

## NEW DEVELOPMENTS OF SOCIAL RIGHTS IN AMERICAN CONSTITUTIONS AND DIFFERENCES WITH EUROPEAN CONSTITUTIONALISM

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### Abstract

In general, recent constitutional processes in Latin America are the principal manifestation of a new constitutionalism in the continent characterized by, among other things, to set a constitutional model and strong social protection and justiciability of social and economic rights of citizens. Obviously, there are exceptions. This paper analyzes how recent constitutions adopted since the 90s onwards, especially the reform of 1994 Argentina and the texts of Venezuela, Ecuador and Bolivia, offer great hope in these countries to achieve full recognition and justiciability of and a reconstruction of the social welfare state.

**Key words:** Latin America, Constitution, Social Rights, Enforcement of rights.

### 1. Introduction: constitutional processes and social rights in Latin America

Little attention has been paid historically to Latin-American constitutionalism. Latin American constitutions have been commonly overlooked or oftentimes even regarded with certain disdain. However, contemporary developments in Latin-American constitutionalism might well change this trend. Several authors<sup>2</sup> have referred to the 1991 Colombian constitutional process as a milestone that represents a turning point in constitutional development, not only in Latin America but also internationally. In the resulting Colombian Constitution, albeit imperfectly, we identify new traits, distinguishable from those of classic constitutionalism, which will later permeate the constitutional processes of Ecuador (1998), Venezuela (1999), Bolivia (2006-2009) and again Ecuador (2007-2008). These new shared traits allow us to talk about a new Latin American constitutionalism.

The traits shared by such constitutional processes are both procedural and substantive. Procedurally, the new constitutional processes entail retrieving the principles of popular sovereignty and of the doctrine of the original constituent power<sup>3</sup>.

Substantively, one common element clearly distinguish these Constitutions from their predecessors: the buttressing of social rights – including the development of existing rights, the

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<sup>2</sup> R. VICIANO and R. MARTÍNEZ. “El proceso constituyente venezolano en el marco del nuevo constitucionalismo latinoamericano”. In *Àgora. Revista de Ciencias Sociales*. Fundación CEPS. Valencia. Spain. 13. 2005. p. 55-68.

<sup>3</sup> Sobre ello, ver: R. MARTINEZ. XXXXXXXXXXXXXXXXXXXXXXXX.

recognition of new social rights, and the creation of new mechanisms to ensure their enforceability. This article will focus on this latter substantive trait.

## **2. Social Rights and their Enforceability**

Furthermore, the progress that these constitutions entail in the recognition, protection and enforceability of social rights providing a specially suitable legal and political framework for the full consecution of a social welfare state. This is specially the case in the Constitutions of Venezuela, Bolivia and Ecuador, as well as, even if to a lesser extent, the Argentinean constitutional reform of 1994. However, we cannot conclude that all recent constitutional developments in Latin America have taken the same direction. It should be noted that certain constitutional processes, such as that of 1993 in Peru, or the Constitutional reforms in Brazil during the nineties, rather entailed a regression in the recognition of social and economic rights. However, we will focus in the firsts cases.

### **2.1. The 1991 Colombian Constitution and the Argentine Constitutional reform of 1994. First steps toward a full recognition of social rights**

#### **2.2.1. Colombia**

In Colombia it was the Constitution of 1991, currently in force, that introduced social and economic rights in the constitutional text, thus superseding an old notion, in the country, that such rights were not meant to appear in Constitutions. Before the 1991 Constitution, the constitutional recognition of economic and social rights was almost inexistent. The Constitution of 1886 contained a short bill of rights, that almost did not give any social and economic right full normative force. Moreover, the Supreme Justice Court, which, prior to the 1991 Constitution created the Constitutional Court, was given the judicial review of laws as to their adherence to the Constitution, understood that its function revolved around resolving conflicts between state bodies, rather than granting the enforceability of rights, specially as to social and economic rights.

