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The Rhetoric of Constitutional Reform in Latin America:
An Empirical Assessment

By

Oscar Sumar

A dissertation submitted in partial satisfaction of the
requirements for the degree of
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Committee in charge:

Professor John Yoo, Chair
Professor David Vogel
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Abstract

The Rhetoric of Constitutional Reform in Latin America:
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In this work, the author offers a new perspective of the Constitutional Reform in Latin America in the period of 1980-2000. Between those years, almost every single Latin American country reformed (totally or at least substantially) their national constitution. This reform period has been seen, in the traditional literature, as characterize for the adoption of reforms based on the “public interest”, with a combination of free-market and wealth rights which was optimal for development. The author, instead, proposes that the reform was implemented based in rhetoric that trumps the debate, independently of if these interests coincide or not with ideologies of the “left” (progressive rhetoric) or of the “right” (sometime identified with some parts of the “rule of Law” rhetoric of the World Bank often called the “Washington Consensus”).

In the first part of the investigation, the progressive rhetoric arguments are presented, both in theory and applied to a specific case (higher education regulations). In the second chapter, the constitutional reform is studied focused in the case of Peru. It is important to note that Peru has largely been considered the Latin American country that most adopted the Washington Consensus and the neoliberal ideology, therefore, its study seems particularly important. In the third chapter, the scope is extended to the whole region, where the author reviews the economic chapters of each Latin American constitution, before and after the reform. At last, he attempts to answer the question: How an “optimal” constitution looks? In doing that, rather than trying to designing a universal constitution for the region, he offers some parameters of what can be regarded as optimal norms, so it can help future constitutional reform endeavors in the region or elsewhere.

To Thalia, for her magic.

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INTRODUCTION

Between the years 1980 and 2000 almost all Latin American constitutions were totally or substantially reformed. Brazil (1998), Colombia (1991), Paraguay (1992), Ecuador (1998 and 2008), Peru (1993) and Venezuela (1999). Also, some countries made major reforms: Argentina (1994), Mexico (1992), Chile (2000) and Costa Rica (1989). Also, the Latin American region suffered economic and social crisis that can explain the urgency of constitutional reforms.

At the same time, we acknowledge the existence of rhetorical arguments –both at the domestic and at the international level– that could be used to justify specific constitutional measures, dampening a more open debate about the convenience of such measures. Our interest is to identify the source of some of the constitutional changes that were implemented in the economic chapters of these Latin American constitutions; and then propose some prescriptions for future constitutional reform.

Constitutional design

Constitutions can be seen as products or instruments to achieve goals. In that sense, constitutions could respond to the instrumental preferences of framers and people in charge of interpret their mandates. As Negretto pointed out:

There is no agreement, however, about the nature of these outcomes. In some theories, constitutional designers are presumed to pursue cooperative outcomes; other theories postulate that constitution designers are mainly concerned with the redistribution effects produced by institutions.¹

In general, there is an agreement that most regulations respond to rent-seeking behavior and group pressure.² Nevertheless, in the case of constitutional design, theorist have been more optimistic, emphasizing the different nature of constitutional choices and the nature of the convention that usually approves a constitution. According to Mueller:

There are several reasons to expect that a different kind of calculation underlies constitutional choices than underlies everyday political choices. At the constitutional stage, one chooses the institutions that will be used to make all future political choices (...). Because the same institutions will be used to make both choices that can benefit individuals and those that can harm them, in making a constitutional choice people may find institutions, for example, that limit future rent-seeking activities to be optimal.³

According to Mueller, this can happen for two reasons: (i) the long term nature of constitutional commitments; and, (ii) that the cost of rent seeking at the constitutional level may

¹ Gabriel L. Negretto, *Making Constitutions: Presidents, Parties, and Institutional Choice in Latin America*, at 49 (2013).

² Richard A. Posner, *Theories of Economic Regulation*, 5 *Bell J Econ Manag Sci.* 335, 353 (1974).

³ Dennis C. Mueller, *Constitutional Democracy*, at 62 (1996).

be too high. Because of this, a sort of “veil of ignorance” is present when choosing constitutional arrangements.⁴

In this dissertation, we will not assume as true neither of these theories. We think that the possibility of making constitutions that do not differ in nature from other minor regulations is present. Also, we think that this “cooperative” theory has, at least, a normative appeal that cannot be discarded.

Constitutional choice: the use of rhetoric and the mature position

According to Vermeule, the debate about how to address constitutional risks is sometimes dominated by rhetoric which trumps a real debate about the pros and cons of adopting a specific provision. Vermeule uses the typical conservative arguments that were brilliant proposed by Hirschman to illustrate the way some parties in the political debate use extreme arguments in a repetitive way, in disregard of evident-based arguments which allow for a more open (and democratic) debate. Then Vermeule asks for the consideration of a “mature” position, in which “(...) the goal of a designer of a regulatory system should be *optimal* precautions rather than *maximal* precautions”.⁵

We have expanded the account for “rhetoric” to include the rhetoric used by progressivists and the rhetoric used by the World Bank to influence the development process in Latin America.

Nevertheless, the question remains, which is a “mature” position in the case of constitutional design? For us, an “optimal” constitution is a constitution that promotes competition between different branches or organizations within the State, and which promotes competition within the private sector. To decide which norms promote more competition in the public sector could be a difficult task. For example, is not clear that a federal system is more compatible with competition that a centralized system.⁶ In the case of private competition, de-regulation seems to be the best alternative. So, a norm making more difficult to pass economic regulation will be almost always preferred. The emphasis should be given, in any case, to procedural rules over substantive rights.⁷

In the first part of this dissertation, I will illustrate the case in which a constitution resembles the rhetoric of progressivists. Then, I will show a case (the regulation of education in Peru) in which the rhetoric is used. In the second part, I will turn to the case of the World Bank “rule of law” rhetoric and its impact in Peru. In the third part, I will expand the same analysis for all Latin American countries, using data collected from 23 constitutions in the period between 1980 and 2000. In the last part, I will identify some trends and specific rules in the Latin American constitutions that can be regarded as optimal—at least nominally—as a way of prescription for future constitutional endeavors in the region or elsewhere.

⁴ *Id.* at 61-62.

⁵ Adrian Vermeule, *The Constitution of Risk*, at 77 (2014).

⁶ David Vogel, *Trading Up: Consumer and Environmental Regulation in a Global Economy*, (1995).

⁷ Mueller, *supra*, at 234.

I. THE RHETORIC FOR ACTION: EVIL HAND, SPECIAL MARKETS AND HUMAN CONQUEST

For several years, I have been involved in the discussion of public policy through the media, the academia and consultancy, generally advocating against regulations. In most of these debates, I had the impression that the other part in the debate –progressives– used standard arguments which were somehow flawed, but convincing, because they appealed to fundamental ideas about how the World (or the market) supposedly works.

Recently, I learned that my own party in the debate –conservatives or libertarians– uses this type of standard/radical arguments. In a provocative –as well as deep and intelligent– book, Albert Hirschman⁸ describes what for him is “The Rhetoric of Reaction”⁹ (ROR). The ROR consists in a series of arguments used in a Manichaean way. The arguments are not necessarily false in every case, but are reductions of the discussion which tend to hinder the dialogue. The arguments often used by conservatives are: Perversity, meaning that regulations tend to have the opposite effect that they intend (for example, minimum wage laws); futility, meaning that regulations have no effect (for example, tobacco regulations that do not reduce the number of smokers); and, jeopardy, meaning that regulations have perils and costs not foreseen by regulators (for example, giving more rights to citizens can represent a peril for democracy).

Learning this, moved me, at least, in two ways: (i) now I have a desire to change the way I discuss about policies, being more open to arguments and evidence; and, (ii) I also want to identify, emulating the work of Hirschman –but considering my own limitations–, some of the archetypal arguments used by progressive scholars or politicians.

Recognizing the utility –and being a conservative in economic matters myself, the accuracy– of Hirschman's characterization of the way libertarians tend to argue against progressive regulations; one can perceive the importance of undertaking a similar endeavor in the search of the “progressive rhetoric” or –as I have called it– the Rhetoric for Action (RFA).

This seems even more compelling if we consider –with the same Hirschman– that “Because of the stubbornly progressive temper of the modern era, ‘reactionaries’ live in a hostile world”. One aspect in which this is apparent is in the rise of the regulatory state.¹⁰ In the terms of Calabresi:

(...) starting with the Progressive Era and with increasing rapidity since the New Deal, we have become a nation governed by written laws.¹¹

⁸ Later I found that Professor Albert Hirschman was also one of the creators of the “Herfindahl-Hirschman Index”, among other academic accomplishments.

⁹ Albert Hirschman, *The Rhetoric of Reaction: Perversity, Futility, Jeopardy*, (1991).

¹⁰ Edward L. Glaeser and Andrei Shleifer, *The Rise of the Regulatory State*, 41J Econ Lit. 401 (2003).

¹¹ Guido Calabresi, *A Common Law for the Age of Statutes*, at 4 (1982).

The last fifty to eighty years have seen a fundamental change in American law. In this time we have gone from a legal system dominated by the common law, divined by courts, to one in which statutes, enacted by legislatures, have become the primary source of law. The consequences of this “orgy of statute making” (...) are just beginning to be recognized.^{12 13}

In the case of Peru, we started at the opposite beginning point (market mostly owned by the State) but, because of the privatization process started in the nineties, we are now a “regulatory state” as well, in which state ownership has been replaced by state control through regulations.

In this scenario, it is important to critique the progressive arguments even more than it is to critique their conservative counterpart, since they are dominating the debate about public policy, at least in Western countries and countries like Peru, which tend to follow the tendency observed in such countries.

In addition, we will try to identify how these arguments are expressed in the constitutional text of Peru. Most regulations have their origin in constitutional mandates. The Peruvian constitution can be found to be the source of both, the privatization process and the subsequent regulatory process. We will focus our search in the case of tertiary education constitutional mandates and regulations.

Previous searches for the rhetoric of progressives

Hirschman recognizes the importance of making a similar endeavor for the case of the progressive rhetoric. Even when his book is about the rhetoric of conservatives, he devotes some pages to describe what he regards as the rhetoric of progressiveness. Being as compelling as it may be, Hirschman's progressive version of the rhetoric is, on the one hand, not as developed as its reactionary counterpart; and, on the other hand, the arguments are supposed to mirror the reactionary ones. Hirschman has looked for the opposite argument for every reactionary argument.¹⁴ These limitations justify our further look for a rhetoric of progressives.

For us, the RFA does not finish in a response to reactionary arguments, but is rather a “positive” rhetoric, which calls for action. The RFA is persuasive in nature. Its main intent is to convince the general public, public officials or representatives that regulation is needed.

On another account, authors like Harold Demsetz¹⁵ have identified the fallacies used by the proponents of regulations. In particular, the “Nirvana Fallacy”, which consists in comparing the current situation of a market with the ideal –utopic one– to conclude that the

¹² *Id.* at 1.

¹³ For a comprehensive study of regulations incremental in the last decades, see: Omar Al-Ubaydli and Patrick A. McLaughlin, Reg-Data: A numerical database on industry-specific regulations for all United States industries and federal regulations, 1997-2012, 10.1111 Regulation & Governance. (2015).

¹⁴ Thus, for example, the counterpart of “perversity” is: “disregard for consequences”; the counterpart of “futility” is “having history on their side”; and, the counterpart of “perversity” is the synergy illusion and the “imminent-danger thesis”. Hirschman, *supra*, at 149-163.

¹⁵ Harold Demsetz, Information and Efficiency: Another Viewpoint, (1969).

current situation must change. Then, this fallacy is combined with the “grass is always green” fallacy to conclude that regulation is the best way to achieve this change. Finally, the “free lunch” fallacy explains why this governmental solution is regarded as cost-free. Combined, all these fallacies explain why proponents of regulation are usually so enthusiastic about it and why they do not care about competing alternatives or the cost of regulation.

Without a doubt, this effort is related with the search of a progressive rhetoric. However, as we can see, Demsetz puts emphasis in the error of the argument, rather than in the way the rhetoric is constructed or inspired –or the stories that progressives are trying to make (or sell)–.

Our task, though, is to identify the RFA, independently of that, in some instances, the arguments which are presented rhetorically can be –indeed– right. In the same fashion as in Hirschman's ROR, our main critic is not about a specific aspect of the RFA, but to the routinely use of this rhetoric arguments in the first place. In the words of Hirschman, the use and overuse of this standard arguments make these arguments “(...) intellectually suspect on several counts”.¹⁶ This is so because as the arguments become commonplace, there are likely to be used “regardless of their fit”.¹⁷

This, at the same time, is dangerous if we want a truly rational and evidence-based public deliberation about public policies. In such a debate:

(...) the participants (...) should be ready to modify initially held opinions in the light of arguments of other participants and also as a result of new information which becomes available in the course of the debate.

Is this what it takes for the democratic process to become self-sustaining and to acquire long-run stability and legitimacy.¹⁸

In this light, our task here is to call out the use of standardized argumentation, which is essentially contrary to a sincere public debate about regulations.

A. The Three Arguments Presented

1. The Evil Hand Argument

The first argument is related with market failures. Its academic background could be traced as the first stage in the theory of regulation. In its academic form is referred to as the “normative analysis as a positive theory” and states that “(...) regulation occurs in industries plagued with market failures”.¹⁹

¹⁶ Hirschman, *supra*, at 166.

¹⁷ *Id.*

¹⁸ *Id.* at 169.

¹⁹ W. Kip Viscusi, John M. Vernon and Joseph E. Harrington, *Economics of Regulation and Antitrust*, at 375 (4th ed. 2005).

The argument has two parts. First, markets do not function well, so they bring bad results. The second part states that the flawlessness of the market –and the absence of regulations– is to be exploited by evil businesspersons.

The rhetoric version of this argument rests in the assertion that believing that the “invisible hand” can make the Economy work is frivolous, naïve or interested. Is frivolous or naïve in the sense that it assumes a lot about the way markets and people behave. A market can only deliver optimal equilibrium if there is complete information and there are sufficient sellers and buyers. In addition, people have to be rational. Given the fact that is easy to prove that markets are not perfect and people are not always rational, then the conclusion follows that we need the intervention of the State.

