegated to the Congress. The electoral college does not work at all as intended (Article II and Amendment XII). "Equal protection of the laws," for which provision is made in Amendment XIV, has only recently begun to receive effective support. Section 2 of the same Amendment XIV, which provides that there shall be a reduction in representation in Congress for those states that arbitrarily deny the right to vote, never has been enforced; and many persons wonder whether there has been enforcement of Amendment XIV, Section 3, which provides that no senator or representative may hold office if he has "given aid and comfort to the enemies" of the Constitution of the United States. Amendment XV, on non-abridgement of the vote because of "race, color, or previous condition of servitude," is only now beginning to enjoy some respect. It seems quite likely that Amendment XXII, which limits the elected President to two terms, will be repealed as soon as a popular, charismatic, demagogic, irresponsible individual finds it convenient to run for a third term.

reality as to be totally misleading for the description of their political systems. Professor Martin C. Needler puts it quite bluntly:

> Quite clearly, many constitutional provisions are honored only in the breach; and yet great stress is placed upon constitutional forms and procedures, even where these mask political realities quite discordant with their intent.[3]

In the words of Professor William S. Stokes:

> . . . the evidence indicates that the theory of Latin American constitutions and the facts of politics are poles apart. Thus, more often than not, the student can find the following contradictions: instead of popular sovereignty, self-perpetuating oligarchy; instead of limited government, unlimited government; instead of federalism, centralization; instead of separation of powers and checks and balances, executive dictatorship; instead of protection of individual rights and guarantees, governmental violation of such rights; instead of peaceful, democratic procedures, violent, anti-democratic procedures. . . .[4]

Latin American scholars do not disagree with this estimate of their constitutional difficulties. In 1862, Fernando Lasalle spoke of the differences between the " paper constitution " and the " real constitution " of government and politics.[5] In his useful volume, *Las instituciones políticas en América Latina*, Raúl Cereceda offers the following comments:

> It is a common view in Latin America that the formal constitutions are not carried out in practice. . . . Undoubtedly, our constitutions have been violated with impunity, modified in accordance with political interest and caprice, and put aside without consideration for the provisions for amendment which are included in the documents. The abrogation of the Cuban Constitution of 1940, done in 1952 by General Batista, and its substitution by a Provisional Statute, is not a unique case in our history. If victorious revolutions can by their own free will exercise the constitutional power and can self-legalize themselves, and if, subsequently, such regimes can violate their constitutions which they themselves have fabricated, it is difficult not to arrive at the conclusion that under such circumstances the preparation of constitutions constitutes a farce, or, at the very least, a failure of political realism.[6]

[3] Martin C. Needler, *Latin American Politics in Perspective* (Princeton: Van Nostrand, 1963), p. 124.

[4] William S. Stokes, *Latin American Politics* (New York: Crowell, 1959), pp. 458-459. Very much the same points are made by J. Lloyd Mecham, " Latin American Constitutions–Nominal and Real," *Journal of Politics*, 21 (May, 1959), 258-275; and by Russell H. Fitzgibbon, " Constitutional Development in Latin America: A Synthesis," *American Political Science Review*, 39 (June, 1945), 511-522.

[5] Stokes, *Latin American Politics*, p. 458.

[6] Raúl Cereceda, *Las instituciones políticas en América Latina* (Bogotá: Oficina Internacional de Investigaciones Sociales de la Federación Internacional de los Institutos Católicos de Investigaciones Sociales y Socio-religiosas [FERES], 1961), pp. 85-86.

Eudocio Ravines, in his famous book, *América Latina*, is of much the same view, and claims that, "The Republic . . . brought in changes, but no transformations. The regimes did not correspond to the ideals; practice was not tied to theory, nor was there correspondence between forms and content." [7]

We can safely say that the contrasts between Latin American constitutional prescription and political reality are so great as to be worthy of special inquiry.

Secondly, it is true that in many instances Latin American constitutions are extremely fragile, and subject to frequent and easy change. Some of the constitutions are fairly old. That of Argentina was first enunciated in 1853. The Colombian was adopted in 1886. Even the documents of Mexico (1917) and Chile (1925) are not so recent as are several European and Asian counterparts.[8] These more durable Latin American constitutions are, quite definitely, exceptions to the rule. Since Independence there have been almost two hundred different Latin American constitutions.[9] This works out to an average of ten different constitutions for each republic. Thirteen countries have had ten or more each. Venezuela and the Dominican Republic take the honors for constitution-making, with over twenty each.[10] On the average, Latin American constitutions endure less than twenty years.[11]

It is apparent that in most Latin American republics, the stipulations of constitutional documents have neither established widely acceptable institutions and processes nor reflected very fundamental or durable arrangements for politics or society.

CAUSAL HYPOTHESES

Scholars have cited various causes as being responsible for the discrepancies between Latin American constitutional theory and political fact, and for the extreme fragility from which the basic documents suffer.

[7] Eudocio Ravines, *América Latina* (2nd ed.; Buenos Aires: Editorial Claridad, 1956), p. 46.

[8] Robert J. Alexander, *Latin-American Politics and Government* (New York: Harper & Row, 1965), pp. 12-13.

[9] Stated by Mecham, "Latin American Constitutions. . ." p. 258 as being 186. Since then, there have been new constitutions in Bolivia, Brazil, Dominican Republic, Ecuador El Salvador, Guatemala, Honduras, and Venezuela.

[10] Stokes, *Latin American Politics*, p. 457. On this point, also see Alexander T. Edelman, *Latin American Government and Politics* (Homewood, Ill.: The Dorsey Press, 1965), pp. 375-377.