It should also be noted, however, that albeit introducing social rights in the Constitution, the treatment given in the 1991 Constitution of workers rights lags well behind the protection that will later afford Constitutions such as those of Ecuador (1998 and 2008), Venezuela (1999) and Bolivia (2009). For instance, while the Colombian Constitution of 1991 incorporates civil and political rights under a chapter devoted to of “fundamental rights”, it refers to social and economic rights in a separate chapters, thus considering the latter as “non-fundamental.” This

is an important distinction, as it leads to differing treatment as to protection and enforceability. It is not the protection mechanisms assigned to a right that determine whether it is fundamental or not, but the other way around.<sup>4</sup> In contemporary legal systems, the mere recognition of certain rights as fundamental entails the attribution of a series of warranties and protections that other rights are not afforded, such as the principle of direct enforceability or specific protective jurisdictional mechanisms.

From 1991 in Colombia, the advancement in social rights and their enforceability, giving them fundamental right attributes, has not been the Constitutional text, but the Constitutional Court, of a progressive nature, at least until the current legislature, based on what is known as the alternative use of law. Several rulings of the court<sup>5</sup> have thus embraced the thesis that it is possible to establish the fundamental nature of a right through interpretative mechanisms, based on the particular circumstances of a case.<sup>6</sup>

The judicial activism of the Colombian Constitutional Court has entailed, in most instances, a progressive interpretation of the Constitution, furthering the warranty of many labor rights.

The violation of the “unnamed right to a minimum subsistence” has been alluded to on hundreds of occasions in order to demand through a writ for the protection of constitutional rights, the enforceability of social rights. The Constitutional Court has ruled favourably, on the basis of minimum subsistence, hundreds of cases such as to delays in payments or the award of social security benefits,<sup>7</sup> the delay in the payment of salaries,<sup>8</sup> the layoff of pregnant women,<sup>9</sup> the lack of healthcare benefits for workers,<sup>10</sup> and the exclusion of vital

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<sup>4</sup> G. PISARELLO. “Los derechos sociales y sus garantías”. Trotta. Madrid. 2007. p. 81.

<sup>5</sup> Sentences T-002, 401, 406 and 426 (1992).

<sup>6</sup> R. ARANGO. Introduction. “Jurisprudencia Constitucional sobre el derecho fundamental al mínimo vital”. In Estudios Ocasionales Review. Centro de Investigaciones Socio-jurídicas. Universidad de Los Andes. Bogotá. 2002. p. 112.

<sup>7</sup> Colombia, Constitutional Court, Sentences about delayed payment of pensions: T-426 (1992), T-005 (1995), T-144 (1995), T-147 (1995), T-198 (1995), T-202 (1995), T-287 (1995), T-076 (1996), T-323 (1996), T-160 (1997), T-278 (1997), T-458 (1997), T-611 (1997), SU-022 (1998), SU-430 (1998), T-07 (1998), T-120<sup>a</sup> (1998), T-143 (1998), T-297 (1998), T-330 (1998), T-553 (1998), T-559 (1998), SU-062 (1999), T-259 (1999), T-1103 (2000), T-1205 (2000), SU-090 (2000), SU-1354 (2000), T-001 (2001), T-019 (2001), T-124 (2001), T-398 (2001), T-400 (2001), T-405 (2001), T-433 (2001), T-444 (2001), T-203 (2002), T-1121 (2002), T-1097 (2002), T-099 (2002), T-910 (2003), T-905 (2003), T-454 (2003), T-435 (2003), T-390 (2003), T-547 (2004), T-524 (2004), T-267 (2004). Sentences of non-payment of maternity: T-270 (1997), T-576 (1997), T-662 (1997), T-139 (1999), T-205 (1999), T-210 (1999), T-558 (1999), T-365 (1999), T-1620 (2000), T-473 (2001), T-483 (2001), T-572 (2001), T-736 (2001), T-707 (2002), T-999 (2003), T-390 (2004).