Believing in the free market is also regarded as interested, because regulations are supposed to hurt corporations and the lack of regulations is supposed to benefit them. This is evident even in the popular culture, where people imagine that firms systematically oppose regulation in order to exploit the public.²⁰ In this view, firms and businesspersons are perceived as somehow evil.

Critics on the Evil Hand Argument

The first problem with this argument is that it makes an unreal characterization of the “invisible hand” argument. The “perfect market” is just a theoretical assumption. No one actually pretends it's true. The same can be said about rationality. Furthermore, not always is necessary to assume that people are rational in order to predict human behavior. Sometimes, assuming that they respond to price variations is enough.²¹ In addition, people who argue in favor of the free market usually put weight in the advantages of competition and the optimal level of innovation, rather than in the “perfection” of the market.

A second problem with these arguments is the tendency to use a broad definition of “market failure”. In this view, obesity is an externality because the State has to pay healthcare afterwards (even when the cause of the “externality” is taxation itself); every missing piece of information is considered a case of information asymmetry (even when there is no apparent “adverse selection”); irrationality is often used if it was some kind of market failure; and, even competition itself is sometimes regarded as ruinous.

In some instances, the result itself is regarded as the failure. For example: “people are choosing a good which is bad for them, so a failure must be there”, even when the specific failure cannot be identified. In these cases, it is likely that the “failure” is just poverty or another concept beyond efficiency considerations. “Bad quality” is not a failure by itself. Apart from the fact that quality is subjective, the market can produce results that are contrary to our ideal, if the ideal is defined with terms beyond efficiency. For example, a market can produce discrimination, which does not mean there is a market failure. In the

²⁰ Larry E. Ribstein, *Wall Street and Vine: Hollywood's View of Business*, University of Illinois Law & Economics Research Paper No. LE05-010. (2009).

²¹ “(...) whatever makes men choose as they do, we must content with the knowledge that for groups or human beings, in almost all circumstances, a higher (relative) price for anything will lead to a reduction in the amount demanded. (...)”. Ronald H. Coase, *The Firm, the Market and the Law*, at 4 (1988).

next argument (Special Markets), we will discuss the case in which the output of markets is criticized even when it is acknowledged that there is no market failure at all.

Proponents of regulations can be indulgent with their own rigor thanks to the bad name they previously help giving the free market. Since nobody cares too much about market freedom anyways, every argument related to its supposedly flaws are to be well received.

The third problem with this argument is related with Demsetz “Nirvana Fallacy”, as described by Cowen and Crampton:

Inefficiency amounts to a cry that “Something must be done!” – a call that politicians and regulators are only too ready to respond to, with an armory of “somethings” always at the ready. Comparative institutional analysis moves beyond the identification of discrepancies between the ideal and the real, examining instead the relative merits of feasible alternative institutional arrangements for dealing with identified economic problems.²²

The simple identification of a market failure, cannot lead us automatically to the conclusion that the government must intervene. On the one hand, intervention is costly. There are “government failures” as well,²³ like the lack of information, irrationality of officers,²⁴ private interests and so on. On the other hand, sometime the market can find substitutes for whatever is lacking or correct itself. This is the case of information asymmetry, which sometimes is corrected by the use of intermediaries or by resting in the reputation of firms.²⁵

Finally, proponents of this argument sometimes assume that firms usually oppose regulations. This is not true as every person familiar with economic regulation will know. Firms have an opportunistic –or rational– behavior towards regulation. Most of the time, regulations help firms to reduce competition, raise prices or to obtain subsidies.²⁶

2. The Special Markets Argument

This argument is used when the market produces a result which is not desirable, independently that the fact that the market works efficiently. In some cases, though, it can be used in addition to the “Evil Hand” argument. The argument has, at least, two variants: (i) the good is “objectively” more important;²⁷ and, (ii) the good is connected with important

²² Tyler Cowen and Eric Crampton, Market Failure or Success: The New Debate, at 24-25 (2002).

²³ Clifford Winston, Government Failure versus Market Failure: Microeconomics Policy Research and Government Performance, (2006); and, Gary Becker, Market Failure Compared to Government Failure, The Becker-Posner Blog: A Blog by Gary Becker and Richard Posner (Sep. 18, 2011, 7:21 p.m.), <http://www.becker-posner-blog.com/2011/09/market-failure-compared-to-government-failure-becker.html>.

²⁴ Stephen Breyer, Breaking the Vicious Circle: Toward Effective Risk Regulation, (1995).

²⁵ Ronald J. Mann, Information Technology and the Increasing Efficacy of Non-Legal Sanctions in Financing Transactions, University of Michigan Law School Paper #00-003. (2001).

²⁶ George J. Stigler, The theory of economic regulation, 2 Bell J Econ Manag Sci. 3 (1971).

²⁷ “For most purposes, we can initially define human needs, in a *minimal* sense, as the amount of food, clean water, adequate shelter, access to health services, and educational opportunity to which every person is entitled by virtue of being born. There are many other quantitative and qualitative needs beyond this level, but beyond this minima, deterioration of the body constrains physical and mental

consequences beyond efficiency, like growth. In both cases, the distribution of that good cannot be left to the morally neutral market mechanism.

This argument is related with a *natural* conception of law and, in this sense, with the human rights movement. The recognition of some aspects of life as human rights presupposes the existence of an objective scale of values. This, in turn, rejects the relativistic nature of the utility concept as it is used in economics. In the economic arena, is closer to the idea of growth linked with the development of human capabilities and the concept of “merit goods”.²⁸

In relation to health care, Richard Epstein has argued that calling this market “special”:

(...) calls for the intervention of government into the operation of the market—so that the ordinary intersection of supply and demand should not be allowed to determine the level of resources devoted to medical care, and, more importantly, shall not be allowed to determine who receives how much of that care and why. This view is sometimes captured in the proposition that health care is a right and not a privilege. The distinction between rights and privileges has a somewhat specialized meaning, with an important role to play. To say that health care is a privilege means that it is available only to those who are able to purchase it in the market. Legal protection is provided only to the extent that it prevents third persons by force from interfering with any contract between an ordinary individual and a health care provider. To say that health care is a right changes radically the nature of the correlative duty.

As we see, a market is special because of ethical concerns, beyond economics. In addition, this argument is generally related with the proposition that government intervention is needed. In the next section, we will discuss why this argument is sometimes used in an erroneous way.

Critics on the Special Market Argument

The first critique has to do with the vagueness of the argument. In some sense, every market is special. Is too difficult to determine an objective scale of the importance of goods. What is more important, health, housing, food, education, transportation, basic utilities, labor? To which degree? Only basic health or every aspect of medical services? Maybe because of this, the argument about “special markets” is used routinely by proponents of regulation.²⁹

activity and degrades the spirit.” John McHale and Magda Cornell McHale, [Meeting Basic Human Needs](#), 442 Ann Am Acad Polit Soc Sci. 13, 16 (1979).

²⁸ “The central characteristic of a merit good is that many individuals are unable to evaluate the benefits correctly. The problem is therefore one of imperfect knowledge, broadly interpreted. In such cases, overt preferences do not represent the individual's “true” preferences or “real interests”. In relation to the benchmark of true preferences or real interests, the overt preferences of the individual are evidently “incorrect” or “distorted”. Public intervention may therefore be justified to correct consumer preferences.” John G. Head, [Merit Goods Revisited](#), 28 Finanzarchiv. 214, 214-215 (1969).

²⁹ “Those of you who have watched the operation of the regulatory system over the generations will know that the term special, for all its emotive power, has a certain tired quality. The term has been used before in countless contexts to pave the way for some form of government intervention”. Richard A. Epstein, [Why is Health Care Special?](#), 40 Univ Kans Law Rev. 307, 310 (1992).

The second critique is related to the way it is used: Once a market acquires the label of “special”, it is assumed as a dogma. Then, the premise “(...) cannot be falsified by any empirical evidence or theoretical arguments to the contrary”.³⁰

Finally, but probably most important, is the critique about the consequences of labeling a market as “special”. Even if we can agree in the fact that some markets (or goods) are special, this alone does not call for a specific solution, nor for a governmental solution and even less for a specific governmental solution as subsidization or regulation. If a market is objectively more important than others, we probably have a moral obligation to be especially careful with the way we treat this market. The absence of regulation can be, in some instances, the best answer to deal with a special market. As stated by Epstein:

Importance (...) is not an argument for government subsidy or support, for if it were then socialism would apply to things where it matters most, and lead to the most ruinous of consequences. Instead the importance, so to speak, of importance is simple: it is important to get the right set of solutions, be it private or public, to the problem at hand. Importance does not create a presumption in favor of government, or for that matter against it. It only raises the stakes for making a correct decision in the matter at hand.³¹

In some cases, putting this “mark of Cain” to a market will doom it for regulation. That “mark of Cain” could be found even in the constitutional texts of some countries, where some markets are defined of “special interest” for the State. That will be almost inevitably interpreted as a presumption (if not a mandate) in favor of regulation or subsidization.

3. The Human Conquest Argument

The Human Conquest argument looks like this: “Every additional regulation (or recognition of a new right) is a milestone in human progress towards the ideal state”. This argument rests in the belief that human history is moving forward through the expansion of social and political rights.

In this view, values like equality and solidarity take precedence over liberty, security or efficiency. The final state of humanity is one in which we live in harmony with each other, where everybody is recognized in its own individuality and –at the same time– collective values and solidarity are important. In addition, humans need to live in harmony with nature and with other animals. The recognition of rights through regulations are steps towards this final stage.

Seeing rights as “conquests” also calls for more regulation. Once we admit that “appropriate employment” is a human right, for example, the prohibition to work more than eight hours is just the first step. The more rights related to labor we can recognize, the better. In addition, going in the opposite direction is always something bad and, in some cases,

³⁰ *Id.*

³¹ *Id.* at 311.

forbidden. In that sense, this argument is even recognized in some international human rights instruments and constitutions. For example, the Bolivian Constitution states that:

The rights recognized in this Constitution are inviolable, universal, inter-dependent, indivisible and **progressive**. The State has the duty to promote, protect and respect them (Article 13, emphasis added).

In the same sense, the International Covenant on Economic, Social and Cultural Rights:

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving **progressively** the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures (Article 2.1, emphasis added).

One thing to notice here is the international nature of this movement. Since progress is viewed as a human conquest, it is only natural that every policy for advancing rights will tend to be imposed on a global scale. This is apparent in the enactment of human rights treaties and the installment of international courts, with regional or global power even against national governments.³²

In addition, according to this argument, “doing something” is always better than “doing nothing”. Since going forward is intrinsically a good thing, people are eager to accept any measure, despite the fact that there is no proof of the necessity of the action, the consequences or the superiority of the action when compared with alternatives. To hear them say things like “The measure is not perfect but at least is an attempt for achieving x” is commonplace.

Critiques on the Human Conquest Argument

The first critique has to do with the relativistic nature of human values. Saying that advancing equality is always a good thing, for example, assumes that equality is a universal value. The same is true for other values or rights, such as respect for the environment, for example. It is obvious that not all people agree on this particular scale of values. For some, freedom is more important than equality, and so on...

If one agrees that different people rank the importance of each fundamental value differently, then a recognition of more equality within a State implies a gain for some, which – lacking more information – is equal to the loss of the opposite group.

Related to this, the recognition of human rights or the regulations related to some goods, which are in the progressive agenda, is a particular way to “honor” these values, which can be wrong for practical reasons, even if one agrees in the particular set of values behind them.

³² Daniel Deudney and G. John Ikenberry, *The nature and sources of liberal international order*, 25 Rev Int Stud. 179 (1999).

In some cases, “doing nothing” is the best way to achieve a goal, so the assertion that “going forward” is always better than “doing nothing” is simple not true. In the public debate, nevertheless, the “doing nothing” approach is highly unpopular. Like in the case of the Special Market argument, saying that achieving x is a conquest does not necessarily calls for government intervention, since the best way to “advance” a value could be through the market.

Like in the other cases, this prevents a more rational debate, based on evidence and arguments, rather than in aprioristic assumptions about the need and desirability of the government intervention trough regulations.

Chart 1: Fundamental values underlying each rhetoric type

ROR		RFA	
Relies in individuals	Individualism	Relies in government action	Collectivism
Asserts that values are relative	Relativism / positivism/ libertarianism	Believe in a specific set of values (with a specific order)	Principlism / Natural Law/ equalitarianism
There is a “natural order” of things (human nature)	Pessimistic	Inevitability of change (humanity is always advancing)	Optimistic
Based on evidence	Empiricism	Base on logical arguments	Rationality
Averse to change	Conservativism	Eager to change	Progressivism
Emphasis in scarcity and efficiency	Economic approach	Emphasis in development and equality	Social approach
Emphasis in particularities of every case	Localism	Importance of an international movement	Globalism

B. The Case of Higher Education Regulations in Peru

In this section, we will show how these three arguments (RFA) have being used –successfully– in a specific public policy debate in Peru and how it relates with some constitutional provisions, weather in the text of the constitution or in decisions of the Constitutional Court of Peru. In the case of the regulation of higher education, all three arguments have been used at the same time.

The public debate has been dominated mostly by three prestigious Peruvian economists. The Secretary of Education –Jaime Saavedra– who has a PhD in Economics from Columbia. The major proponent of regulations is Gustavo Yamada, also has a PhD from Columbia, friends with Saavedra, and former Dean of the School of Economics and director of the research center at Universidad del Pacifico, the most prestigious economic school in the country. From abroad, another PhD in Economics, also Saavedra’s friend, is Hugo Ñopo, former head of the education division in the Inter America Development Bank. We will use quotes of them in the next pages –even of op-end articles– among others, since their participation in the debate was determinant.