[11] Needler, *Latin American Politics in Perspective*, p. 124.

It is contended, first, that Latin American constitutions tend to be quite artificial, and divorced from the environments in which they are supposed to function. Because of their low level of previous experience, it is argued, the founders of Latin American republics were compelled to turn to other lands for their constitutional models.[12] The Latin Americans borrowed freely from the United States, Spain, and France, and even imported some forms from Britain, Switzerland, and ancient Greek and Roman sources. The presidential system, the concept of separation of powers, the formalities of federalism where attempted, statements of individual rights, judicial structures, some tinkering with parliamentary devices—all these were lifted out of foreign constitutional documents, and were not native to the Latin American soil.[13] As Professor Russell H. Fitzgibbon puts it, ". . . Latin American constitutions failed to be the creatures of their own environment; they were simply alien adoptions and adaptations." [14]

Or, when not borrowed from abroad, the provisions in Latin American constitutional documents were quite artificial for another reason: They were and are creations of small, unrepresentative elites out of touch with their surroundings and moved by highly abstract, theoretical concepts unrelated to their environments. Professor Stokes contends that the Latin American constitutions have seldom been drafted by individuals representing the real social forces of the countries.[15] In the words of Professor Rosendo A. Gomez, " Ideas were everywhere more plentiful that the results of experience. The new constitutions were strongly disposed to enshrine the abstract." [16] Renato Poblete and J. L. Segundo refer to the Latin American constitutional framers as being drawn from a " pressure group composed of intellectuals," and stress that this elite group has been rather divorced from reality and has exerted a disproportionate influence on the Latin American political process.[17] Even Simón Bolívar was distressed about this feature of Latin American constitutionalism, as when he expressed his disdain for theoretically-oriented framers:

[12] Cereceda, *Las instituciones políticas* . . . , p. 86.

[13] Blanksten, " Constitutions . . . ," p. 228; Edelman, *Latin American Government and Politics*, pp. 377-379; Needler, *Latin American Politics in Perspective*, p. 123; and Stokes, *Latin American Politics*, pp. 460-464.

[14] Fitzgibbon, " Constitutional Development . . ," p. 521.

[15] Stokes, *Latin American Politics*, p. 459.

[16] R. A. Gomez, *Government and Politics in Latin America* (rev. ed.: New York: Random House, 1964), p. 24.

[17] Renato Poblete and J. L. Segundo, S. J., " La variable política," *Revista interamericana de ciencias sociales*, 2 (Número especial, 1963), pp. 276-277.

> . . . in place of attending to the practical norms of government, they follow the maxims of visionaries who, imagining republics in the clouds, attempt to achieve political perfection on the assumption of the perfectibility of humanity.[18]

So, it is charged, Latin American constitutions are quite artificial and unrealistic on two counts: (1) they are importations from very different foreign environments, and (2) their framers had little contact with their own socio-environmental needs.

There is also a rather different kind of contention about the sources of Latin American constitutional anomalies. According to this view, the Latin American environments themselves were and are extremely hostile to the establishment of any sort of stable, constitutional government, no matter what the forms or origins.

Books have been written about these unfavorable elements of Latin American historical, physical, and social environment. Even a bibliography, to say nothing of a complete commentary on this question, would be entirely beyond the limitations of this paper. Suffice it to say here that many writers have lamented (1) the physical and social dissection of Latin America, which has made it difficult to agree upon the rules of the political game, (2) the intense poverty of large sectors of the Latin American population, which has deprived governments of the revenue needed for public education, communications, and general improvement, (3) the failure of leading sectors of many Latin American populations to regard government as having a social or public function, (4) the persistence of feudalistic relationships and attitudes which emerge out of patterns of land monopoly and prevent development of a sense of public responsibility, and (5) the paucity of self-disciplined, responsible, socially conscious leaders.[19] There are many ways to phrase and classify the various unfavorable elements; [20] but it is not our function

[18] Cereceda, *Las instituciones políticas* . . . , p. 55.

[19] These and several other such elements are summarized in James L. Busey, *Latin American Political Guide* (11th ed.; El Paso: Texas Western College Press, 1967), pp. 2-4; Gomez, *Government and Politics in Latin America*, pp. 7-23; and numerous other sources. Relevant bibliographies on this may be found, among other places, in James L. Busey, *Latin America: Political Institutions and Processes* (New York: Random House, 1965), pp. 175-178; Gomez, *Government and Politics in Latin America*, pp. 118-119. Works in Spanish and Portuguese on this problem are too numerous for mention here. See bibliographies in Cereceda, *Las instituciones políticas* . . . , pp. 28-29, 41-42, 51, 71, 83-84, *et passim*; and in Poblete and Segundo, "La variable política," pp. 297-311.

[20] Cereceda lists the unfavorable elements as including (1) deep social cleavages which intensified disagreement on constitutional form, (2) *caudillismo*, and (3) weak economic foundations. *Las instituciones políticas* . . . , pp. 53-54.

to enter upon that project here.[21] It is, however, appropriate to the objectives of this paper that we stress that there is an important body of opinion which holds that there are factors in the Latin American environment which would make any constitutional arrangements both unrealistic and fragile.

There is no doubt that many Latin Americans, like people around the world, have been beguiled by the notion that good laws make good people and good governments.[22] One cannot but agree with Professor Mecham when he emphasizes that no constitutional gimmicks will assure democracy; that a free polity, with the corresponding and functioning constitutional documents, must be imbedded in the very mores of the people.[23]

The point is well illustrated by the case of Canada. The British North America Act (1867), which serves as the constitution for Canada, is notorious for its failure to depict the realities of Canadian political life. It would appear from the document that the Queen, the Canadian Privy Council, and the Governor General, exercise the real powers of government. The BNA Act leaves one with the impression that the Governor General is a sort of tyrannical potentate, though in reality he is little more than a ceremonial ornament.