<sup>8</sup> Colombia, Constitutional Court, Sentences about delayed payment of salaries: T-146 (1996), T-166 (1997), T-174 (1997), T-529 (1997), T-144 (1999), T-502 (1999), T-679 (1999), SU-995 (1999), T-121 (2001), T-132 (2001), T-399 (2001), T-418 (2001), T-435 (2001), T-436 (2001), T-438 (2001), T-458 (2001), T-481 (2001), T-541 (2001), T-614 (2001), T-626 (2001), T-630 (2001), T-698 (2001), T-700 (2001), T-725 (2001), T-734 (2001), T-1156 (2001), T-148 (2001), T-115 (2002), T-162 (2002), T-594 (2002), T-192 (2003), T-222 (2003), T-1023 (2003), T-1049 (2003), T-552 (2004), T-541 (2004), T-505 (2004).

<sup>9</sup> Colombia, Constitutional Court, Sentences T-238 (1998), T-283 (1998), T-286 (1998).

<sup>10</sup> Colombia, Constitutional Court, Sentences SU-562 (1999), T-497 (1997).

medicines and medical treatments from the Compulsory Health Plan.<sup>1112</sup>

We thus observe how the progressive outlook of the justices of the Constitutional Court in Colombia has allowed, from its inception, to overcome constitutional shortcomings in the protection of social rights. In doing so and though numerous cases the court has, through its case law, taken and given prevailing importance to an ethical standpoint and interpretation, rather than to a formalistic legal approach<sup>13</sup>.

### 3.2.2 Argentina

As to Argentina, the constitutional reform approved in 1994 constitutes another example of the regional trend toward a greater protection and enforceability of social rights. Albeit a modest constitutional reform it introduced important new elements.

The full recognition of social rights in Argentinean constitutionalism dates back to the constitutional amendments of 1957. The constitutional convention of 1957 abrogated the Peronist Constitution of 1949 and declared the full force the Constitution of 1853 with the amendments of 1860, 1866 and 1889, and excluding the reforms of 1949. To such text it added a new article, at the time individuated as article 14 bis, which entailed the recognition of social rights in the Argentinean Constitution. This article was the expression of a paradigmatic shift in the notion of work, which has been initiated but not completed by the 1949 reforms. The change in 1957 entailed the recognition of the rights at work – both individual<sup>14</sup> and collective<sup>15</sup> workers' rights, as well as rights to social security – as social rights with special protection by the state.<sup>16</sup> Article 14 bis was introduced as a transformative norm, based on the obligation that it imposes upon the state to protect work in its diverse forms, through minimal substantive contents that set limitations in relation to other rights. It

<sup>11</sup> Some cases are AIDS treatment (Colombia, Constitutional Court, Sentence T-328 (1998)), cancer (T-283 (1998)), cerebral palsy (T-286 (1998)), cases where needed orthopedic equipment (T-597 (1993)) or surgery (T-571 (1998)).

<sup>12</sup> J. LEMAITRE RIPOLL. "El Coronel sí tiene quien le escriba: la protección judicial del derecho al mínimo vital en Colombia". In *Derecho y pobreza*. Editores del puerto. Buenos Aires. 2007. p. 53-54; See also: R. ARANGO. Introducción. "Jurisprudencia Constitucional sobre el derecho fundamental al mínimo vital". Cit.

<sup>13</sup>, On the role of the Colombian Constitutional Court in protecting social rights, see: A. NOGUERA. "¿Independencia o control?. Los derechos sociales y los esfuerzos del Ejecutivo por el control de la Corte Constitucional en Colombia". Cit.

<sup>14</sup> Article 14a recognized the rights to: dignified and equitable conditions of work, limited working hours, rest and paid vacation, fair compensation, adjustable minimum wage, equal pay for equal work, participation in the profits of enterprises, with control production and collaboration in management, and protection against arbitrary dismissal, stability. To the public employees were also recognized: free and democratic union.

<sup>15</sup> Specifically, it acknowledged the right of unions to bargain collectively, the right to resort to conciliation and arbitration and the right to strike.