1. The Evil Hand Argument

In relation to this first argument, the proponents of regulation try to caricaturize the defense of free market in tertiary level education. For them, in Peru we have “too much faith” in the market. For example, Ñopo has argued that:

As it can be seen, for a market of educational services to work healthfully we would need to regulate various aspects of the reality. The risks of not doing it appropriately are big. Meanwhile, thinking that the educational systems will improve with more private participation is blind faith. Definitely it’s a topic that needs much debate about the basis of reasons and not of faith.³³

Apart from this, educational entrepreneurs have been accused of opportunistic behavior, taking advantage of the lack of regulation to mislead consumers making them believe that they are selling good quality education.

In relation to market failures, there are lots of arguments that have been used to support regulation of tertiary education: (i) information asymmetry; (ii) a decay in quality as a consequence of de-regulation; and, (iii) positive externalities. In the next pages, we will explore these alleged failures in more detail.

Information Asymmetry

Yamada, Rivera and Castro have pointed out that the problems of quality in the tertiary educational market are due to the lack of incentives. The structure of this market, according to them, makes impossible to obtain sensible information to decide what and where to study. In their words:

In a competitive market with complete information, the consumers regulate quality, disciplining goods or services which do not meet up to expectations. (...).

³³ Hugo Ñopo, [Los mercados. ¿Y la educación?](#), El Comercio, September 25, 2015. In response to: Ian Vásquez, [La educación privada es clave](#), El Comercio, October 3, 2015.

Education investment has characteristics which prevent this to happen easily. Particularly, it takes a lot of years to experience the benefits of educational services.³⁴

In the same sense, Ñopo compares a university with a restaurant:

Leaving a restaurant, the consumer has a clear idea of the quality of the service. In education, this does not happen, because the timing is different. Part of the quality is revealed immediately, but part of it (probable the most important) is revealed in the future.³⁵

Following the example of the restaurant (and proving somehow the connection between this “thinkers”), in a surprisingly different version of the argument, Saavedra argues that university markets can indeed provide the same information, but is socially undesirable to close universities because of the “social cost” of it:

The vision that the university system is a market that works like any other is incorrect. The market of restaurants can regulate itself efficiently. You go to a restaurant, and if it is bad, you do not go again; and, eventually, the restaurant closes. This does not have major social costs. However, in education we want long-term investments that provide a good quality education. We do not want universities that open and close, to retire a bad educational service from the market has a very high social cost. At the same time, we neither want young people to lose valuable years of their life.³⁶

Maybe this last quote is closer to the “Special Market” argument but is interesting to observe inconsistencies within the progressive rhetoric.

Decay in quality as a consequence of de-regulation

Yamada and Castro have compared the quality of universities in Peru pre and post the de-regulation of the market. They have found that the quality decayed after de-regulation. The proxy for “quality” was the return of an additional year of education.

[The period of decay in universities quality] coincides with an important shift in terms of incentives for higher education providers. In 1996, using special legislative powers granted by Congress, the Peruvian government passed a law (Legislative Decree 882) to promote private investment in education. This decree allowed private schools and universities to operate under the same rules as a private business. There are no reasons to suspect that private investment, per se, should hinder higher education quality. However, there is a large

³⁴ Gustavo Yamada, Mario Rivera and Juan F. Castro, Educación Superior en el Perú: Retos para el Aseguramiento de la Calidad, at 59 (2013).

³⁵ Ñopo, *supra*.

³⁶ Jaime Saavedra, Indispensable (e irrenunciable), El Comercio, May 15, 2016.

risk that a profit maximizing initiative will end up overlooking educational outcomes if it is not accompanied by strong regulation. A profit maximizing college faces powerful incentives to maximize enrollment in the short run and keep fixed costs as low as possible. Once fixed costs have been covered, an additional student translates almost entirely into profit.³⁷

The work of Yamada and Castro is very valuable and an example of policy prescriptions based on evidence, which is exactly what we are looking for. Nevertheless, in this case, it's not apparent to which market failure they are referring to and they jump to quickly to the conclusion that more regulation is needed. Apparently, "educational outcomes" are defined as an alternative measuring of the optimal level of quality in this market, thus making this argument closer to the Special Market one.

Nevertheless, this argument resembles the failure consistent in "ruinous competition". "Too much competition" is seen as a bad thing. According to Yamada and Castro, the increase of universities in the last decade has created a "race to the bottom", where universities relaxed their student's admissions standards and reduced costs in order to attract more students. This reduction is apparent in the hiring of unqualified (or part time) professors.³⁸

Positive externalities

The same Yamada and Castro³⁹ has argued that "A tertiary level education of high quality is a must for making reality our dream of becoming a developed country". In the same sense, the Secretary Saavedra always says, in op-ed articles and public speeches that "Education should be our obsession".

The argument here is that education benefits are not completely reflected in private return:

In circumstances where the market mechanism fails government intervention is needed, because higher education has positive externalities: benefits are enjoyed by the greater public.⁴⁰

In the same sense:

There is increasing empirical evidence suggesting that the diffusion of knowledge and human capital externalities are essential for explaining cross-

³⁷ Gustavo Yamada and Juan F. Castro, "Convexification" and "Deconvexification" of the Peruvian Wage Profile: A Tale of Declining Education Quality, Discussion Document DD/12/02. 6 (2012).

³⁸ *Id.* at 40 and 60.

³⁹ Gustavo Yamada and Juan F. Castro, *Calidad y acreditación de la educación superior: retos urgentes para el Perú*, at 19 (2013).

⁴⁰ Jane Hemsley-Brown, *Market Heal Thyself: the challenges of a free marketing in higher education*, 21 J Market High Educ. 115 (2011).

country divergences in growth rates (Klenow and Rodriguez-Clare 2005). Relatedly, Moretti (2004) and many others shows that the social benefit of human capital is only partially reflected in the private return to education.⁴¹

According with this view, since education has a spillover effect, there is going to be less education than the social optimal level. In other words, education is supposed to be a public good.⁴²

One can say that the Peruvian constitution has a skeptical approach to regulations. It includes some provisions like the “subsidiary State intervention principle” which means that all public activity is forbidden if the market can function well providing a specific good. In addition, there is a general ban of arbitrary action, which could be used in the specific case of economic regulations. In other words, regulations have to coup with a “balancing test” which includes the market as the benchmark that regulations have to pass.

Nevertheless, the Peruvian constitution also has a provision saying that the State “(...). Supervises its fulfillment and education quality” (article 16). In this case, then, the government does not have to prove that the regulation of quality is best suited by the market mechanism. In this case, the government has an obligation to supervise quality standards.

2. The Special Markets Argument

In relation to education, our Constitutional Court has said that:

Within the functions that condition State’s existence, education holds the highest ranking priority, because it funds in democracy’s essential principles and it’s linked directly with the economic and social development of the country. It’s also democratic because it’s about a life system funded in the constant economic, social and cultural improvement of the people; it’s directed to the understand of our problems, use of our resources, defense of our politic independence, ensure of our economic progress and to the continuity and enhancement of our culture, thus contributing to better human relationships. It must be directed to strengthen in human person the principles of solidarity, social justice, human dignity and family integrity.

Education is a human right and a fundamental social duty; it is, as well, democratic, and mandatory. State assumes it as an indeclinable function and its obligated to invest in all its levels and modalities. Education is a public service and it’s based in the respect of every line of thought, with the finality to develop

⁴¹ Leonard Wantchekon, Natalija Novta and Marko Klačnja, Education and Human Capital Externalities: Evidence from Colonial Benin, Working paper. 2 (2013).

⁴² “In first term, we reaffirm that higher education is not a commodity but a **public good** that contributes to improve the **equity** and citizen’s **life quality** and, therefore, the construction of a common space of higher education in this ambit constitutes, above all, a **social good** that is based on shared values and feeds from them, and recognizes the importance of the education and the scientific and technologic progress in the **integral, equitable and fair development** of our societies”. José Ramón García Menéndez, La mercantilización de la educación superior: ¿Bien público o negocio privado?, Presented at II Jornadas de Economía Crítica. (2009).

the creative potential of every human being and the full exercise of its personality in a democratic society based in the ethical assessment of work and active, aware and solidary participation in social transformation processes consistent with the values of national identity, framed in a Latin American and universal vision.

Education is an inherent right to the people. Consists in the faculty of acquire and transmit information, knowledge and values to enable people for their existential and coexistential actions and relations; being a guide, direction or orientation for the integral development of the people.⁴³

Education is, without a doubt, a market which has being “blessed” with the “mark of Cain”. The argument rests in the understanding that education is inherently a human right and, from there, its provision must be regulated or directly managed by the State.

In that sense, the Peruvian Constitutional Court has also stated:

29. It is correct that the article 15 of the Constitution establishes that:

(...) every person, natural or legal, has the right to promote and conduct educational institutions and to transfer the property of these, according to law.

30. Nevertheless, it is also necessary to annotate in that regard that this Constitutional Court has already established that that disposition cannot be interpreted as the right to make educational entities simple firms subject to the directives of the market's rules of supply and demand.

31. In fact, when the State opens the possibility for such activities, in principle entrusted to it, to be carried by private entities, a special duty of vigilance and oversight of the service provided is born, because its accomplishment is not only a matter that concerns the private entity, but is particularly relevant to the State's own purposes.⁴⁴

Another way to construct this argument is to call for the “peculiarities” of the education market. In this sense, Ñopo:

To want to improve the education from a market perspective is ignoring that the educational service has many particularities. It is very different to the typical service on which free competition transactions can be made.⁴⁵

In the same sense, León-Velarde has argued that:

⁴³ Case file 4232-2004-AA/TC.

⁴⁴ Case file 0014-2014-P1/TC, 0016-2014-PI/TC, 0019-2014-P1/TC and 0007-2015-PI/TC.

⁴⁵ Ñopo, *supra*.

Given the situation of the university education in Peru, we cannot indulge us into expecting that market competition and complete information regulate education; because having good public universities, good private universities, but also bad universities –although very economically accessible–, we take the risk of having a university stratification by income and not necessarily based on intellectual capacity. If we want to improve the place of Peruvians universities at the global level, we need a higher expansion and better quality of the higher education.⁴⁶

We can extract from this that we cannot trust the market to deliver what we need from higher education. The optimal level of education only could be achieved through public intervention. This is so, because the intrinsic values of education are absent in the morally neutral rules of the market:

Higher education it is found in a crossroad and nobody has any certainty in regard of its future. The central issue is to know if it will prevail the market logics or the social values and the academic ethos. Or anything different from these two readings. The old concepts of autonomy and academic freedom are increasingly conditioned by economic models and more and more the higher education institutions are organized as profit companies. Against the threat that represents the entry of new providers and the formalization of education as a commodity to be controlled by the OMC, what warranties of quality of their educational systems can still offer the nations?⁴⁷

As we can tell, the Evil Hand and Special Market arguments –in some instances– are difficult to differentiate. This fact alone give us a clue about the broad and lousy way in which supposedly technical economic arguments are being used.

3. The Human Conquest Argument

As a human right, every step towards expanding the content of the right to education formally or empirically is considered a conquest under the “progressive realization” principle. In this light, the right of education started being a right of receiving elementary education, but now this has expanded to “education for work”, which includes tertiary education. As a consequence, governments have to make efforts to provide free tertiary level education:

For example, in the International Covenant on Economic, Social and Cultural Rights (1966), is stated that:

The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:

⁴⁶ Fabiola León-Velarde, [La universidad que queremos](#), La República, December 20, 2013.

⁴⁷ José Dias Sobrinho and Márcia Regina F. De Brito, [La educación superior en Brasil: principales tendencias y desafíos](#), 13 Avaliação (Campinas). 487, 504 (2008).

(...). Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education.

The Peruvian constitution has similar provisions:

Is State's duty to ensure that no one is prevented from receiving an adequate education for their economic situation or mental or physical limitations (article 16).

(...). In public universities State guarantee the right to receive free education to the students that keep a satisfactory performance and don't have the necessary economic resources to cover education costs. With the goal to guarantee the biggest plurality of educational supply, and in favor of those who can't pay for their education, the law prescribes the mode to subsidize private education in any of its modalities, including communal and cooperative ones (article 17).

This last provision is related with the scholarship program that the government has implemented which allows students with less resources to study in the best private universities in the country.⁴⁸ Also, in Peru universities do not have to pay taxes, even when they are for-profit institutions.⁴⁹

The government influence over education also was apparent in a case of a student who did not pay fees on time to a private institution. In this case, the Constitutional Court ruled that the institution was obligated to provide education for that student for the rest of the semester and measures like conditioning the rendering of exams to payments was forbidden.⁵⁰

This illustrates the view that the subsidization (or direct supply by the State) of education is saw always as progress, with such force that it has being made a principle of international and constitutional law, mandatory for the states.

Another aspect of this argument is that every step towards more regulation (or the collectivization of decisions about education) is view as a positive policy, in disregard of the specific justifications it may have or the consequences of such policy.

In the case of Peruvian universities regulation, even when some progressives acknowledge flaws in the recent University Act which imposes standards to universities; they are indulgent with it, only because it is a step forward the goal of making higher education more public.

For instance, Mora, the congressional representative responsible for this Act, said:

⁴⁸ The program is called "Beca 18". More information: http://www.pronabec.gob.pe/2016_Beca18.php.

⁴⁹ Case file 02053-2013-PA/TC.

⁵⁰ Case file 0011-2013-PI/TC.

Of course, no law is perfect, but this is how we **advance**. What happens is that there are universities that do not want to be overseen. They say that it is an intervention to its autonomy and they falsify information.⁵¹

In the same sense, Lerner, a former president of one of the most recognized universities in Peru:

We must reaffirm that the new University Act is an important **advance** in the recovery of the true sense of higher education. It is a perfectible rule, as many, but it cannot be denied that it creates various tools that allow a better management to secure quality.⁵²

In the eyes of progressives, the University Act is a conquest if compared with the recent scenario where universities were less regulated.