The so-called Canadian Constitution says nothing whatever about some of the most important institutions and processes of the country—e. g., the Prime Minister, the whole concept of responsible government, or the most significant rôle of the House of Commons. The BNA Act goes on at great length about an upper house, the Senate, whose contemporary functions require a magnifying glass to detect, and whose members are supposed to be appointed for life by the Governor General —a duty performed in fact by the Prime Minister. From the BNA Act, one might assume that the Senate is just as significant as the House of Commons—or more so, since it is put first in the document. The BNA Act contains no provisions for its own amendment, and this question is still not entirely settled.

If one were to believe the Canadian Constitution, really meaningful power in the provinces is exercised by a Lieutenant Governor, though

[21] In his book-monograph, *Notes on Costa Rican Democracy* (Boulder: University of Colorado Press, 1962), Part II, "Causal Elements," pp. 47-72 and "Epilogue," pp. 73-78, this writer analyzes the rôles of land monopoly and land distribution in affecting the success of democracy and stability in Costa Rica.

[22] William W. Pierson and Federico G. Gil, *Governments of Latin America* (New York: McGraw-Hill, 1957), p. 108.

[23] Mecham, "Latin American Constitutions . . . ," pp. 274-275.

in fact this luminary is little more than a figurehead representing a figurehead (the Governor General) who in turn represents another figurehead (the Queen). A reading of the British North America Act gives the impression that it created a highly centralized government, with little effective power being granted to the provinces. In reality, almost the reverse is true, and the vigor of provincial government often threatens to tear the nation asunder.[24]

Furthermore, much of the BNA Act is phrased in a clumsy, pedestrian, disorganized manner. Take, for example, this gem of deathless prose, from Section 94:

> Notwithstanding anything in this Act, the Parliament of Canada may make Provision for the Uniformity of all or any of the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and of the Procedure of all or any of the Courts in those Three Provinces, and from and after the passing of any Act in that Behalf the Power of the Parliament of Canada to make Laws in relation to any Matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted; but any Act of the Parliament of Canada making Provision for such Uniformity shall not have effect in any Province unless and until it is adopted and enacted as Law by the Legislature thereof.

Or this, from Section 91:

> It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and the House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say, . . .

[24] The British North America Act, 1867, is available in R. MacGregor Dawson, *The Government of Canada* (4th ed.; rev. by Norman Ward; Toronto: University of Toronto Press, 1963), pp. 543-578. The same book contains a commentary, Chapters 4-7, pp. 61-150, especially p. 62. Other useful sources on this question would include R. MacGregor Dawson, *Democratic Government in Canada* (rev. by W. F. Dawson; Toronto: University of Toronto Press, 1957), Chapter II, pp. 17-24; Paul Fox (ed.), *Politics: Canada* (Toronto: McGraw-Hill of Canada, 1962), Parts 3 and 4, pp. 50-98 *et passim*; Paul Gérin Lajoie, *Constitutional Amendment in Canada* (Toronto: University of Toronto Press, 1950); W. R. Lederman, *The Courts and the Canadian Constitution* (Toronto: McClelland and Stewart, Ltd., The Carleton Library No. 16, 1964); Robert A. Mackay, *The Unreformed Senate of Canada* (rev. ed.; Toronto: McClelland and Stewart, Ltd., The Carleton Library No. 6, 1963); and John T. Saywell, *The Office of Lieutenant-Governor* (Toronto: University of Toronto Press, 1957).

In short, Canada may well have one of the most unrealistic and awkwardly expressed constitutions in the world. Yet, as is well known, she enjoys a governmental system which in terms of democracy and stability is probably second to none. It can hardly be doubted that there must be favorable physical, historical, and social features in the Canadian environment which encourage government to function even under the most adverse possible constitutional circumstances.[25] It is to be noted, in passing, that the British North America Act has served as the Constitution of Canada since 1867, and is therefore among the oldest such documents on earth.

We have cited two opposite sorts of causal hypotheses about Latin American constitutions: (1) that they were imported from abroad and framed by highly idealistic elite groups, and therefore had little if any relationship to the environments where they were supposed to function, and (2) that the Latin American environments were, in any case, not suitable for the successful application or long duration of any kinds of constitutions, no matter how ably framed. A moment of reflection will persuade us that these two points of view, while apparently contradictory to each other, are not necessarily opposed. They can both be true, and there is no doubt that there is much validity to both contentions.

Because of an understandable desperation which attaches to any attempt at rationalizing Latin American constitutions, another opinion is often expressed, and is designed to skirt the problem of causes for the inapplicability and fragility of Latin American constitutions. This is, to the effect that Latin American framers never intended that their documents would really be put into practice or that they would reflect Latin American political reality. The constitutions, it is alleged, were only supposed to express hopeful aspirations, ideal goals, or noble dreams of their founders.[26] Since there is little evidence that Latin American constitutional framers were in fact moved by such esoteric and unrealistic considerations, one cannot avoid the suspicion that much of this is rationalization after the fact. Nevertheless, there is doubtless much justification for assuming that after about the fifteenth or twentieth con-

[25] This writer has prepared a paper on this, entitled "Agents of Brazilian Instability in the Light of Canadian Experience," presented at Conference of the Western Political Science Association, Victoria, B. C., March 19, 1965; *Western Political Quarterly*, forthcoming.