<sup>16</sup> C.S. FAYT. "Evolución de los derechos sociales: del reconocimiento a la exigibilidad". FEDYE. Buenos Aires. 2007. p. 64-75.

entailed engaging the state in the removal of the several barriers, mostly of an economic nature, that impaired the full force and effect of the social rights enunciated in the Constitution.<sup>17</sup> Parallel to article 14 bis, the constitutional reform also amended section 12 of article 75, which regulates the competencies of Parliament. Such section used to announce the obligation to enact a “mining code”, which was expanded to be a “mining, labour and social security code”.

However, although the reforms of 1957 entail the recognition of social rights, little did it contribute to setting forth mechanisms for their enforceability. This need was addressed by the constitutional reforms of 1994, approved by the national constituent convention of Paraná, Santa Fé.

The 1994 constitutional reforms, entail, among other elements:

- a) The introduction in the constitution of norms linked to social rights and their implementation and protection. Since the Law on the Need for Constitutional Reform did not allow for the modification of any article in the first part of the Constitution – on “Declarations, Rights and Safeguards”<sup>18</sup> – in order to introduce new rights and protection mechanisms the constituent power had to add a new chapter under the title “New Rights and Warranties”, where it incorporated new rights such as the right to a healthy environment (article 41) or the rights of consumers (article 42), which even if, according to some, would not be considered social rights in nature, their recognition is closely linked to social concerns. The most notable development, however, was the introduction of jurisdictional mechanism for the protection of social rights, including those of workers. The main novelty consisted in the introduction, through the first two paragraphs of a new article 43, of a warranty writ as a fundamental means in order to demand the observance of the social rights recognized in different disposition.<sup>19</sup> The

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<sup>17</sup> About the incorporation of Article 14a in the reform of 1957, the Argentina Supreme Court stated: “Hoy, luego de la reforma de 1957, el régimen constitucional ha cambiado. La materia sobre la que versa el litigio no constituye ahora, sino la manifestación parcial del gran tema que está referido a uno de los deberes inexcusables el Congreso: el de asegurar al trabajador un conjunto de derechos inviolables, entre los que figura, de manera conspicua, el de tener protección contra el despido arbitrario”. (Republic of Argentina. Supreme Court. Sentences 252:160). (Ibid. p. 75-76).

<sup>18</sup> The standard to which I refer is the National Law 24,309, which article 7 prohibits amend Chapter of the Constitution referred to "Declarations, Rights and Guarantees" (arts. 1 a 35).

<sup>19</sup> Art. 43 Constitution of Argentina, 1994: “Toda persona puede interponer acción expedita y rápida de amparo, siempre que no exista otro medio judicial más idóneo, contra todo acto u omisión de autoridades públicas o de particulares, que en forma actual o inminente lesione, restrinja, altere o amenace, con arbitrariedad o ilegalidad manifiesta, derechos y garantías reconocidos por esta Constitución, un tratado o una ley. En el caso, el juez podrá declarar la inconstitucionalidad de la norma en que se funde el acto u omisión lesiva. Podrán interponer esta acción contra cualquier forma de discriminación y en lo relativo a los derechos que protegen al ambiente, a la competencia, al usuario y al consumidor, así como a los derechos de incidencia colectiva en general, el afectado, el defensor del pueblo y las asociaciones que propendan a esos fines, registradas conforme

introduction of such writ of judicial protection of social rights entailed an important advancement in the protection of social rights. Moreover, the second paragraph of article 43 not only gives standing to file the writ to individuals and the national ombudsperson, but broadens such standing to “legally registered organizations pursuing such ends”, which allows for the collective or class writ processing to protect the rights of union workers or worker groups that share a similar situation and demand collective remedies. It thus strengthens the mechanisms to grant the full force and enforceability of social rights.