Chart 2: higher education rhetoric in constitutional provisions (Peru)

RFA	Constitutional provision	Counter-constitutional argument
Evil hand	The State coordinates the education policy and supervises quality standards. ^{53 54} Through an Act the State establishes the condition for the functioning of public and private universities. ⁵⁵	-Subsidiary intervention principle ⁵⁶ . “University autonomy” principle in academics, administrative affairs and economics. ⁵⁷
Special market	Education has goals as the development of persons and the encouragements of solidarity. ^{58 59}	“(…). Universities are promoted by private or public institutions. (...)” (article 18).
Human Conquest	Free education in public universities for people with good grades and no economic means.	The obligation to subsidize education diminishes when we go higher in the educational level. ⁶³

⁵¹ Daniel Mora, [La Universidad Garcilaso de la Vega ha sido manejada como una chacra](#) (interview by Enrique Patriau), La República, April 28, 2014.

⁵² Salomón Lerner Febres, [Ley universitaria en peligro](#), La República, December 4, 2015. Even more: “Perfect? It is not. But it can't be denied that it looks insistently to raise the academic level of the Peruvian University System. The Superintendencia Nacional de Educación Superior Universitaria (SUNEDU), created by that law, has that objective”. Luis Valles, [Nueva Ley Universitaria](#), 81 Revista de la Sociedad Química del Perú. 79, 79 (2015).

⁵³ Article 16 of the Constitution.

⁵⁴ Case file 04232-2004-AA.

⁵⁵ Article 18 of the Constitution.

⁵⁶ Article 60 of the constitution.

⁵⁷ Article 18 of the Constitution; and, Case file 04232-2004-AA.

⁵⁸ Articles 13 and 14 of the Constitution.

⁵⁹ Case file 04232-2004-AA, 0014-2014-P1/TC, 0016-2014-PI/TC, 0019-2014-P1/TC and 0007-2015-PI/TC.

⁶³ Case file 04232-2004-AA.

	<p>Subsidization of some students in private universities.^{60 61}</p> <p>Tax incentives for private universities, even for the for profit ones.⁶²</p>	
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C. The Call for Regulation

As expected, the three arguments have something in common: all three call for more regulation. In the case of Peru, as well as in the US,⁶⁴ the preferred way to regulate the tertiary level education market have being trough standards.

Yamada was one of the most enthusiastic proponents of standardization:

As a fundamental policy prescription, we believe that, in order that the current economic growth do not stops rapidly and we can hope to transform it in fulfilling development, is necessary to make the accreditation system stronger for all the education institutions in the country, so it can incentivize the improvement of all the system, so it can provide the qualify human capital that all the country urgently needs.⁶⁵

Setting standards is a classic way to regulate. Basically, they tell the industry how to behave, affecting the characteristics of the product (or service) or setting goals that they have to achieve. There are many variations in the way a standard can be set. For example, the standard can be narrow or be general; the standard can be imposed or it can be just suggested and encouraged by incentives; it can attack a specific problem in the industry or indirectly suggest a change in behavior that can ultimately lead to the desired result.

In the case of Peru, we have a University Act, which specifies some requirements for universities and then states that they have to cope with standards to be decided by a specialized agency (created by the own Act). Combining the requirements that were originally in the Act and some included afterword’s trough regulations, universities in Peru have to comply with norms regarding: (i) the composition of decision making bodies including students; (ii) definition of financial plans, including the proof of having enough means to subsists; (ii) definition of academic plans, including the justification of the existence of programs; (iv) requirements of infrastructure; (v) requirements of faculty; (vi) research institutionalization and resources; (vii) services for students; and more.

⁶⁰ Case file 00607-2009-AA; and, 02053-2013-AA.
⁶¹ Article 17 of the Constitution.
⁶² Article 19 of the Constitution.
⁶⁴ “Though accreditation is considered a “voluntary” process, students who attend unaccredited institutions are ineligible for federal student loans and grants”. Kathleen Negri, Mortgaging the American Dream: The Misplaced Role of Accreditation in the Federal Student Loan System, 82 Fordham Law Review. 1905, 1917 (note 92) (2014).
⁶⁵ Yamada and Castro, Calidad y acreditación de la educación superior: retos urgentes para el Perú, supra, at 61.

In more detail, there are mandates such as: “courses cannot be more than 50% online” or “professors had to have at least a master degree to teach, and a doctoral degree to be dean or president of the university”.

Critique to the standardization process and particular standards

Is not the aim of this note to criticize standardization as a public policy tool, but given the fact that part of our general critique to the RFA is that it calls for regulation in an automatic –unreasonable– way; we think it’s important to state here why standardization is not a sound policy, at least if the goal is to improve tertiary education.

Standardization can be criticized in various respects, including:

- (i) Quality could be very difficult to define and measure properly (Mortgaging⁶⁶) so the whole idea of regulating quality could be mistaken.
- (ii) Standards can be used by the industry itself to difficult the entry of rivals.⁶⁷ This could have an effect not only in efficiency, but also in equality because the reduction in competition can increase prices and –in doing so– reduce access.
- (iii) The Government does not have enough information to decide the appropriate standards so it has to rely in the industry itself.⁶⁸
- (iv) Standards could deter innovation, as the prohibition of online classes can illustrate (Recalibrating-Task force)⁶⁹.
- (v) Standards could be disconnected with the goal of the policy, as the mandatory master requirement for professor can illustrate, assuming that there is no evidence showing that students of professor with masters tend to gain more than students of professor with no master.
- (vi) In some instances, the standards can be contrary to the aim. For example, making masters mandatory will create a market for “expedite” (low quality) masters.⁷⁰
- (vii) The standard can be costly to administer or to interpret, depending on the detail they are written (Recalibrating/⁷¹ Mortgaging⁷²).
- (viii) The standards inevitably will reduce the liberty of the agents of that market which, in the case of education, will translate in a claim for autonomy.⁷³

⁶⁶ Negri, *supra*.

⁶⁷ Stigler, *supra*.

⁶⁸ Stephen Breyer, *Regulation and Its Reform*, (1984).

⁶⁹ Task Force on Federal Regulation of Higher Education, *Recalibrating Regulation of Colleges and Universities*, (2015).

⁷⁰ Breyer, *Regulation and Its Reform*, *supra*.

⁷¹ Task Force on Federal Regulation of Higher Education, *supra*.

⁷² Negri, *supra*.

⁷³ Case file 0014-2014-P1/TC, 0016-2014-PI/TC, 0019-2014-P1/TC and 0007-2015-PI/TC.

D. Some conclusions

In this part of the dissertation, we have tried to describe what we see as the Rhetoric for Action, which –in our own conception– is a type of rhetoric used to justify the intervention of government in market through the recognition of rights; the expansion of regulations and the subsidization of some goods.

The arguments presented are not per se erroneous, and one can even sympathies with some of the values underlying this optimistic view of human progress. They have the positive effect of remind us that things can be different and that are values beyond economic efficiency that are important for society.

Nevertheless, since these arguments tend to be used in a standardized way, their use have the peril of hindering a more meaningful debate about the goals we want to achieve as a society and the most convenient ways to achieve them.

We have demonstrated that the RFA was not only present but was triumphant in the higher education regulation debate in Peru. The use of these arguments persuaded public opinion and legislative authorities even in the absence of evidence about the necessity of regulation higher education and without a serious discussion about the pertinence and convenience of standards as a way to regulated universities.

In addition, probably the use of the ROR for the opponents of regulation, including me, did not helped the public (or public representatives) to understand the real consequences of such regulations. In this sense, libertarians would carry some of the blame for the fruitless debate about higher education regulation in Peru.

Being aware of the use and misuse of both, Hirschman's ROR and “ours” RFA, puts as a step forward in achieving the goal of having this meaningful debate.

II. PUBLIC CHOICE AND WASHINGTON CONSENSUS: THE CASE OF THE PERUVIAN CONSTITUTION

Since its approval by an authoritarian government, the Peruvian constitution has been under attack. For example, in the last presidential election in Peru, the candidates of the socialist parties proposed the enactment of a new constitution⁷⁴. Currently, 29 change proposals are under debate to in the National Congress⁷⁵. Even more, a constitutional claim was made in year 2003 to declare the Constitution itself void⁷⁶.

Much of the criticism is due to the spurious origin of the Constitution, but also for its content, especially the economic chapter. On the one hand, it is the product of a *coup d'état* perpetrated by Alberto Fujimori to gain the majority in the Congress and, on the other

⁷⁴ For example, Verónica Mendoza (who run third in the presidential election) made the constitutional change a major theme of its campaign. Source: El Comercio newspaper, April 7, 2016.

⁷⁵ Source: <<http://www.proyectosdeley.pe>>.

⁷⁶ Decision STC 014-2003-AI/TC in which the Court declared that the Constitution itself cannot be declared void because of the lack of a parameter to judge its own validity.

hand, it implanted –for most people commenting on the subject– a neoliberal economic system as a consequence of the pressure of international financial organizations through a process now known as ‘The Washington Consensus’.

In general, it has been said that the Washington Consensus have had a great influence in the constitutional reform in the region. Peru, in particular, is said to have the most neoliberal constitution of all.

In this section, I will argue that this is not entirely true. It is true that Peru undertook major economic reforms, leading it to macroeconomic stabilization and privatization but, at the same time, Peru also started to regulate its economy more heavily and kept recognizing social rights. In addition, constitutions are not static documents –they change thanks to interpretations of the relevant actors, particularly in the recognition of social rights.

In addition, the Consensus itself is not a reflection of neoliberal policies. The proponents of the Consensus were critical about the results, and suggest some changes, particularly in the area of institutions and social rights.⁷⁷ Even more, the reform was a complicated process, in which more than one political force acted, including progressive activists.

The explanation of this lies in the dynamics of the regulatory process in general and regulatory change in particular. Public Choice is particularly useful in explaining the outcome in this case.

Regulation was popularly seen as something imposed on private firms against their will, so as to constrain prices and profits that allegedly these firms would otherwise earn as natural monopolies. Such was the theory. In practice, however, it was observed that regulation did not actually restrain firms; indeed, firms actively sought to be regulated.⁷⁸

Public Choice theory asserts that –when in the political arena- humans’ act as maximizers, as in any other field; or, at least, that assuming that humans’ act as maximizers in the political arena is equally useful than assuming that they are maximizers when act in traditional markets. The implications of this statement are contradictory with the postulates of “public interest” theories, because now we can assume that politics and firms act opportunistically in relation to economic regulation.

Today, there is great consensus about this, but some areas are traditionally excluded from this “logic”, like environment and labor.⁷⁹ We can add “Constitutional Law” to this list. Nevertheless, a constitution is not exempt from the political process. We know since Beard⁸⁰ that a constitution is also the result of economic constraints and pressures. The political process implies the participation of both firms and the states. In the case of the

⁷⁷ John Williamson, Overview: An Agenda for Restarting Growth and Reform, in Pedro Pablo Kuczynski and John Williamson (eds), After the Washington Consensus: Restarting Growth and Reform in Latin America, (2003).

⁷⁸ Fred S. McChesney, Rent seeking and rent extraction, in William F. Shughart II and Laura Razzolini (eds), The Elgar Companion to Public Choice, at 380 (2001).

⁷⁹ Dale D. Murphy, The Business Dynamics of Global Regulatory Competition, in David Vogel and Robert A. Kagan (eds), Dynamics of Regulatory Change: How Globalization Affects National Regulatory Policies, at 88 (2004).

⁸⁰ Charles A. Beard, An Economic Interpretation of the Constitution of the United States (1921).

Peruvian Constitution, it was “liberalized” in the sense that it helped privatize great portions of the economy, but it also brought regulations and social rights. This suggests that the process is more easily explained as a negotiation between political interests and the opportunistic behavior of potential beneficiaries of the privatization process than a pure pursuit of a neoliberal heaven in Latin America.

The section will go as follows: In the first part, I will describe the Washington Consensus and the political and economic transformation of the region. In the second part, I will show how these ideas and institutions were reflected in constitutional texts. In the third part, I will show how these constitutional provisions affected reality and were changed through constitutional practice, especially by the decisions of the Constitutional Court of Peru. Finally, I will present three cases in order to demonstrate that the Peruvian Constitution could be more easily explained in public choice theory terms rather than in the ideologically pursued of a neoliberal economy.

A. Washington Consensus and Constitutionalism in Latin America

1. Two major reforms in Latin America (1980-2000)

It has been said that, starting in the eighties, two major reforms took place in Latin America: one was a change in almost every constitution and an economic reform that led some countries in Latin America to open their markets, de-regulate, stabilize their monetary policy and privatize.⁸¹

Before 1980, most Latin American countries had authoritarian regimes and failed economies. Also, they had a big international debt. To be sure, “Total US bank exposure in the Third World grew from \$110 billion in 1978 to \$450 billion at the end of 1982 – over 300 per cent in four years”⁸². They entered economic reforms under the pressure of international organizations; because of their lack of payment abilities and the necessity of receiving new loans. In countries like Chile or Argentina, where the reform started under dictatorships, the champions of the reform were known as “Chicago Boys”, because most of them were post-graduate’s students of Chicago, under the influence of professors like Milton Friedman.

In the case of Peru, its economy was sinking when Alberto Fujimori took the presidency in 1990 elections. Inflation was in the order of the thousands and former president Alan García had announced his intention of stopping paying Peruvian foreign debt. Also, foreign investment was in the order of 26 USD million in 1980, compared with two and a half billion in 1995. All this, without mentioning the political and social crisis due to the rise of terrorism in the same years.

⁸¹ Rodrigo Uprimny, Agendas económicas de modernización del Estado y reformas constitucionales en América Latina: encuentros y desencuentros, in Los procesos de control estratégico como pilares de la modernización del Estado (2007).

⁸² Susan George, A Fate Worse than Debt: The World Financial Crisis and the Poor, at 30-31(1988).

Given this situation, Fujimori considered sitting with World Bank and International Monetary Fund representatives, who asked him to undertake some reforms known as the “prescriptions” of the Consensus.