[26] Alexander, *Latin-American Politics and Government*, p. 10; Edelman, *Latin American Government and Politics*, pp. 372-373; Gomez, *Government and Politics in Latin America*, p. 28; and substantially all other authors on the subject.

stitution, the statesmen of any country would probably develop a certain sense of unreality or even frivolity as they drearily set about their task another time. This "aspiration-quality" of Latin American constitutions is probably not so much a cause of their impracticality and fragility as it is a further demonstration of those features.

PROBLEMS OF CONSTITUTIONAL CONTENT

Specialists are in general agreement, then, that for the most part Latin American constitutions are quite artificially grafted to their environments, both because they are exotic foreign importations and because their framers had little contact with their own environmental reality; and that in any event, many of the conditions of Latin America were not favorable to the development of stable constitutional government of any kind. We can leave to speculation the thought that when they drafted their constitutions, Latin Americans didn't really expect much of them anyhow.

We can accept all these points of view, and still contend that there are features of Latin American constitutional content which have been inconsistent, self-defeating, and conducive to extreme governmental instability. Here, it will not be possible to examine these features in microscopic detail; much less will it be feasible to cite all the relevant phrases in all the Latin American constitutions. The broad outlines can be painted in easily and convincingly; and examples from a few representative documents can be cited.

It is frequently commented that though Latin American constitutional *policies* may be violated, their *forms* are usually observed. That is to say, there *are* presidents, congresses, systems of courts, and the like, and these more or less correspond to the constitutional dicta.[27] However, Latin American governmental practice does not coincide with constitutional provisions for democratic and civilian government, free elections, independent judiciaries, effective and respected legislative bodies, limitation of the executive power, individual guarantees and civil rights, social reform, and the like.

Almost every constitution of Latin America makes some statement to the effect that the government is to be democratic, and that power is to emanate from the people. Elaborate provisions set up legislative bodies and provide in minutiae for the procedures whereby they will determine policy, as well as proclaim that no branch of government is

[27] Needler, *Latin American Politics in Perspective*, p. 125.

to exercise the powers of others. And yet, the same documents provide their presidents with an incredible sweep of powers, permit them to declare states of siege and suspend constitutional guarantees, and provide only the most dubious protections against abuse of presidential authority. For example, the Mexican Constitution, Article 39, states that " the national sovereignty rests essentially and originally in the people," and in Article 40 proclaims that the republic is to be " democratic "; and there are many other phrases to the same effect. According to Article 49, " The supreme power of the Federation is divided, for its exercise, into Legislative, Executive, and Judicial " and " two or more of these Powers shall never be united in one single person or corporation," and so on. Articles 51-79 are devoted to every imaginable aspect of the legislative power; and then, Article 89 cuts the legislative power to pieces by granting to the President policy-making authority in areas which are unknown in most democratic systems—e. g., to appoint several top executive officers (including the Governor of the huge Federal District) without consulting either house of Congress; to declare war " pursuant to a previous law "; to open all classes of ports and establish maritime and frontier customs houses; to grant patents; and to request the removal of judicial authorities (subject only to a majority vote of the two houses of the Congress). In almost every Latin American constitution, sweeping legislative powers are granted to presidents, despite strong admonitions in the same constitutions against any fusion of two or more branches.

In the Mexican Constitution, as in most others of Latin America, the President is permitted to suspend constitutional guarantees throughout the republic or in determined places. His action is said (Article 29) to require " approval by the Federal Congress, and during adjournments of the latter [i. e., during eight months of each year—jlb], of the Permanent Committee," which can be secured by the President *after* the guarantees have been suspended. Nothing of this sort is known to the Constitution of the United States, the Canadian Constitution, or to most of the constitutions of Western Europe.

In these matters, the Constitution of Mexico is no exception in Latin America. Rather, it represents the norm. Similar and occasionally even more striking provisions may be found in the documents of almost every republic south of the Río Bravo del Norte. A typical provision is to be found in the Peruvian Constitution, Article 70:

> When necessary for the security of the State, the Executive Power may totally or partially suspend the guarantees declared in Articles 56, 61, 62, 67, and 68 throughout or in part of the national territory. If

> the suspension of guarantees is decreed while Congress is in session, the Executive Power shall immediately inform it thereof. The period of the suspension of guarantees shall not exceed thirty days. Any extension requires a new decree. . . .

The guarantees to which the Peruvian Constitution alludes, and which may therefore be suspended by presidential decree, are those relating to detention of persons, inviolability of the home, peaceful assemblage, freedom of movement about the country, and banishment from the country.

It is said that the Constitution of Argentina, 1853, is closer to that of the United States than any other; and yet, features conducive to executive power were introduced in Argentina which are unknown to the U. S. document. Article 86 of the Argentine Constitution goes beyond anything to be found in our executive provisions of Article II, and includes (Section 19), a very broad and essentially unlimited power to suspend the constitutional guarantees. To make no mistake that this power of suspension would be well imbedded in the document, reference is also made to it in Article 23, Article 53, and in Article 67, Section 26; and so it goes with almost every other constitutional document in Latin America. Certainly there was no constitutional reason why the government of President Illía needed to be so ineffective that the military felt induced to intervene!

The Brazilian Constitution of 1946, Article 87, laid the foundations for an extremely powerful president; and Articles 206-210 provided in intricate and bewildering detail for a so-called *estado de sitio*, or suspension of guarantees. The fact that a new, sixth constitution went into effect on January 24, 1967, does not weaken the point. In fact, the new Brazilian Constitution grants to the President even more sweeping powers than ever over the passage of legislation, suspension of guarantees, and intervention into the political processes within the states.