- b) The attribution of constitutional hierarchical status to international instruments noted in article 75.22, among which we can single out the Universal Declaration of Human Rights, or American Convention on Human Rights with the San Salvador Protocol, the Social and Cultural Rights International Pact or the Convention on the Rights of the Child. The Constitution provides for the direct application of all the social rights recognized in international human rights treaties, thus entailing an important advance in the enforceability of such rights. The direct applicability of these treaties does not only aim to complement the bill of rights section of a constitution, but it also conditions the competencies of all public bodies<sup>20</sup>, mainly in two aspects: first, it entails obligations for the executive and legislative branches<sup>21</sup> and, secondly, it draws a duty for the judiciary as guarantor of state obligations as to the observance of such rights.<sup>22</sup>

In conclusion, the constitutional reform of 1994 entailed an important step ahead toward the protection and enforceability of workers’ rights in Argentina.<sup>23</sup>

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*a la ley, la que determinará los requisitos y formas de su organización”.*

<sup>20</sup> V. ABRAMOVICH and C. COURTIS. “La interpretación de los tratados internacionales de derechos humanos por los órganos internos: el caso de las obligaciones estatales en materia de Derechos Económicos, Sociales y Culturales”. In O. CANTÓN and S. CORCUERA (coord.). *Derechos Económicos, Sociales y Culturales. Ensayos y materiales*. Porrúa. México. 2004. p. 41.

<sup>21</sup> The recognition, for example, of the ICESCR rights are accompanied by clear obligations for the State. As noted by the Limburg Principles (Principle 25) or the principles of Maastricht (Principle 9), is a minimum obligation for the State to ensure the satisfaction of, at least, minimum essential levels of each of these rights. The United Nations Committee on Economic, Social and Cultural Rights, the body responsible for monitoring compliance with the Covenant and drafting general comments that are seen as authoritative sources of interpretation of the Covenant, believes that this obligation arises from Article 2.1 of the Covenant, and in some cases involving measures involve some kind of positive action, when the degree of satisfaction is right at levels that do not meet the minimum requirements. In other cases required only to keep the situation, not back.

<sup>22</sup> Given the constitutional status accorded to treaties, its violation is not only an event of international state responsibility, but also a violation of the constitution itself. The non-justiciability of these rights by national courts would be a violation of constitutional norms.

<sup>23</sup> F. SALVIOLI (ed.). “La Constitución de la Nación Argentina y los derechos humanos”. Ediciones del Movimiento Ecueménico por los Derechos Humanos. Buenos Aires. 1995.

### 3.3. The new Constitutions of Venezuela, Ecuador and Bolivia. Protection and enforceability of social rights.

#### 3.3.1. Full recognition and equal status of social rights

The Constitutions of Venezuela (1999), Ecuador (1998 and 2008) and Bolivia (2009)<sup>24</sup> constitute the main expression of what we can term as Latin-American neoconstitutionalism, characterized. As noted above, it can be characterized, among others, by two largely unprecedented traits: the setting up a constitutional model of strong “economic activism” by the state<sup>25</sup> and the protection and enforceability of social and economic rights. All these constitutions entail a full reactivation of social and economic rights as first class rights, fully protected and enforceable, enjoying the same hierarchical rank as civil and political rights.<sup>26</sup>

Reading the Constitutions of Venezuela and Ecuador (both 1998 and 2008) we see how these do not refer to “fundamental rights” but more simply allude to “rights” or “human rights”.<sup>27</sup>

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<sup>24</sup> For a detailed study of the causes and procedures by which is born the new Bolivian Constitution of 2009, see: A. Noguera. “Plurinacionalidad y autonomías. Comentarios para iniciar el debate entorno el nuevo proyecto de Constitución boliviana”. Revista Española de Derecho Constitucional. 84. Centro de Estudios Políticos y Constitucionales. Madrid. Spain. 2008.

<sup>25</sup> With a lesser extent in the case of the 1998 Ecuadorian Constitution drafted by a Constituent Assembly with a majority of the Social Christian Party, a party of neo-liberal trend.