To do this, Peru started structural reforms as well as macroeconomic stabilization and opening of the markets.⁸³ These measures were undertaken because of the “advice” of international institutions like the International Monetary Fund and the World Bank.⁸⁴

2. Two tales of reform: From the Consensus to the Anti-Consensus

The term “Washington Consensus” have being used in a variety of ways, from a general –and imprecise– concept to describe the influence of American neoliberal thinking to developing countries, to the more precise concept referring to a group of policy prescriptions brought by Williamson. This group of ten prescriptions referred to the managing of macroeconomic issues, deregulation and opening of the market to foreign trade.⁸⁵ The proceeding by which the term became public knowledge was as follows:

In November 1989, the Institute for International Economics convened a conference to investigate what was actually happening with the economic reforms in Latin America. Structural adjustment in Latin America had the goal of substituting a market-based economic system for a traditional statist economic system (Williamson, 1990b, p. 402). In this conference, Williamson (1990a) found the opportunity for the first time to reveal his new found term in a background

⁸³ G. Terrier et al, Peru: Selected Issues, (2007).

⁸⁴ As reported by a former government official (Susan C. Stokes, Democratic accountability and political change. Economic policy in Fujimori's Peru, 29 Comp Polit. 217 (1997)), meetings with directors of these institutions were held short after Fujimori assumed the presidency.

“At the meeting, as reported to me by Figueroa (who also attended), the following alternatives were communicated to Fujimori. If the new president tried to avoid an immediate, painful adjustment, his administration would run the course of Alan Garcia's. If he did not adjust, he ought not to turn to the international financial institutions for help. If he did adjust and complemented ‘realistic’ short-term stabilization measures with structural reforms, the international financial institutions would help him. In other words, if the government did nothing, it would face continued isolation; if it did everything the international financial institutions wanted, it could count on them for full support.”

Is interesting to remember that Fujimori's campaign was exactly opposed as what he actually did as a president. He promised moderated economic reforms and heterodox policies; contrary to his political adversary Vargas-Llosa, a neoliberal. But, after these meetings, Fujimori radically changed his mind, now becoming in favor of opening the markets and privatize the economy. One possible explanation is that he saw more opportunities of corruption in privatization. Other is that he was actually convinced about the necessity of these reforms.

As stated by two officials of the World Bank in an interview, ‘The Peruvian Government wanted to resume payment of interests to the bank and we wonder how can we adopt them into the international finance system if they do it. The problem was that we couldn't borrow they money if they didn't pay the debt they already have, which was in the order of (USD 200 or 300 millions) at the time’ (Free translation of: ‘El Gobierno Peruano quería reanudar el pago de intereses al banco y nosotros nos preguntábamos cómo podríamos reintegrarlos al sistema financiero internacional si lo hacían. La complicación era que no podíamos prestarle hasta que pagaran toda la deuda atrasada, que en ese momento ascendía a (...)’).

If Fujimori pretended to run a country, complying with these institutions was a necessary thing to do. So, when his government has the chance to make the reforms, they not only did them, but they did that in a fast and pompous way, leaving no doubt about their commitment. In this sense, one of the officials interviewed said: “After my first reunion with Yoshiyama (prime minister of Peru at the time) I left the room thinking ‘He's being serious or just saying what we want to hear?’” (Free translation of: “De mi primera reunión con Yoshiyama salí pensando: ‘¿Está hablando en serio este señor o solo nos está diciendo lo que queremos oír?’”).

⁸⁵ “The theoretical foundations of these policies were largely inspire policy proposals advanced in 1989-90 when John Williamson provided the economic and policy-making communities, including the IMF the World Bank, with a blueprint for economic growth that was meant be the panacea to end developing countries' economic problems (Williamson, 1990). The Washington Consensus, a set of ten policy prescriptions, represented “an intellectual convergence” of ideas (Williamson, 2000) on development economics. Resting on fiscal discipline, a market economy, and a greater openness to the rest of the world, its policy remedies represented, as Williamson explained later, “motherhood and apple pie”. Claude Gnos and Louis-Philippe Rochon, What Is Next for the Washington Consensus? The Fifteenth Anniversary, 1989-2004, 27 Journal of Post Keynesian Economics. 187, 189 (2004-2005).

paper that would spell out the substance of the policy debate for the conference, entitled *What Washington Means by Policy Reform?* The background paper was sent to 10 authors who had agreed to write country studies for the conference. The papers presented were subsequently edited by Williamson (1990c) and published in a book entitled *Latin America Adjustment: How Much Has Happened?* As a result the term “Washington Consensus” became public knowledge.

Williamson (1990a, 1993, 1994, 2004–5) identified and debated 10 policy instruments, whose proper deployment could muster a reasonable degree of consensus in Washington. The list of 10 reforms “were practically universally agreed in Washington to be desirable in most Latin American countries” (Williamson, 2004–5, p. 195). The consensus signifies a reconsideration of what used to be traditional economic development advice: import substitution, nationalization, planning, and use of the inflation tax to raise savings. As of 1989, systematic thinking on international development had produced a set of multiple and complementary reforms that specified the need to establish property rights and effective market incentives, and to maintain macroeconomic stability. These reforms had long been regarded as orthodox in the OECD countries, as Williamson argued. The goal of the conference and subsequent writings of Williamson was to use the term as a means to impress on Washington that Latin America deserved debt relief under the Brady plan. The region had rejected the economic development mentality of the 1960s and the time was right to demonstrate that Latin America had implemented reforms that Washington would agree were required and hence should be funded.⁸⁶

Despite the fact that the Washington Consensus is mostly ideologically neutral, “Many saw this policy framework as consistent with a neoliberal bias in favor of market determined economic outcomes and against government intervention”.⁸⁷ As consequence, “This neoliberal meaning appears to me to be the way most self-styled opponents of the Washington Consensus have used the term in recent years”.⁸⁸

Contrarily as this inaccurate portray, as we already said, the Consensus, in any of its meanings, is a part of a broader “Rule of Law” rhetoric of the World Bank. In their first stage, the agenda of the WB promoted a more formal understanding of the “rule of law” mandate and –in the latest form– is related to the promotion of social rights.⁸⁹

In relation to this last stage, concerns about income distributional problems in the region emerged after the Consensus, after realizing that one of the causes of the failure of the

⁸⁶ John Marangos, *What happened to the Washington Consensus? The evolution of international development policy*, 38 *J Soc Econ.* 197, 198 (2009).

⁸⁷ Jane D' Arista, *Moving Beyond the Washington Consensus*, 32 *Int J Polit Econ.* 22, 22 (2002/2003).

⁸⁸ John Williamson, *Appendix: Our Agenda and the Washington Consensus*, in Pedro-Pablo Kuczynski and John Williamson (eds), *After the Washington Consensus: Restarting Growth and Reform in Latin America*, at 326 (2003).

⁸⁹ Alvaro Santos, *The World Bank's uses of the “rule of law” promise in economic development*, in David M. Trubek and Alvaro Santos (eds), *The New Law and Economic Development: A Critical Appraisal*, (2006).

Consensus in some Latin American countries was that “(...) policy remained focused on accelerating growth, not on growth plus equity”⁹⁰. That is why a “new agenda” was suggested, one incorporating a reform and estrangement of public institutions and income redistribution, especially in areas like education, property, health and infrastructure.⁹¹

3. Constitutional expressions of the Consensus

There was also a constitutional expression of the Consensus, characterized by authors like Tushnet⁹² as the “new constitutional order”. This new order was also spread in Latin American constitutions.

Although there is no uniformity in the adoption of the Consensus in Latin America, it is generally assumed that the Peruvian Constitution of 1993 is a clear expression of the Consensus. In that sense, Uprimny⁹³ says that:

(...) it is not easy to find a common trend in the various constitutions, as there are significant national differences. For example, texts like the Peruvian constitution –which was made under the Washington consensus– tends to contain more pro-market mechanisms, while texts like the Ecuadorian and Bolivian constitutions significantly strengthen the state’s role in the economy and even have anti-capitalist trends.

According to some authors, the Peruvian constitution not only adopted the prescriptions, but also “(...) eradicated, at the same time, various of the ‘social’ elements of the 1979 Constitution”.⁹⁴ In the same sense, Kresalja and Ochoa⁹⁵ say that the Peruvian constitution went from “An interventionist State, provider, producer and planner in the seventies to a minimum size State of the nineties”.

And they continue:

In a different manner of the 1979 Constitution, which estrangement the role of the State in the economy and even allowed the reserve of productive activities and services for the State, in the constitutional debate of 1993 the officialism majority of the Constitutional Convention funded their position in a radical neoliberalism (...).

In that context, the generalize privatization of the economic life was stated in the constitutional text of 1993 (...).⁹⁶

⁹⁰ Williamson, Overview: An Agenda for Restarting Growth and Reform, supra, at 6.

⁹¹ *Id.* at 17. Nevertheless, it was clear that “The solution is not to abolish the market economy, which was tried in the communist countries for 70 years and proved disastrous dead end, but instead to give the poor access to assets that will enable them to make and sell things that other will pay to buy”.

⁹² Mark Tushnet, The New Constitutional Order, (2004).

⁹³ Rodrigo Uprimny, The recent transformation of constitutional law in Latin America: Trends and Challenges, 89 Tex Law Rev. 1594 (2011).

⁹⁴ Gerardo Pisarello, Un largo Terremoto. Historia y crítica del constitucionalismo antidemocrático, at 186 (2012).

⁹⁵ Baldo Kresalja and César Ochoa, El régimen económico de la Constitución de 1993, at 54 (2013).

⁹⁶ *Id.* at 51.

As I will develop in more extension afterwards, this sentiment is not entirely true. Like the Washington Consensus itself, the Peruvian Constitution –among other Latin American constitutions has two sides, or two stories, that have to be seen at the same time in order to comprehend the real meaning of the text. In that sense, Gargarella:⁹⁷

Many of these reform processes managed to advance the interests of the most disadvantaged, at least in theory. Better than that, the practice of these constitutions showed that the changes introduced in the sections regarding rights were far from innocuous. In the last few years (although –and this is a problem– only in the last few years), the Latin American countries that had adopted more socially robust constitutions developed an interesting and imaginative practice of judicial enforcement of social rights.

The economic chapters of the Latin American constitutions did include a strong protection of social rights. Some of these protection came from the reforms themselves and other were developed through judicial practice and the entering of international treaties.

In recent decades, neoliberal economic policies have expanded throughout the world while at the same time social rights have begun to be vigorously protected by national judicial systems. The parallel existence of these two competing phenomena constitutes a great paradox. Indeed, the breaking point between neoliberal ideas and policies and other egalitarian liberal democratic positions is, without a doubt, the discussion on social rights protection.⁹⁸

The Consensus, then, had more than one agenda. The first agenda, called “first floor reform” consisted in ten prescriptions that were indeed followed by the Peruvian constitution:^{99 100}

Chart 3: first agenda prescriptions in peruvian Constitution

Prescription	Constitutional provision	Commentary
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⁹⁷ Roberto Gargarella, Latin American Constitutionalism: Social Rights and the ‘Engine Room’ of the Constitution, 4 Notre Dame Journal of International and Comparative Law. 16 (2014).

⁹⁸ María Paula Saffon, Can Constitutional Courts be Counterhegemonic Powers vis-à-vis Neoliberalism? The Case of the Colombian Constitutional Court, 5 Seattle Journal of Social Justice. (2007).

⁹⁹ To make the chart that follows we have employed the Constitute Project (<https://www.constituteproject.org>), that compares Constitutions around the world.

¹⁰⁰ For a comparison of the 1993 Peruvian constitution with the 1979 constitution, see the next chapter of this dissertation. You can also find a comparison of all the other constitutions in the region there.

Indebtedness	Articles 75, 76, 77 and 78 state that indebtedness has to be specified in an act and that all public expenditures have to follow a procedure. The economic balance principle is recognized in the constitution.	These articles restrain indebtedness by the check of the Congress, at the big scale. At short scale, no expenditure can be made without following a lawful procedure.
Redirection of public expending	Articles 9 to 13 prioricize the spending of the State to areas like education, health and infrastructure. The eleventh final disposition of the Constitution says that all new rights demanding expenditures are to be applied in a progressive (not automatic) way.	The Constitution does not restrain social policies, but reorientating them to the most salient social issues and thus ordain it. Also, “progressiveness” means that even when social rights cannot go-back, they are an “aspirational” principal, not a reality that can be demands right now.
Tax reform	Article 74 states that all taxes have to be in an act and could not have a confiscatory effect.	Also in the tax reform, the separation of powers tends to be the guarantee of order and stability in State finances.
Rates on loans	Article 83 creates an independent central bank with the task of regulating this.	In Peru, the Central Bank is an independent power, like the judicial brand or the Congress.
Exchange rate	Article 83 creates an independent central bank. Also, article 64 allows citizens to have foreign currency and use it in the national territory without limitations.	The Central Bank is one of the most respected and “technical” institutions in Peru.
Free international trade	Article 63 states that international trade is free	This is a short statement, but very clear in their intention of freeing the market for imported goods.

Barriers to foreign investment	Article 63 states that all foreign investment will receive national treatment and no discrimination. Also, recognizes international arbitration for disputes with the State.	Equal, national treatment and the possibility of international arbitration are key factors of the investment climate in Peru today.
Privatization of national enterprises	Article 60 states that only for national interest the State could act like a private entrepreneur.	The principle of “subsidiarity” is represented in this article. It means that the State has to choose the means which restrains less the economy to achieve their ends. This includes, mostly, state entrepreneurs with are now relegated to a second place.
Deregulation	Article 58 and 62 recognizes the right of free enterprise, along with freedom of contracts. Also in article 62, the State has the power to make contracts with the formalities of an act of the National Congress. Article 60 also states that the indirect activity of the State in regulation has a second place, subordinated to the freedom of the market.	Peru is a pioneer in the recognition of the free entrepreneurship as a fundamental right. Article 60 can also be interpreted as a way to relegate regulation to a second place. Thus, the role of the State is to incentivize and control, but not to alter the conditions of the market or to plan the economy.
Property rights	Article 70 states that property rights are sacrosanct.	This is achieved stating a takings process, which recognizes the right to be compensated if the government takes your property.

Peru do not only follow the prescriptions, but went beyond that. Peru is innovative in recognizing the “freedom of entrepreneurship” as a fundamental right; the principle of “subsidiary intervention of the State”; and, stabilization contracts at the constitutional level.