Latin American constitutions go to great pains to establish judicial systems which are presumed to be independent and governed only by the rule of law. At the same time, they frequently assure that judges will in fact be quite subject to the whims of the executive power. For example, though the Mexican Constitution now provides for unlimited terms of office for Ministers of the Supreme Court of Justice, and although their appointment by the President is subject to approval by the Senate (assuming an independent Senate, which does not exist in fact), the same document also stresses in two different places (Article 89, Section XIX, and Article 94) that judges may be removed from office "whenever they are guilty of bad conduct," and in Article 111 that

this may be done whenever a majority of both congressional chambers concur. This is a far weaker protection of judicial independence than is to be found in U. S. provisions for impeachment by two-thirds of the Senate, and in the Mexican context of essential one-party control becomes less than meaningful. In almost every other country of Latin America, the judiciary is similarly stripped of substantial constitutional protection. In many instances, as in Nicaragua, the terms of judges coincide with those of the political authorities, thus guaranteeing that there will be no vestige of judicial independence from executive dictation.

The constitutions of Mexico (1917), Argentina (1853), Brazil (1946, as well as that of 1967), and Venezuela (1961) provide for federal systems of government. However, the documents themselves include provisions which effectively negate the concept of federalism. In the cases of all four so-called federal systems, such broad and sweeping grants of power are made to the central governments that one is hard put to it to determine what, if anything, is left over for the exercise of state or provincial authority.[28] In Brazil, for example, in addition to the more usual powers granted to national governments in federal systems, the Union is authorized to control business and banking corporations; establish national highway plans; direct all forms of communications; protect against all natural or human disasters; legislate on " civil, commercial, criminal, procedural, electoral, aeronautical, and labor law "; make all rules relative to social welfare, as well as to production and consumption; set up educational systems; establish commercial boards; expropriate property regulate use of resources, mining, metallurgy, waters, electric energy, forests, hunting, fishing; and establish qualifications for practice of the professions.[29] Mexican, Argentine, and Venezuelan provisions are not described here because, while different in details, they are generally repetitious of the Brazilian pattern.

The so-called federal systems of Latin America not only provide their central governments with such a wide range of powers that they leave their regional governments with almost nothing to do; they also provide for some form of central intervention into internal state affairs. In Mexico, the Senate (a pliant tool of the President) may declare

[28] *Argentina*, especially Articles 67 and 86 on powers of Congress and President; *Brazil*, Article 5, on the powers of the Union, *et passim*; *Mexico*, Article 73 on powers of Congress, 89 on powers of the President, 27 and 28 on property, 115-121 which limit powers of states as well as prescribe forms for municipal government, and 3, 23, and 130 on federal control over education, labor, social security, and religion; *Venezuela*, especially Article 136 on " competence of the national power " and 190 on powers of the President, *et passim*.

[29] Brazil, Constitution of 1946, Article 5; 1967, Article 8.

that " constitutional powers of a State have disappeared," appoint a provisional governor, and call elections for selection of a new one (Article 76, Section V). When the Senate is not in session, which is during most of the year, this function may be performed by the Permanent Committee of the Congress. This procedure was well illustrated last August 4, 1966. On that day, at the behest of President Gustavo Díaz Ordaz, the Permanent Committee of Congress removed Governor Enrique Dupré Ceniceros of the state of Durango, on the grounds that he had failed to keep order during student demonstrations, and that the " constitutional powers " had therefore disappeared. Lic. Rodríguez Solórzano was chosen by the twenty-five unanimous votes on the Committee to serve as provisional governor until the next regular elections. The Committee did not bother to arrange for a special election, and the whole operation consumed less than two hours.

In one of the most complex and cumbersome sets of provisions in the hemisphere, the Brazilian Constitution of 1946 provided for central-government intervention in the states, by the President in some cases, the Congress in others, and the Supreme Court in still others. The new Brazilian Constitution incorporates many features of the *Atos Institucionais* decreed by the military since the revolution of April 1, 1964, and enhances the presidential power to order intervention into state affairs. The Venezuelan Constitution of 1961 contains ample opportunity for such intervention by the national government into the states, including the sweeping Articles 240-243 on emergency powers; and Article 190, Sections 6 and 7 on the same subject, as well as Section 11, which provides the President with the power " to order, in case of proven emergency during an adjournment of Congress, the creation of and appropriation for new public services, or the modification or abolition of those in existence, with the authorization of the Delegated Committee." In Venezuela, the Delegated Committee corresponds to the Mexican Permanent Committee of the Congress.

On the matter of intervention into state affairs, the case of Argentina is very much in point. It is true that the Constituion of 1853 was in large measure borrowed from that of the United States. But at certain crucial points, provisions were added, or protections removed, in a manner which could only conduce to the negation of the democratic essence of the document. In some respects, the Argentine provisions (Articles 5-9) on federal obligations to the provinces are quite similar to those in the U. S. Constitution, Article IV. Yet, whereas the U. S. Constitution simply says that the United States shall " guarantee to each State in this Union a republican form of government, and shall protect

each of them against invasion. . . ," the Argentine (Article 6) adds an ominous note: " The Federal Government *may intervene* [italics mine] in the territory of a Province in order to guarantee the republican form of government or to repel foreign invasions. . . ." The fact is that such intervention has been practiced in Argentina no less than 110 times. Because the Constitution does not state who should initiate the intervention, or under what procedures, it has been the practice for the President to take this mission upon himself, usually when the Congress is adjourned.[30]

In these four countries, federalism was supposed to be established; but constitutional provisions gave such sweeping powers to central governments, and provided them with such extensive intervening powers, that federalism has been more of a myth than a reality.