<sup>26</sup> Until the arrival of these constitutions, social rights were always found in a situation of "minority" with respect to civil and political rights. The UN Committee for the Economic, Social and Cultural Rights acknowledged in its General Comment n. 9 on implementation in different countries of the ICESCR, there is a lower possibility of citizens to claim through the courts, both international and national level, effective implementation of social rights than their civil and political rights (See: UN Doc.E/C.12/1998/24,#10). This situation arose in the period called the Cold War. The cold war ended what came to be a balanced discussion of the rights between 1914 and 1947, culminating with the adoption of the Universal Declaration of Human Rights of 1948, which recognizes together, so mixed and no type of classification or distinction between them, rights of all kinds: civil, political, economic, sociales and cultural Rights (P. ALSTON. “Economic and Social Rights”. In L. HENKIN y J.L. HARGROVE (eds.). *Human Rights: an Agenda for the Next Century*. ASIL. Washington DC. 1994. p. 152). The arrival of the cold war and the ideological struggle between regional blocs opposed (capitalist-socialist), each anchored in the defense of a group of rights and exclusion of others, was the beginning of the fragmentation and categorization of the different groups of rights. Differentiation in the constitutions between fundamental rights and non-fundamental (or even between rights and "non-rights"), constitutes, from this moment as a categorization to serve to the various ideological and political paradigms of "partial denial of rights" (G. PECES BARBA. *Lecciones de Derechos Fundamentales*. Dykinson. Madrid. 2004. p. 58 y ss), While as a result of this differentiation derive different degrees of protection for each group of rights groups. The Cold War, therefore, brought dire consequences, especially for economic, social and cultural reights, reinforcing the identification of these rights as a different and separate group from civil and political rights, what has done that in the liberal model which have imposed in the history, social rights have always found in that situation of "minority" regarding civil and political rights.

<sup>27</sup> For a more detailed study of the recognition and protection of human rights in the new Ecuadorian constitution of 2008, see: A. NOGUERA. “El constitucionalismo de los derechos: apuntes sobre la nueva Constitución ecuatoriana de 2008”. Revista Vasca de Administración Pública. 83. Instituto Vasco de Administración Pública (IVAP). San Sebastián. Spain. 2009.

Traditionally, reference to “fundamental rights” in constitutional texts entailed some sort of distinguish between rights recognized by the constitution. Such distinction implies that these constitutions not only contain rights that, labelled as fundamental, are deemed to be self executing, but also rights that require implementing legislation in order to be enforceable. Moreover, the designation of a right as fundamental entails an obligation on legal actors when carrying out any constitutional interpretation to maximize its protection in relation to other rights. However, in constitutional models where no distinctions are made between rights – e.g. as to their category, protection mechanisms or ensuing obligations - the distinction between fundamental and non-fundamental rights loses its *raison d’être*. The distinction is only useful in ideological and political paradigms based on the depletion of certain rights, but not in models based in the indivisibility and interdependence of rights. This is the case, as noted, in the Constitutions of Venezuela and Ecuador, where no reference is made to “fundamental rights” but rather only to “rights” or “human rights”.<sup>28</sup>

### **3.3.2. Warranties and Enforceability of Social Rights**

These constitutions set up several warranties in order to guarantee the enforceability of social rights.

First, these constitutions establish a set of judicial processes, i.e. specific processes that allow individual right holders to oppose to the arbitrary or passivity of public authorities, or of other individuals, and thus promote the recognition and observance of their rights. These are, among others: the traditional writ for protection of constitutional rights; the writ on grounds of unconstitutionality in order to demand the abrogation of legal norms that violate social rights constitutionally recognized, the writ of compliance to avoid situations of omission that entail the violation of constitutional rights, such as delays in enacting necessary implementing legislation in order to make effective certain programmatic clauses in the Constitution, or delays in the execution, i.e. where a decision has been taken but it is not enforced, such as an awarded yet unpaid retirement benefit; collective actions, such as the popular action, which allow to supersede process constraints or the inadequacy of traditional procedural mechanisms in order to protect certain social rights.