Only Montenegro¹⁰¹, Serbia¹⁰² and Ukraine¹⁰³ are as clearer as Peru in recognizing the constitutional right of “freedom of entrepreneurship”. In Peru, this right is recognized along with a right of free competition, contracts, property rights and other economic rights. Also, economic rights are enforceable at the constitutional level and have the same level of protection and importance than political rights.

The express recognition of the “principle of subsidiarity” as a way to restrain state-ownership is something distinctive of our 1993 Constitution. According to this principle, the State can only have enterprises if the private sector has no incentives to provide a service or there is an equity concern. In the region, only Chile¹⁰⁴ has something in the lines of this; and Italy¹⁰⁵ at the global level. None of them, though, have given the principle the exact meaning that characterizes the Peruvian Constitution.¹⁰⁶

In the case of stabilization clauses, Peru is the only country in the World that has this at the Constitutional level, as was said by our Constitutional Court.

4. The “other Consensus” and the Peruvian constitution

As we already mentioned, the Consensus has another aspect: second floor reforms and also a social motivation. The Peruvian constitution, accordingly, is also an expression of this other Consensus.

In more specific terms, this agenda included: (i) a more robust separation of powers; (ii) decentralization; (iii) social –progressive– rights; (iv) pluralism; and, (v) environmental and consumer protection. These categories have been chosen based on the kind of rights and controls of democracy usually recognized by international treaties¹⁰⁷ in the region and by authors on the subject like Kresalja¹⁰⁸ and Flores.¹⁰⁹

Chart 4: Second agenda prescriptions in peruvian Constitution

Agenda	Constitutional provision	Commentary
Separation of powers	Articles 201, 84 and 177 created new powers like the Constitutional Court, a Central Bank and an Electoral Court.	In the case of Peru and most Latin American countries, new actors enter scene: the Constitutional Court, the Central Bank and the Electoral Tribunal. These organisms are completely independent from the three traditional branches of government. All three have

¹⁰¹ Article 59 of their constitution.

¹⁰² Articles 82 and 83 of their constitution.

¹⁰³ Article 92, section 8 of their constitution.

¹⁰⁴ Article 1 of their constitution.

¹⁰⁵ Article 118.

¹⁰⁶ Other countries have the word ‘subsidiarity’ but in relation of territory competences, at the European level (the case of Germany) or local (the case of Colombia).

¹⁰⁷ Such as the International Covenant on Economic, Social and Cultural Rights and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ‘Protocol of San Salvador’.

¹⁰⁸ Kresalja and Ochoa, supra.

¹⁰⁹ Lourdes Flores Nano, *La Economía Social de Mercado – presente, pasado y futuro*, (2015).

		<p>played a role in shaping the political process.</p> <p>The Constitutional Court is a key factor in the political process, since is something like a ‘negative congress’. At turn, the Central Bank is independent in matter related with monetary process, which is a novelty in a country like Peru where the monetary policy has been used with political criteria. Finally, the Electoral Tribunal has the final word in matters related with elections. Apart from this, the Executive Branch has more controls now, and its discretionary powers have been limited.</p>
Decentralization	Article 188 and forward state that our government is decentralizes.	This process is incomplete in Peru. By now, we have not implemented the decentralization process mandated by the 1993 Constitution.
Social rights	Article 58 states that the government acts especially in the areas of employment, health, education, security, public services and infrastructure. The hall chapter 2 (articles 4 in advance) develops this in detail.	The pursuing of “efficiency” is clearly not the only –and probably not the most important– goal of the government. All branches act in order to promote equity, giving subsidies to poor people or recognizing ‘fundamental’ rights.
Pluralism	Article 60 says that the State recognizes the “economic pluralism”. Article 149 says that native communities have the right to deal with their juridical problems themselves. Article 2.19 says that every person has the right to their ethnic authenticity.	<p>Acts like the one recognizing the right to be consulted before an exploitation (or equivalent) of natural resources if you are a native community and live on a land that could be affected by the project are a sign of the interest of the government of –at least formally– coup with the problem of pluralism.</p> <p>In addition, native communities have the right to decide their own cases, according to ancient law and to organize their economic and political life’s according to their values.</p>
Environment and Consumer protection	Article 66 states that the government has a duty to preserve the environment. Also, those natural resources are owned by the Nation.	Peruvian constitution is pioneer in the protection of the environment and consumers at the constitutional levels. Since the enactment of the 1993 Constitution, there are institutions specifically devoted to these areas.

In more general terms, the Peruvian constitution recognizes the principle of 'Social market economy', which means that we have a sense of community, of social justice, and equity that is more important than the selfish pursuit of individual gains.

The Constitution tries to achieve this through both an organic aspect and a substantial one. The first is related with the division of power, at the central as well as in terms of decentralization. The substantive part has to do with the recognition of values and rights beyond the efficiency –and even economic– realm.

The enactment of the 1993 Peruvian Constitution

After the coup d'état of 1991, the Peruvian Constitution was written again. For this, a national assembly was installed with popular elections, where 80 assemblies were designed. The officialism –Cambio 90-Nueva Mayoría, the party of the president Fujimori– had the majority of the assemblies (44). The second most representative political force had 8 votes.

The officialism showed a strong preference for the inclusion of market economy institutions in the Constitution. In that sense, one can read the declaration in the debate of politicians as Joy Way:

The economic aspects of 1979 Constitution do not require simple partial or punctual modifications, but rather an integral reform that produce a new coherent and consistent text. This, because of three incontrovertible facts. The first is that world context has changed significantly since late 70's.

a) World economy is experimenting deep changes: increasing globalization, scientific and technologic revolution, regional blocs proliferation, etc. More independence and competition intensification due to better capabilities of production and management, and discredit of simplistic and paternalistic recipes for the problems of poverty and underdevelopment.¹¹⁰

The second incontrovertible fact is referred to what happens in the region. The experience of the majority of countries in our Continent, including Peru, show the failure of populism and state intervention. Behind the aspiration of "social justice", some defended the interests of a few. The only thing that was redistributed was poverty –extending it–, because creation of richness was punished with bad economic politics that discouraged private investment and propitiated the escape of talents and capital to the exterior.¹¹¹

The second part of this foundation, mister President, is referred to the unfitness of 1979 Constitution in its economic aspects.

¹¹⁰ Comisión de Constitución y de Reglamento, *Debate Constitucional – 1993*, at 1803 (1993).

¹¹¹ *Id.* at 1803-1804.

(...)

Indeed, 1979 Constitution's main problem is its underlying ambiguity about the roles of the market and the State in the economy. Both roles are apparently recognized in the phrasing, in the rhetoric, but truly there is an incomprehension about the role of the market and a mystification of the role of the State in the economy.

As to the first, market's role, there is an incomprehension about its multiplying of material richness opportunities and personal realization function. Based on this function, modernity displaced mercantilism and feudalism, where economic operations were kept to clans and castes.

(...)

As to State role in economy's mystification, it starts with the subtle assimilation of social to state-owned, as if they were the same thing; assimilation that is, at the same time, correlative to a subliminal separation of social and market, as if they were antithetical.¹¹²

The new approach that we propose parts of that Constitution must ensure the correct operation of market forces, that implies both free competition introduction in existent markets as well as creation and development of modern markets where they do not yet exist. This is an economic imperative, by the way, indispensable for raising peruvian market's efficiency and competitiveness and for ensuring its long term's sustained growth.

(...)

This approach is not prisoner of artificial dichotomies about market and State's role in the economy: both are irreplaceable and complementary for economic and social progress of the country and all its inhabitants. Competitive and extended markets, where each one of peruvians can freely unfold their individual aspirations of richness and progress, give solid support to the State so it can be a full expression of common good and establish a counselor and stable frame, in which all the social collective look effectively included.¹¹³

In his statement you can notice the influence of the liberal ideas of the consensus and, at the same time, how this influential politician is advocating for the position of the Government, which in that time had embraced the postulates of the World Bank in legislative reforms of the economy.

This position meet resistance from other political parties, especially the Christian Democratic party. In particular, Henry Peace said that:

¹¹² *Id.* at 1804-1805.

¹¹³ *Id.* at 1805-1806.

In the proposal that we present, our starting point hasn't been trying to reflect the model of society that we aspire to, but a starting point that has been said and we won't get tired to emphasize: Constitution is the great frame within we all act. If some want a neoliberal Constitution, they are excluding the ones who are not.¹¹⁴

At the end, even the officialism agreed that the constitutional text needed a combined formula, which also includes social rights. In the words of probably the most influential assemblist:

They are not going to pretend now that we do a socialist Constitution and that we make again State an entrepreneur, as mister Pease has just said: that is indispensable to be an entrepreneur, that even Pinochet support the entrepreneur State. Very wrong is Pinochet in that case; and I don't have any inconvenient on saying it, because I do not support, directly or indirectly, general Pinochet.

But the case is, mister President, that Nueva Mayoría-Cambio 90 does not bring us a project that can be called neoliberal; brings a transaction project, and brings a project with certain attitudes and temperaments from the left.¹¹⁵

At the end, as we have seeing, the Peruvian Constitution reflected a compromise between the liberal postulates that the officialism was trying to include and the inclusion of redistributive provisions. This provisions were not necessarily contradictory with the prescriptions of the consensus, so their inclusion cannot be regarded as a failure of the officialist agenda.

B. Impact in Reality of the Constitutional Reforms

Private but regulated

Before 1993, telecoms, electricity and mineral exploitation where –mostly– State-owned businesses in Peru. After the enactment of the 1993 Constitution, most former public utilities were privatized. The first one was Telefonica del Peru, in 1994. For that end, institutions like PROINVERSION¹¹⁶ where created.

Is to be noticed that a Privatization Act was passed in 1991, even before the enactment of the Constitution. However, no privatization was made before the Constitution, so –apparently– the Constitution played a role in changing the equilibrium of power giving leverage to the government to undertake their reforms.¹¹⁷

¹¹⁴ *Id.* at 1813.

¹¹⁵ *Id.* at 1817.

¹¹⁶ Spanish acronym for Investment Promotion Agency.

¹¹⁷ Gabriel Ortiz de Zevallos et al, La economía política de las reformas institucionales en el Perú: los casos de educación, salud y pensiones, Inter-American Development Bank Working paper R-348. (1999).

In the case of monetary stability, the Constitution also played a great role, since the Constitution created an independent central bank, capable of ordering Peruvian economy. This is also true in the case of opening the Peruvian economy to free trade. Norms like the one of “stabilization contracts” are unique of the Peruvian constitution and are constantly used by firms to secure their investments, along with other provisions.

In other aspects, like regulation, it is more difficult to see the influence of the Constitution. Before the 1993 Constitution, the Peruvian economy was little and mostly state-owned. In such scenario, there is no need for economic regulation.

Conversely, a traditional state-owned economy difficulty will change radically to a system of free enterprise. Therefore, when the Peruvian economy was privatized and open to the World, a need for regulation emerged. Because of this, the Peruvian economy went from “state owned” to “mostly privately owned but regulated”. Being so, it is difficult to see how the Constitution has helped to deregulate the economy.

In general, though, the balance in diminishing the degree of intervention of the government is positive. On the one hand, the Constitution has procedural and substantive mechanisms that help deregulated –or stop– regulations. On the other hand, a privately owned but regulated economy is freer than a state owned one.

The role of the Constitutional Court

As stated by Elster¹¹⁸, “The impact of a Constitution on economic performance is not simply a matter of the text itself”, because of three reasons. First, constitutional arrangements are not always explicitly stated in a constitution. Some countries do not even have a constitution in the formal sense (UK, for example). Second, constitutions can be effective or ineffective. Some of the more repressive regimes in the world have a long list of fundamental rights. As we say in Peru, some norms are simply “death words”. Talking is cheap and so is writing a bill of rights. The same applies for other constitutional commitments. Third, the text of the constitution is “alive” in some sense, moreover when constitutional courts are in place, which is currently the case of Peru.

In Peru, the meaning of the Constitution is decided in great extent by the decisions of the Constitutional Court. In this context, for example, the Peruvian Court has stated that ‘stabilization contracts’ has constitutional limits: *i.e.*, the government needs a justification to enter these agreements and the content of the agreements are subject to constitutional scrutiny (Decision STC 0003-2001-AI).

The influence of the Constitutional Court in developing the ‘second wave’ of the Washington Consensus agenda can be seen in –at least– three areas:

- (i) The recognition of social rights beyond the scope of the Constitution;
- (ii) A pro state-intervention interpretation of (neo)liberal constitutional provisions; and,
- (iii) An indulgent treatment of economic regulation in general.

¹¹⁸ Jon Elster, [The impact of constitutions on economic performance](#), 8 World Bank Econ Rev. 210 (1994).

The recognition of social rights beyond the scope of the Constitution

Similarly as in the case of Colombia, even when our 1993 Constitution has some provisions that can be interpreted as neoliberal, the Constitutional Court has had a role in protecting social rights which is more salient than their role in other areas of social life. The Court has even recognized some rights that are not explicitly considered in the Constitution, like the right to water (Decision 06534-2006-PA/TC).

In relation to the Colombian case, it has been said that:

Since its creation in 1991, the CCC [Constitutional Court] has actively and progressively defended the protection of social rights in areas such as health, labor social security, education, and housing its endeavors have constituted effective resistance to the neoliberal policies that have been implemented in Colombia. These policies have developed the neoliberal economic clauses present in the Colombian Constitution, which clash with the social promises of the constitutional text. Indeed, through a strategy of economic liberalization and with the support of international agencies, the Colombian government has privileged the neoliberal orientation of certain constitutional clauses over the rights-based general orientation of the Constitution. In contrast, the CCC has emphasized the importance of protecting constitutional rights, human dignity, social inclusion, and equality and has, therefore, imposed specific, considerable limitations on neoliberal policies.¹¹⁹ (The added text is mine).

The Peruvian case is similar in that the Court has a progressive approach to economic issues, always remarking the fact that our Constitution does not privilege economic aspects over the dignity of people.

For example, even when our Constitution does not recognize a right to have water, our Constitutional Court have declared water as a human right.