And so it goes. All the constitutions contain long statements on individual rights. In several instances, however, the rights are stated in such a long-winded, confusing and obfuscating manner, and with so many rights indicated as " subject to the law," and the like, that the documents themselves deny the very individual rights they purport to preserve. Most of the Central American constitutions suffer from this defect. Though the Constitution of Argentina includes brief sections on procedural juridical rights and on social guarantees, it nowhere makes clear that freedom of speech and press are to be protected. Article 14 guarantees to individuals the right " of publishing their ideas through the press without previous censorship," but says nothing about subsequent censorship! The Constitution of Peru (1933) and a few others are exceptionally clear on the question of individual rights; but in almost all cases (including that of Peru, Article 70, and others we have cited), such rights may be readily suspended, and so must be exercised with extreme caution lest they be withdrawn altogether.

In brief, it is quite true that most Latin American constitutions were, in large measure, foreign and rather artificial importations, and that they still suffer from those features. It is also true that their environments were not conducive to development of many of the democratic freedoms that their founders envisioned. But it is likewise true that the documents themselves are filled with inconsistencies. Expressions on democratic government are coupled with provisions for powerful executives, suspensions of guarantees and executive imposition over the judiciary. Statements on individual rights are often so bewildering that they can only be described as *contraproducente*. Federal systems are supposed

[30] Busey, *Latin America* . . . , pp. 133-134 and 149-150.

to exist in a context of uncontrolled centralism and unlimited intervention by central governments into regional affairs.

At the risk of being repetitious, it must be stressed that the problem does not only lie in artificiality of origin or in unfriendliness of environment. The documents themselves include built-in conflicts of meaning and intent. They are likely to grant powers to executive and centralized authority which are enough to assure the establishment of dictatorships, with or without other causal factors; and the unsatisfactory, self-defeating content of the documents themselves would be reason enough for frequent change. Their own provisions often provide for violations of free government. Even ferocious dictators have carried on their rule without doing too much violence to their constitutions. Provisions could be found to permit every atrocity. Or, since the documents were so little worthy of respect, they could be easily changed to suit the whims of tyrants.[31]

The fact is, that though there were widespread borrowings from abroad, and though narrow elites who were disconnected from reality did play important rôles in Latin American constitution-making, much of the fault lies in the indigenous features of the constitutions themselves. It may even be said that *too much* of the Latin American environment went into them. That is, they omitted important protections, obfuscated statements of individual rights and added sections which could only subvert the democratic purposes that they were supposed to serve. Instead of protecting against some of the major threats in the Latin American environments—that is, *caudillismo*, *personalismo*, executive preëminence, weak rule of law, and the like—*the framers incorporated most of these features into the constitutional documents themselves.* For the achievement of stable democracy, environmental features demanded that radical and rigid protections be built into constitutions which would preserve and enhance, not weaken and destroy, the opportunities for development of free government. There is nothing unusual about the importation of ideas from abroad. This is the way all constitutions are built. What was unusual was that the Latin Americans would pay constitutional homage to the very dictatorial features of their environments which they were presumably trying to avoid.

THE COSTA RICAN EXCEPTION

Though the obstacles be great, it is not impossible, in Latin America or elsewhere, to construct constitutional documents which will help to

[31] Alexander, *Latin-American Politics and Government*, pp. 11-12; Needler, *Latin American Politics in Perspective*, p. 127. This point has been made by many writers, but not all its implications have been examined.

protect against undemocratic elements of the environment as well as make a contribution to political stability. Individual sections of several Latin American constitutions have attempted to accomplish this. For example, the awkward Uruguayan plural executive was designed to serve this end. One document which is consistently planned to confront and control undemocratic tendencies is the Costa Rican Constitution of 1949. As is well known to Latin Americanists, this document followed upon the heels of an uprising which reversed an attempted political imposition in 1948. The circumstances of those events, or of the formulation of the Constitution itself, need not detain us here.

The Costa Rican Constitution is filled with ingenious devices that are designed to protect the country against the sorts of *caudillismo*, electoral fraud, military imposition, excessive executive manipulation, ineffective legislative bodies, and the like, which have plagued many other Latin American governments. Of course the Costa Rican Constitution of 1949 is not singly responsible for the relative success of Costa Rican democracy. That democracy, or at least the tendency towards it, has been a phenomenon of Costa Rica for many years, and many writers have commented upon it. Before 1949, however, the country did suffer, though in moderate degree, from executive imposition, electoral fraud, judicial irregularities, and even occasional military or quasi-military domination of the government. Since 1949, these tendencies seem to have disappeared. The elections of 1953, 1958, 1962, and 1966, have been singularly free of taint. Irregular application of force seems now to have vanished from Costa Rican politics. Complaints about executive-legislative relations in Costa Rica are generally to the effect that the President enjoys too little authority or respect, and that the one-house Legislative Assembly is entirely too dominant.[32] Costa Rica has a long history of general respect for free government, but there can be little doubt that the present Constitution makes a genuine contribution to the continuance and strengthening of Costa Rican democracy.

Here, we need not comment upon the general Costa Rican statements about democratic aspirations, for these are to be found in every Latin American constitution. The question is whether the Costa Rican constitutional content matches the stated aspirations.

A famous Costa Rican provision, Article 12, states simply that "The Army as a permanent institution is proscribed." While there is a

[32] Busey, *Notes* . . . , pp. 38-44 *et passim*. See also, the bibliography in same, for further reading on Costa Rican government and politics; and, same writer, "The Presidents of Costa Rica," *The Americas*, 18 (July, 1961), 55-70.

guardia civil which serves in a para-military capacity, it is definitely subordinate to the civilian authority.