The traditional mechanisms geared toward the enforcement of rights were created under the nineteenth century paradigm of property rights, whose traits informed the nature of such

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<sup>28</sup> Bout it, see: A. NOGUERA. “¿Derechos fundamentales, fundamentalísimos o, simplemente, derechos?. El principio de indivisibilidad de los derechos en el viejo y el nuevo constitucionalismo”. In *Derechos y libertades*. 21. Instituto de Derechos Humanos Bartolomé de las Casas. Universidad Carlos III. Madrid. 2009.

protective mechanisms.<sup>29</sup> These are processes that were developed assuming the existence of a bilateral process or a conflict between individuals. Consequently, such procedures are oftentimes inadequate, e.g. in order to handle collective claims as to the social rights of groups that share a similar predicament, situations which require a collective remedy. Another example of such inadequacies can be noted as to the large amount of evidence that certain processes entail, when violations of social rights often require urgent redress.

The above mentioned constitutions also share additional mechanisms as to the advancement of social rights. For instance, the self executing nature of social rights, together with that of other rights. That is, by virtue of their mere recognition in the Constitution these rights are automatically enforceable, e.g. through judicial means, by the right holders in concrete cases, independently of whether there is implementing legislation in place. The subjection of state authorities and private parties to these rights is of an absolute nature. The aim of such self executing or direct applicability principle is to avoid the phenomenon of “negative legislation”, i.e. that such rights loose their force due to the non-enactment of developing legislation.<sup>30</sup>

The Constitutions of Venezuela (1999), Ecuador (1998 and 2008), as well as the Constitution of Bolivia (2009), afford the same status to social and economic rights and to civil and political rights, thus affording direct applicability to the former.

In addition to this immediate applicability or self executing nature afforded to social rights constitutionally enshrined, these five Constitutions explicitly recognize as self executing, like the Argentinean Constitution did by virtue of its 1994 reform, the social and economic rights

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<sup>29</sup> J.R. LOPEZ. “Dereito Subjetivo e Direitos Sociais: O Dilema do Judiciário no Estado Social de Direito”. In J.E. FARIA (ed.). “Direitos Humanos, Directos Sociais e Justiça”. Malheiros. Sao Paulo. 1994. p. 114-138.

<sup>30</sup> In some countries such as Spain, social rights are not directly applicable rights, but rights to free-choice legislative. Based on those concepts that say that civil and political rights and social rights are two sets of rights with different legal nature, and on this basis, argue that social rights are not real rights but are another type of legal norms, Specifically, institutional safeguards, principles or guidelines to guide social policies (See: A.H. ROBERTSON y J.G. MERRILLS. *Human Rights in the world*. Manchester University Press. Manchester. 1989; M. BOSSUYT. “International Human Rights Systems: Strengths and Weakness”. In K. MAHONEY y P. MAHONEY (eds). *Human Rights in the Twenty-first century*. Dordrecht. Martinus Nijhoff. 1993), the 1978 spanish constitution, places the civil and political rights under Section 1 of Chapter II of Title I ( “The fundamental rights and public freedoms”) and social rights under Chapter III of Title One ( “The guiding principles of the policy social and economic ”). Then the art. 53.3 of the Constitution establishes: “*el reconocimiento, el respeto y la protección, de los principios reconocidos en el capítulo tercero informaran la legislación positiva, la práctica judicial y la actuación de los poderes públicos. Sólo podrán ser alegados ante la jurisdicción ordinaria de acuerdo con lo que disponen las leyes que les desarrollan*”. It follows that social rights are not, in Spain, directly applicable, but their actual implementation depends on what the legislature decides to shift or not to do with them, but they may not be imposed greater limits or links about it. If the legislature do not gives meaning to these rights through legislative development, these will be waste paper.

contained in international human rights treaties, which would include, among others, the above mentioned Social and Cultural Rights International Pact and Additional Protocol to the American Convention on Human Rights in Matters of Economic, Social, and Cultural Rights, known as the Protocol of San Salvador.