19. Water, as a natural resource, doesn't only contribute directly to the consolidation of the fundamental rights mentioned, but from an extra personal perspective impacts over the social and economic development of the country through the politics that the State undertakes in a series of sectors. That is the case of agriculture, mining, transport, industry, etc. It can be said therefore that thanks to its existence and employment it becomes possible the sustained development and the warranty that society as a whole doesn't get prejudiced, in short, medium and long term.

20. Thus, even when it isn't part of the controverted matter, it's clear that the consideration of the essential role that water has for the individual and society as a whole allows to situate its status not only at the level of a fundamental

¹¹⁹ Saffron, *supra*.

right, but also as an objective value that the Constitutional State has to privilege. (Case file 06534-2006-PA/TC).

The context in which this case was decided was a person living in a building and has a contract with SEDAPAL (the state-owned Peruvian company of water supplier). The contract provides for separate invoices (each one of the owners) of water service, except that 25% of homeowners fail to pay, in which case SEDAPAL would cut service to all.

The Court considered this contract as "unreasonable" and declared it void. Thus, for this person the problem was solved and –for the entire society– a new right has emerged. Nevertheless, the issue of access to water remains the same since that decision. More than 50% of people in Peru do not have access to water.

Apart from this, the National Congress of Peru in trying to pass a constitutional amendment to convert water into a constitutional right within the text of the Constitution. This can be interpreted as a sign of the lack of impact of the Court decision, since the recognition of the right by the Court, theoretically should suffice to consider it a proper constitutional right.

The relevant discussion today in Peru is if the water service goes private or not. The court's decision in matters related to water do not solve any problem, but are populist measures that confirm previous beliefs of people about the legal "nature" of water.

A pro state-intervention interpretation of pro-market constitutional provisions

As we will illustrate subsequently in a case, the 1993 Constitution has a prohibition on legal monopolies. Nevertheless, the Court stated that a previously state-owned firm could be granted with a legal monopoly.

In the case against the Congress for granting telecom company Telefonica del Peru SAA a legal monopoly, the Court noted that:

(...) Article 61 of the Constitution prohibits the legislature to create or establish new monopolies by law: "No law or constitutional provision or arrangement may authorize or establish monopolies". But the ban to create legal monopolies can not extend similarly to regulating mechanisms and the process of elimination of pre-existing ones, prior to the Constitution of 1993. As previously noted, through the second fraction of the Eighth Final Transitional Provision Transitional of Constitution it has established a mandate to regulated monopolies, with priority on the process and mechanisms to eliminate the monopolies that exist prior to the enactment of the Constitution (STC 0005-2003-AI, paragraph 27).¹²⁰

¹²⁰ Free translation of: "(...) el artículo 61° de la Constitución prohíbe al legislador crear o establecer nuevos monopolios mediante ley: "Ninguna ley –refiere dicho precepto constitucional- ni concertación puede autorizar ni establecer monopolios". Pero esa prohibición de crear monopolios legales no puede extenderse análogamente, a la regulación de los mecanismos y el proceso de eliminación de los monopolios preexistentes a la Constitución de 1993. Como antes se ha señalado, a través de la segunda

In other words, the Court makes good legal gymnastics to reach the conclusion that not all norms that impose legal monopolies are prohibited, although in other cases have said that all monopolies, including those achieved through market competition, are forbidden.

In another case, however, the Court was much harsh against an act imposing a monopoly not even formally but that had only the effect of restricting competition in such way that actually helped to create a monopoly:

(...) Although the dominant position on the market is not prohibited-because that would prevent entrepreneurial success that is so provided that such dominance is acquired legitimately and not on legal norms granting privilege without reasonable justification, violating the principle of equality before the law, so it is not acceptable that the Supreme Decree No. 158-99-EF set an arbitrary classification, which gives preferential treatment to a category of cigarettes, favoring some producers or traders, with respect to the other (STC 01311-2000-AA, paragraph 4).¹²¹

Is not difficult to see that the Court has an ambiguous position in relation to legal monopolies. In addition, the Court do not have a record of using this constitutional principle extensively, even when a lot of markets have entry regulations that can be perceived as legal monopolies.

The subsidiary state intervention principle

The subsidiary principle is one of the most pro-market principles in the Peruvian Constitution. This principle, when is interpreted correctly, imposes two restrictions to the State. First, since the market is the rule, the State can only regulate when necessary. That is, only when regulation is the most convenient way if compared with the market. Second, the State only can own a firm if the market is not capable of deliver the good by itself.¹²²

In relation to the first use of the principle, the Court has never used this principle to tackle down a regulation. The Court has used a similar principle (the "necessity" test, as a part of the balancing test), but the "necessity" principle is used to compare alternative methods of regulation, not regulation against the market.

In relation to the second use, the Court has never questioned the fact that the government acts as an entrepreneur in areas like water provision, education and health. The only time that a state owned firm was call out, was in a case before Indecopi, an administrative

fracción de la VIII Disposición Final y Transitoria de la Constitución se ha establecido un mandato de legislar, con carácter prioritario, sobre el proceso y los mecanismos para eliminar los monopolios que existan con anterioridad a su entrada en vigencia" (STC 0005-2003-AI, fundamento 27).

¹²¹ Free translation of: "(...) si bien la posición de dominio en el mercado no está prohibida –porque eso supondría impedir el éxito empresarial- ello es así siempre que dicha posición dominante sea adquirida de manera legítima y no en base a normas jurídicas que sin justificación razonable la privilegian, vulnerando el principio de igualdad ante la ley, por lo que no es aceptable que el Decreto Supremo N° 158-99-EF establezca una clasificación arbitraria, que otorga un trato preferencial a una categoría de cigarrillos, favoreciendo a algunos productores y/o comercializadores, respecto a los demás" (STC 01311-2000-AA, fundamento 4).

¹²² Eduardo Quintana, *Análisis de Impacto Regulatorio en la Regulación Peruana de Servicios Públicos*, 35 Derecho & Sociedad. 15 (2011).

agency (Decision 3134-2010/SC1-INDECOPI), but not by the Constitutional Court, and the case was utterly irrelevant: The discussion was if the state can own a chicken restaurant inside a public university. The decision has never been applied to other cases.

An indulgent treatment of economic regulation in general

In general, the Court has an indulgent treatment of economic regulation. You can test that in cases in which the Court is very flexible in interpreting the goals of acts like the “Ley Universitaria” (Universities Act), in which “having a constitutional goal” (Decision 0014-2014-P1/TC, 0016-2014-PI/TC, 0019-2014-P1/TC and 0007-2015-PI/TC) was enough justification for a policy.

I have checked over than 400 hundred decisions in the period between 2000 and 2010, in which the Court used the “balancing test” in order to analyze the validity of hundreds of acts of the Congress. The test consists in three part, being the “cost and benefit analysis” the third one –and arguably the more complicated and technical one. It is notorious that, in those 400 cases, the third part of the test was never used, even when the act passed the first two sub-tests!¹²³

In addition, the relation between the Court and the other branches of government not always guarantees an optimal resolution of cases involving economic regulation. In some cases, the Court has helped the government to enforce economic regulations, like in the case of casinos, where the Court helped the government to overcome decisions of independents judges opposing the regulation in particular cases (Decision 006-2006-PC/TC). Even in cases where the Court has opposed economic regulations, the Congress and the Executive Branch have insisted on passing the laws, making the ruling of the Court irrelevant.¹²⁴

From this, we can argue that, in general, the Court relies in the ability of the other two branches of government in justifying adequately economic regulations and does not have enough power to oppose the government when do not.

C. Three Cases of Opportunism and Reform

Now we will attempt an explanation of why the 1993 Constitution does not promote neoliberal values as is regularly asserted. We think that the explanation lies in the general theory of public choice. The Constitution, as every other norm, was not created with a genuine interest of achieving any social goal, but primarily to promote personal interests, reflecting interests that were already prevailing in that context and the anticipation of a favorable scenario to act opportunistically in the future.

¹²³ Oscar Súmar, *Protección de libertades económicas por el Tribunal Constitucional del Perú: un análisis estadístico y econométrico*, 5 Revista Peruana de Derecho Constitucional. (2012).

¹²⁴ Here is interesting to note that even when the Court declared, in a first case, that a decree (Supreme Decree 017-2005-MTC) was unconstitutional and therefore shouldn't be applied (Decision 04197-2010-PA/TC), the Executive Branch enacted a very similar decree (Supreme Decree 003-2008-MTC) that passed another unconstitutional process (Decision 00863-2011-PA/TC).

As can be seen, if the Executive Branch would have considered the Court ruling in the subject, the second decree would have never been enacted, following the criteria of the Court in terms of economic regulation.

As we already said, the constitutional reform in Peru was not primarily informed by a genuine desire to promote “libertarian” values. As in any regulatory process, the relevant factor is the pursuit of personal gains by interest groups. The reformers in Peru used the Constitution in three ways as to obtain benefits, all predicted by Stigler:¹²⁵ (i) restricted rivals entry and substitute products; (ii) direct subsidies; and, (iii) weaken buyers and suppliers.

All of this was achieved through direct modifications of the Constitution (Case 1) or by creating institutions suited to subvert constitutional choices in the future (Cases 2 and 3).

Case 1: Education, Health and Social Security

According to the 1979 Constitution, health and social security have to be run by public agencies. In the case of education, it has to be non-for profit, even when administrated by private firms. The 1993 Constitution changed this. Now privates can create and run hospitals and financial institutions devoted to administer public safes and schools can be operated as for-profit institutions.

Until this point, you can say that this is an example of de-regulation; but, apart from that, the 1993 Constitution also encouraged the creation of more private universities, exonerating them from taxes. In the case of social security, an Act established mandatory safes for the public, so the private institutions in charge of their administration receive about 13% of –at least a group of– workers income every month.

In addition, the 1993 Constitution said that these sectors would be closely supervised by the State. In all three of them, we have a special regulatory agency in charge of supervising the quality of the services and imposing standards, which act as barriers to entry.

Therefore, far from a case of de-regulation, in this case we have replaced public institutions for highly regulated ones, which are also beneficiaries of subsidies and rents.

It is to be notice that, one of the major proponents of the reform, Carlos Boloña, according to Ortiz de Zeballos¹²⁶, Secretary of Economy under the Fujimori government, was later appointed director of a social security administration fund and was also the founder of a –now well established– for-profit private university.

In recent years, the education sector has entered a state of reform, based on the perceived lack of quality of education due to the liberalization (including the spread of “for profit” universities) that Fujimori’s reform started. In that sense, in 2013, the Congress passed the “Ley Universitaria” (‘Universities Act’), which established hundreds of standards for universities, varying from campus extension requirements to the licensing of new programs. Now that 1990 universities, including the one of Boloña, are already established, one can perceive this as an attempt to prevent further competition in the sector.

¹²⁵ Stigler, *supra*.

¹²⁶ Ortiz de Zeballos et al, *supra*, at 9.

In the case of social security, an inverse path has taken place. In this industry, the emergence of more beneficiaries or pensions has led the government to liberalize part of their savings. Nevertheless, the aggregate impact of this on the total amount of saving currently in the hands of private funds is minimal, which explains the possibility of the reforms in the first place.

This cases illustrate how the constitutional reform was used not as a means to advance libertarian ideals (like privatization), but rather in an opportunistic manner. Privatization, plus subsidies, plus economic regulations. The link between the actors of the reform and the beneficiaries of it are also clear in the person of Boloña.

Case 2: stabilization contracts and legal monopolies

One way an interest group can benefit from stricter rules –in this case, rules “imposing” free market– is that they are better suited to subvert that rules when everyone else has to comply.

Peru is the only country in the World with a “stabilization contracts” at the constitutional level. These contracts are intended to guarantee investors about the continuity of a given regulatory regime. At the same time, we have a rule prohibiting the creation of legal monopolies. Nevertheless, when the public telephone company was privatized, Telefonica del Peru (the Spanish buyer of the public company) used this same set of rules to create a legal monopoly.

Indeed, thanks to a provision in a contract –then formalized as an Act using the stabilization contract provision– Telefonica gained a five years monopoly. This monopoly was justified in the economic theory of ‘natural monopoly’. According to the government, and the Constitutional Court of Peru, the investment that has to be done in telephonic infrastructure was too high, so any potential investor in this field would need a monopoly in order to invest.

Article 61 of the Constitution prohibits the legislature to create or establish new monopolies by law: “No law or constitutional provision or arrangement may authorize or establish monopolies”.

But the ban to create legal monopolies can not extend similarly to regulating mechanisms and the process of elimination of pre-existing ones, prior to the Constitution of 1993. As previously noted, through the second fraction of the Eighth Final Transitional Provision Transitional of Constitution it has established a mandate to regulated monopolies, with priority on the process and mechanisms to eliminate the monopolies that exist prior to the enactment of the Constitution (decision STC 0005-2003-AI, paragraph 27).¹²⁷

¹²⁷ Free translation of: “(...) el artículo 61° de la Constitución prohíbe al legislador crear o establecer nuevos monopolios mediante ley: ‘Ninguna ley –refiere dicho precepto constitucional- ni concertación puede autorizar ni establecer monopolios’.

Now we know that (i) the telephone market was not a natural monopoly; and, (ii) Telefonica made extraordinary profits from the concession.

It is to be noticed that all three branches of government, acting one after another, granted Telefonica a monopoly even when there was a supposedly clear constitutional provision prohibiting that. The rationale then, was: The Constitution prohibits “new” legal monopolies, but not the granting of a monopoly in a previously State-owned industry.

Even when this rationale can sound somehow credible, it is unlikely that it will be used if this was not a USD 2,000 million-dollar deal.

This raises questions about the use of political and economic power to subvert constitutional rules.¹²⁸

Case 3: the ownership of natural resources

The 1993 Constitution states that natural resources (like water or commodities) are property of “the Nation”, which is an elusive concept somehow similar to “state owned”. The consequence is that if you find –let’s say– petroleum in your yard underfloor, petroleum is not yours but of ‘the Nation’. This is a rule contrary with the one in –for example– California, where if you find petroleum in your yard, it is yours.