The Costa Rican Constitution provides that the Legislative Assembly is to meet once per year, *even if not convoked* (Article 116). This departs from a common Latin American practice whereby constitutional provisions establish dates of convocation of congresses, but provide that the President of the Republic shall " attend the opening " (Mexico, Article 69) or " preside annually at the opening " (Argentina, Article 86, Section 11), and the like. In the Latin American context, and in the absence of specific clarifying provisions, this is likely to mean that it is expected the President will convoke the Congress. If he fails to announce the convocation, or is unable to be persent, it may be regarded that there is no legal sanction for such a meeting. In Argentina, for example, there have been many occasions when the President simply found it convenient not to convoke the Congress, which therefore did not find it legally possible to meet, despite dates indicated in the Constitution (May 1 to September 30, according to Article 55).

The Costa Rican Constitution does permit a suspension of guarantees, but under the most stringent and ingenious protections to be found in Latin America. The suspension is essentially a legislative act, and can only occur by vote of two-thirds of the Assembly (Article 121, Section 7). Only seven different constitutional guarantees may be suspended, and these are indicated specifically in the Constitution. The suspension may only occur for a period of thirty days, and during such period no confinement in prisons may occur. That is, only house-arrest is permitted. If the Legislative Assembly is not in session (a rare occurrence in Costa Rica, where the congress meets almost all year round), the President may order a suspension of guarantees. However, such proclamation serves as an *automatic convocation* of the Legislative Assembly, which must meet within forty-eight hours to confirm or reject the suspension (Article 140, Section 4). Finally, if because of lack of a quorum (that is, forcible prevention of same by the executive), the Legislative Assembly is unable to perform its functions, *any number of deputies who are able to meet the following day are to constitute a quorum, for the casting of the two-thirds vote of approval.*

To protect the Supreme Court of Justice from political interference, the Costa Rican Constitution goes to unusual lengths. The Legislative Assembly, not the President, selects the Court. Though terms of the legislature and of the President are for four years, those of the Court magistrates are for eight. Though judges are selected by a majority vote of the Legislative Assembly, *they are considered to be automatically*

elected for subsequent eight-year terms unless there is a legislative two-thirds vote to the contrary.

The Constitution (Article 10) states that the Supreme Court may, by a two-thirds vote, pass on the constitutionality of legislation; and that any such legislation that is declared to be contrary to the Constitution is automatically void. The Supreme Court is also authorized to make the same sort of judgment about executive acts, and with the same results. Though other Latin American constitutions make allusion to judicial review, few contain such clear-cut statements, designed to protect against both legislative and executive abuse of power. There are those in the United States who might ponder the Costa Rican requirement that a two-thirds vote by the Supreme Court is necessary for a determination of unconstitutionality.

According to the Costa Rican Constitution (Article 95, Section 3), the Supreme Electoral Tribunal is supposed to be completely independent of other branches of government. To make sure that this is more than a poetical aspiration, the Constitution provides that its three magistrates and two alternates are to be appointed by the Supreme Court of Justice, by a two-thirds vote. Furthermore, according to Article 95, Section 3, within six months prior to and four months after a popular election, no legislation is permitted which is opposed by the Supreme Electoral Tribunal. There is no appeal from its decisions, and its members enjoy six-year terms which do not correspond either with the four-year executive and legislative or eight-year judicial terms of office. This is quite a departure from the practice in many Latin American countries, where electoral tribunals are selected by political officials such as the Minister of the Interior (Gobernación, as in Mexico). The Constitutions of Chile (1925), Ecuador (1946), Panama (1946) and Uruguay (1951) contain provisions designed to protect their electoral tribunals from external political intrusion, and less impressive provisions are to be found elsewhere. None are more complete or more ingenious than those of the Costa Rican Constitution.

The Costa Rican Comptroller-General of the Republic, who is to watch over accounts, is likewise selected by the Legislative Assembly, not by the executive. His term is for eight years, and is to begin two years after opening of the legislative-presidential terms. The Comptroller may be reappointed indefinitely, and is to have the immunities and prerogatives of the top members of the three branches of government (Article 183). But the expenditure of moneys is authorized by the National Treasurer, who is appointed by the executive for a four-year

term. Though checks may be issued by the executive-appointed Treasurer, they must all be countersigned by the office of the Comptroller, who is selected by the Legislative Assembly. According to Article 184, "no obligation of the State becomes effective unless so countersigned." In addition, the Comptroller General must "examine and approve or disapprove the budgets of the Municipalities and autonomous institutions . . ." and "submit a report annually to the Legislative Assembly, at its first regular session, covering the preceding fiscal year . . . ." The Costa Rican separation of the Comptroller from executive influence is accomplished even more effectively than is done in the United States, where the Comptroller General is appointed by the President with confirmation by the Senate, for a 15-year term. The Constitutions of Ecuador and Venezuela provide for congressional selection of the Comptroller, but do not include provisions on terms of office or duties that would provide so sweeping a protection against financial irregularity as is found in the Costa Rican Constitution. Only the Constitution of Uruguay (Articles 208-213), which establishes a Tribunal of Accounts, can be said to have provided really rigorous guarantees against financial irregularities.

In general, these constitutionally established institutions and procedures have worked in Costa Rica as intended. The Supreme Electoral Tribunal and the Supreme Court of Justice are respected highly, and rarely if ever charged with corruption. There is no fear of executive tyranny or of drift into authoritarian government. An effective bridle has been placed on military ambitions, and there is no exercise of executive powers which would tend to overwhelm the legislative functions of the Assembly. In Costa Rica, the loudest complaints have to do with legislative power and irresponsibility, and disrespect for the weak executive branch. "Better the excesses of liberty than those of tyranny," as one distinguished Costa Rican publisher once expressed it to this writer.[33]

CONCLUSIONS

It would be foolish indeed to contend that constitutions alone ever make or break a democratic system of government. The Canadian case would be proof enough of the falsity of any such assertion. In some environments the historical, social, and economic elements are conducive to stable, constitutional government. In other environments, they are not.