The granting of constitutional status to international human rights treaties strengthens the operative applicability of social rights, as substantial part of human rights, based on several reasons: first, one must bear in mind the international obligations and responsibility assumed by the state with the adoption of such instruments when the norms stated therein are not observed;<sup>31</sup> second, the mere acceptance of such instruments entails the adoption by the state of three main obligations – to respect the protected rights, to grant the full enjoyment and exercise of those rights to the individuals under its jurisdiction and to adopt necessary measures to grant the effectiveness of such rights. In short, the Constitutions of Ecuador, Venezuela and Bolivia clearly establish the possibility of immediate judicial enforceability of social rights, both of those enshrined in these constitutions as well as those emanating from international human rights treaties.

An additional warranty set forth by the said constitutions is the principle as to the prohibition of regressive measures on rights. We have mentioned earlier some examples of regressive measures as to workers rights. In order to avoid such situations, the 1999 Constitution of Venezuela, the 2008 Constitution of Ecuador and the 2009 Constitution of Bolivia, recognize<sup>32</sup> a principle on the progressive nature of rights, of which derives the prohibition of regressive measures that deplete the content of recognized rights. Similarly and explicitly, the new Ecuadorian constitution states in its article 11.4 that “No legal norm will be able to restrict the content of constitutional rights and warranties”.

Finally, these constitutions require the enactment of special laws – organic laws, requiring a strong majority in order to be approved. Normally this organic law requirement is normally understood as a protection mechanism for rights<sup>33</sup>. It is a warranty that lies on the source that produces such law, the parliament, and that requires that any legislation implementing – typically fundamental – rights requires for its approval a qualified majority of votes. The rationale is that, being certain rights of such crucial importance that its award and development

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<sup>31</sup> C.S. FAYT. “Evolución de los derechos sociales: del reconocimiento a la exigibilidad”. Ob. Cit. p. 89.

<sup>32</sup> Articles 19, 11.8 and 13.1 respectively.

<sup>33</sup> R. ALEXY. “Teoría de los derechos Fundamentales”. Centro de Estudios Constitucionales. Madrid. 1997. p. 432.

cannot be left to contextual Parliamentary voting.<sup>34</sup> These rights, therefore, cannot be substantially modified through ordinary legislation or administrative regulations – the concern being that the full disposition of, for instance, social rights by prevailing political forces, could transform these in simple policy instruments, which would be incompatible with the notion of human dignity underpinning them. The requirement of organic law is therefore linked to the notion of legal certainty, which, in turn, is intimately related to the prohibition on regressive measures as to recognized rights.

It should be noted, however, that although the organic law requirement does require a larger majority and entails a protection against changes to rights based on contextual shifts in political power, it is not sufficient as a cautionary measure. We can cite, in this vein, the case of the reforms to the Ecuadorian constitution prior to 1998, especially since 1992, in which a majority of two thirds was required, to allude to the above mentioned constitutional amendments aimed at depleting the content of many labor rights, which required a majority of three fifths of parliamentary votes.

#### **4. Conclusions**

We can summarize the analysis above with the following conclusions. While during a long period of time Latin-American constitutionalism had been regarded with a certain contempt and considered devoid of use as a reference, in the past years we have witnessed the emergence of a new constitutionalism in Latin America. This constitutionalism aims to retrieve the role of guarantor of the interests of citizens - and among these those of the most disfavoured sectors of society, protecting such interests from state arbitrariness.

These new Latin-American constitutionalism is creating a constitutional model of its own, which we can formulate as progressively distinctive traits. One of them, which distinguishes it from earlier constitutions, is the improvement of existing social and economic rights and the introduction of new social rights, as well as the creation of new mechanisms to grant their enforceability.

With the of the 1993 Peruvian constitution and the constitutional amendments to the Brazilian constitution in 1988, in the late eighties and early nineties, the new constitutions of Colombia (1991) and the constitutional reforms of 1994 in Argentina show signs of an advancement into

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<sup>34</sup> Ibid.

a full recognition and the enforceability of social rights.

This trend consolidates with the Constitutions of Ecuador (1998 and 2008), Venezuela (1999) and Bolivia (2009), which set up an unprecedented legal and political framework, unprecedented in the [continent][region...], for the creation of a fully social model of state and the full enforceability of social rights.