[33] Interview with D. Ricardo Castro Beeche, director, *La Nación*, San José, Costa Rica, May 20, 1959.

It is likewise clear that constitutions, if carefully written with a view to environmental difficulties, can help to conjure away some of the principal obstacles to free government. If the environment favors *caudillismo*, there is no reason why a constitutional document needs to encourage it. If the military has a penchant for seizing the reins of power, there is no reason why a supposedly democratic constitution needs to include provisions which facilitate such action—or exclude those that might prevent it. If suspension of guarantees is likely to be utilized for the overthrow of democratic government, there is no reason why the constitution needs to include a *carte blanche* for such suspension. If there is danger of fraudulent elections, a constitution can at least try to build in such protections as possible against that eventuality. If the judiciary or legislature are likely to be subverted by the executive power, it is not beyond the ingenuity of constitutional framers to set up terms of office and modes of selection that will at least reduce that possibility. If there is danger that the president will abuse his authority, there is no sense in providing him with such an unlimited sweep of power that such abuse is assured. Nor, if a federal system is desired, is it very consistent to then turn around and grant so much authority to the central government, plus sweeping powers of intervention, that a federal system is rendered impossible.

It is no doubt true that many constitutions of Latin America have been framed by narrow, unrepresentative elites. It is notorious that such elites have usually been leaders of victorious military rebellions, or revolutionary cliques of other kinds, or various sorts of land-owning or other powerful economic groups who were determined that their power was to be preserved. Apparently, the problem is not so much that they have been too idealistic or too unrealistic, as that they have been determined to hold power, and have been quite realistic about the instrumentalities they would need to do so. Very few Latin American constitutions have been designed with a view to future transfers of power from one elite group to another, or from an elite group to the general population.

There can be no valid argument against the proposition that if several of the Latin American republics are to develop stable, constitutional governments, many changes must occur in their social, cultural, and even physical environments. At this moment, distinguished and able Latin American leaders are working vigorously to improve educational facilities, to distribute land and agricultural techniques, to terminate feudalism, to improve physical and cultural communications, and to encourage emergence of a large middle class of independent proprietors in agriculture, trade, and manufacture. In the words of Professor Robert

Alexander, ". . . during the present century the Latin American countries have tended less to copy others and have come to be innovators in constitution-making." [34] Professor Alexander is referring to constitutional provisions for sweeping social and agrarian reform.

For the strengthening of Latin American political democracy, such social reform is essential. It is also essential that Latin Americans give much greater attention than they have to the kinds of political innovations in their constitution-making that will enable them to extricate themselves from the undemocratic features of their own environments.[35]

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[34] Alexander, *Latin-American Politics and Government*, p. 15.

[35] It is not always easy to obtain original copies of the constitutions of the various republics of Latin America. The next best thing to do is to secure them from the Pan American Union, Washington, D. C. The Pan American Union supplies copies of most of the constitutions of the Americas, but (except for the U. S. document) in English translation. There is a very large Spanish and Portuguese literature on Latin American constitutionalism, but much of it is quite formalized and lacking in sufficient realistic comment. In addition to the sources that have been mentioned in this paper, one would want to list the following, *inter alia*: Juan Bautista Alberdi, *Bases* (Buenos Aires and Santa Fé, Argentina, 1963); same author, *Obras selectas* (Buenos Aires, 1920); José Arce, *La constitución argentina en la teoría y en la práctica* (Buenos Aires, 1961); Justo Arosemena, *Estudios constitucionales sobre los gobiernos de la América Latina* (2 vols.; Paris, 1878); George I. Blanksten, *Ecuador: Constitutions and Caudillos* (Berkeley, 1951); F. Campos Harriet, *Historia constitucional de Chile* (Santiago, 1956); Jaime Eyzaguirre, *Historia constitucional de Chile* (Santiago, 1962); José Gil Fourtoul, *Historia constitucional de Venezuela* (2nd ed.; 2 vols.; Caracas, 1954); Ricardo Gallardo, *Las constituciones de la república federal de Centro América* (Madrid, 1958); Víctor F. Goytia, *Las constituciones de Panamá* (Madrid, 1954); Héctor Gros Espiell, *Las constituciones del Uruguay* (Madrid, 1956); Instituto de Estudios Políticos, T. Brandão (ed.), *Las constituciones de los Estados Unidos del Brasil* (Madrid, 1958); Instituto de Estudios Políticos, Emilio Alvárez Lejarza (ed.), *Las constituciones de Nicaragua;* Herman G. James, *The Constitutional System of Brazil* (Washington, D. C., 1923); S. M. Lozada, *La constitución nacional anotada* (Buenos Aires, 1961); Fernando H. Mendes de Almeida (ed.), *Constituições do Brasil* (4th ed.; São Paulo, 1963); José Morales, *Las constituciones de México* (México, D. F., 1957); José Pareja, *Las constituciones del Perú* (Madrid, 1954); A. Arava Rodríguez, *Génesis constitucional de la República Oriental del Uruguay* (Montevideo, 1955); Celso Soares Carneiro, *Constituição do Brasil* (Rio de Janeiro, 1962); Félix Trigo, *Las constituciones de Bolivia* (Madrid, 1959); M. de la Villa de Helguera, *Constituciones vigentes de la república mexicana* (2 vols.; México, D. F., 1962).