Why this norm is a possible case of rent-seeking behavior? If you are a mining or petroleum corporation, you will probably prefer to pay a tariff to a government dependency rather than a price to the actual private owner of the land. By this way, you have a “less interested” seller, due to agency problems, accomplishing the “weakened of the seller” predicted by Stigler.

This norm also generates many social conflicts, since the owners of the lands feel displaced in the bargaining. This has led the government to pass an Act recognizing the right of indigenous peoples of being consulted about projects to be performed in their territories. Nevertheless, this ‘concessions’ of the government can be understood as strategic acts to calm them, rather than a sincere vocation to alleviate the problem.

D. Balance and conclusions

The Peruvian Constitution is commonly referred to as one of the most neoliberal-oriented in the region if not in the entire World. Also, is considered to have received a great deal of influence of the Washington Consensus.

Pero esa prohibición de crear monopolios legales no puede extenderse análogamente, a la regulación de los mecanismos y el proceso de eliminación de los monopolios preexistentes a la Constitución de 1993. Como antes se ha señalado, a través de la segunda fracción de la VIII Disposición Final y Transitoria de la Constitución se ha establecido un mandato de legislar, con carácter prioritario, sobre el proceso y los mecanismos para eliminar los monopolios que existan con anterioridad a su entrada en vigencia” (STC 0005-2003-AI, fundamento 27).

¹²⁸ Glaeser and Scheifel, *supra*.

This, if true, will constitute a puzzle for theorists of public choice. Public choice theories predict that norms will hardly be created to purely follow an ideology –in this case, neoliberalism. On the contrary, norms –including constitutions– are often created as the product of complex interactions between economic agents acting in pursue of their benefit –or opportunistically.

Then, I argued that on the one hand, the Consensus is not reflection of economic liberty principles; and, on the other, the Peruvian Constitution –even when it followed a great deal of the prescriptions of the Consensus– does include a series of procedural and substantive provisions that can hardly be defined as “libertarian”. On the procedural side, it created organisms like the Constitutional Court, which is primarily devoted to the protection of social rights and indulgent with state intervention. On the substantive side, the Constitution recognized several social rights and principles contrary to economic efficiency.

In addition, even provisions that one could characterize as neoliberal are not so. The Peruvian constitution was used or permits the extraction of rents and the imposing of barriers to competition, even when it “privatizes” the economy.

“Private but regulated” is more “liberal” than “state owned”, true; but it is far from the libertarian ideal of an optimal level of public intervention in the economy. The Peruvian constitution can be more easily explained as a tool for private interest groups to obtain rents than by the ideologically driven pursuit of a neoliberal regime. As for the social part, it can be explained as a way to ‘calm’ social protests legitimizing the action of the government in given some industries advantages, as suggested by Saffon.¹²⁹

The result is a Constitution that far from representing liberal values can be rather seeing as embodying mixed values that can be –and are– used by interest groups in an opportunistic manner.

III. MYTHS ABOUT NEOLIBERALISM AND CONSTITUTIONAL REFORM IN LATIN AMERICA: A COMPARATIVE STUDY

In the last chapter, we studied the way in which the Washington Consensus influenced the Peruvian constitution. In this section, we will turn our attention to Latin America in general, for a more data-driven study in which we will try to establish causation between the consensus (or the World Bank rhetoric in general) and the reforms implemented in the region.

Although the Washington Consensus is not really a product of neoliberal thinking but rather a pragmatic assessment of how to promote growth in Latin American following ten prescriptions about macroeconomics, free trade and privatization; some scholars and politicians identify the consensus as neoliberal. They also acknowledge the impact of the consensus in the constitutional reform in Latin American.

¹²⁹ Saffon, *supra*.

In addition, the majority of them think that the consensus had an ambiguous impact in the region: some countries adopted it; some countries reacted to it and some countries were indifferent. So, for most scholars, there is not a definite trend about the adoption of the prescriptions or the inclusion of more social rights in constitutional texts as a response on how the consensus was implemented in some countries.

The plan of this chapter is as follows: In the first part, I will describe the “traditional ideas” about the constitutional reform in the region. Second, I will show the methodology and data used to compare the Latin American constitutions of the period between them. After this, I will show the results of the study. In the third part, I will explain the results and show how they differ from the ‘traditional ideas’. In the last part, I will propose an alternative explanation of the constitutional reform.

This study adds to previous studies on the subject because of the detailed, comprehensive and in-deep exploration and comparison between Latin American constitutions. Also, we distinguish more clearly different periods of constitutional reform than previous studies, which in somehow confuse them. Showing detailed results helps understand the tendencies in the reforms and the need for alternative narratives on the subject.

A. Traditional Ideas About Constitutional Reforms

- (i) *There was not a clear tendency, but some countries adopted free-market provisions, dampening social rights instead*

In a first period of reforms, often called “structural adjustment”:¹³⁰

(...) the Bank assisted borrowing countries in a wide variety of legal changes deemed necessary to implement the macroeconomic policies agreed to as part of structural adjustment loans. Legal reforms were thus a condition for loan disbursement. They were narrowly tailored to introduce fiscal reform, ending exchange-rate controls, liberalizing trade, securing property rights, ending subsidies, and privatizing state-owned enterprises.¹³¹

Constitutional reform played a central role as instruments of these reforms:

¹³⁰ As known, the Washington Consensus prescriptions are:

1. Fiscal policy discipline, with avoidance of large fiscal deficits relative to GDP;
2. Redirection of public spending from subsidies (“especially indiscriminate subsidies”) toward broad-based provision of key pro-growth, pro-poor services like primary education, primary health care and infrastructure investment;
3. Tax reform, broadening the tax base and adopting moderate marginal tax rates;
4. Interest rates that are market determined and positive (but moderate) in real terms;
5. Competitive exchange rates;
6. Trade liberalization: liberalization of imports, with particular emphasis on elimination of quantitative restrictions (licensing, etc.); any trade protection to be provided by low and relatively uniform tariffs;
7. Liberalization of inward foreign direct investment;
8. Privatization of state enterprises;
9. Deregulation: abolition of regulations that impede market entry or restrict competition, except for those justified on safety, environmental and consumer protection grounds, and prudential oversight of financial institutions;
10. Legal security for property rights.

¹³¹ Santos, *supra*, at 267.

As an empirical matter, a great deal of the resurgence of interest in the law of developing countries involves interest in the constitutional law of those countries. Over 56 per cent of the 188 member states of the United Nations made major amendments to their constitutions in the decade between 1989 and 1999 and of these states at least 70 per cent adopted completely new constitutions. At least one quarter of all the member states of the UN introduced bills of rights and some form of constitutional review into their constitutional regimes during this period. As a result at least 92 countries, or approximately 50 per cent of member states, have incorporated bills of rights, fundamental rights or some form of individual and/or collective rights into their constitutional orders.¹³²

In Latin America, in particular, the reforms had a direct impact in constitutional texts, which greatly conditioned constitutional texts in the region. As stated by Gargarella:

The impact of these policies of structural adjustment on constitutionalism was enormous. More directly, the launch of these programs usually required the introduction of legal and even constitutional changes directed at facilitating the application of economic initiatives.¹³³

In the same sense, Pisarello: “For many peripheral countries, this mandates configured, at the end, a sort of supra-state Constitution (...) to which they had to subordinate”.¹³⁴

Other authors, like Uprimny –one of the most recognized authors on the subject–, seem somehow confused about the reform, not finding a clear tendency. For him, some countries adopted reforms, but other went in the opposite direction. According to him:

(...) it is not easy to find a common trend in the various constitutions, as there are significant national differences. For example, texts like the Peruvian constitution –which was made under the Washington consensus– tend to contain more pro-market mechanisms, while texts like the Ecuadorian or Bolivian constitutions significantly strengthen the state’s role in the economy and even have anticapitalist trends. However, the amended texts and new constitutions do not have complete clarity on this point. In fact, many constitutions –like the Colombian constitution of 1991– contain features that both expand and reduce government intervention and redistributive functions.¹³⁵

This is not true, as we will show in the next section, there is a clear tendency in the constitutions, which is compatible not only with the prescriptions of the Washington Consensus, but with an increasement of social rights recognition as well.

¹³² Kevin E. Davis and Michael J. Trebilcock, The Relationship Between Law and Development: Optimists versus Skeptics, 56 Am J Comp Law. 905 (2008).

¹³³ Gargarella, supra, at 14.

¹³⁴ Pisarello, supra, at 185.

Free translation of: “Para muchos países periféricos, estos mandatos acabaron configurando también una suerte de Constitución supraestatal a la que (...) debían subordinarse”.

¹³⁵ Uprimny, The recent transformation of constitutional law in Latin America: Trends and Challenges, supra, at 1594.

Nevertheless, the traditional ideas about the reform state that there was a constriction in the recognition of social rights. In that sense, Pisarello, talking about the Peruvian constitution of 1993 –the most pro-market oriented constitution of the region–, says that it “(...) liquidated (...) most social elements recognized in the 1979 Constitution”¹³⁶. More generally, he argues that: “This assault of the neoliberal economic constitution against the social content of state constitutions did not leave unscathed the democratic principle (...)”¹³⁷.

In the same sense, Kresalja and Ochoa¹³⁸ say that the Peruvian constitution went from “An interventionist State, provider, producer and planner in the seventies to a minimum size State of the nineties”.

And they continue:

In a different manner of the 1979 Constitution, which estrangement the role of the State in the economy and even allowed the reserve of productive activities and services for the State, in the constitutional debate of 1993 the officialism majority of the Constitutional Convention funded their position in a radical neoliberalism, under the inspiration of the Washington Consensus, one of their effects being the suppression of the valorative principles which inspired the economic regime.

In that context, the generalize privatization of the economic life was stated in the constitutional text of 1993 (...).¹³⁹

“(...) From the interventionist, lender, productor and planner state of the seventies, it went to the minimal state of the nineties”¹⁴⁰.

Some authors, like Uprimny¹⁴¹, have recognized the trend in the recognition of social rights, although, without explaining, he says that there is no trend and that the major trend is towards economic freedom. This confused approach to the subject can be grasp in the work of Gargarella as well:¹⁴²

Many of these reform processes managed to advance the interests of the most disadvantaged, at least in theory. Better than that, the practice of these constitutions showed that the changes introduced in the sections regarding rights were far from innocuous. In the last few years (although –and this is a problem– only in the last few years), the Latin American countries that had adopted more socially robust constitutions developed an interesting and imaginative practice of judicial enforcement of social rights.

¹³⁶ Pisarello, *supra*, at 187.

¹³⁷ Free translation of: “Esta embestida de la constitución económica neoliberal en contra del contenido social de las constituciones estatales no dejó indemne el principio democrático (...)”.

¹³⁸ Kresalja and Ochoa, *supra*, at 54.

¹³⁹ *Id.* at 51.

¹⁴⁰ *Id.* at 54.

¹⁴¹ Uprimny, *The recent transformation of constitutional law in Latin America: Trends and Challenges*, *supra*.

¹⁴² Gargarella, *supra*, at 16.

Reading him, it's not entirely clear if there is a tendency, if the tendency is not good enough or if it's only recent.

Also, Saffron has identified that there is some recognition of social rights. For her, this recognition is mostly based in decision judicial making –not texts– and is contradictory with the general tendency toward economic liberalization.

In recent decades, neoliberal economic policies have expanded throughout the world while at the same time social rights have begun to be vigorously protected by national judicial systems. The parallel existence of these two competing phenomena constitutes a great paradox. Indeed, the breaking point between neoliberal ideas and policies and other egalitarian liberal democratic positions is, without a doubt, the discussion on social rights protection.¹⁴³

Her mistake lays in that: the protection of social rights can be found in the texts themselves, not only in court decisions; and in that there is no contradiction between protecting social rights and advancing the 'structural adjustment' ideas, as we will show later.

(ii) *The subsequent crisis of these neoliberal policies brought a wave of social rights inclusion in late-period constitutional texts (1995-2000).*

The second part of the traditional narrative on the Latin American constitutional reform asserts that, even when the tendency of the reform was originally towards free market and efficiency, the lack of results –and subsequent economic crisis– brought social discontent, which, in turn, generated a reaction with constitutional expressions. Supposedly, there is a second wave of reforms proposed by the World Bank, which, in turn, lead to a second wave of constitutional reforms in the region.

In Santo's words, these different stages of the reform "(...) encompass the rise and fall of neoliberal thinking, or the so-called Washington Consensus, and the subsequent move to an "enlightened" Washington Consensus, mediated by a decade of profound reforms and severe crisis".¹⁴⁴

The current "comprehensive development" phase was inaugurated by President James D. Wolfhenson's strategy of a Comprehensive Development Framework (CDF). This strategy was launched as a response to the critiques of the neoliberal economic policies and sought to turn from a focus on economic growth to one of 'interdependence' of all aspects of development. CDF seeks to reconceptualize development by going beyond its macroeconomic and financial aspects to focus on structural, social, and human concerns. The quest is for a stable, equitable and sustainable development. The reduction of

¹⁴³ Saffon, supra.

¹⁴⁴ Santos, supra, at 267.

poverty, or rather freedom from poverty, has been introduced as a central part of the strategy.¹⁴⁵

According to Gargarella, the first wave of reforms diminished the traditional role of the state in regard to key economic assets like water, gas or land; bringing social protests: “Social protests and counter-institutional uprisings exploded in the entire region, from the south to the north, east to west”.¹⁴⁶

Then, social discontent and protests lead to the adoption of socially stronger constitution. In his words:

Not surprisingly, some of the most relevant socio-legal reforms of the last few decades –including those of Colombia, Bolivia, Ecuador, Venezuela, and Mexico– followed the economic crises of the 1990s. The new constitutional changes can be read as a direct response to the social crisis of the previous years. Thus, by the end of the century, most countries in the region had adopted extremely strong constitutions, at least with regards to the social, economic, and cultural rights that they included.¹⁴⁷

In the same line, even with a democratic romantic tone, authors like Pisarello see these constitutional changes as expressions of some sort of “popular constitutionalism”:

Different from the case of most European countries, this new Latin American constitutionalism, born from the crisis, did not pretend to cancel the popular constitutive power, but activate it, trying to achieve a complementary bond between constitutionalism and democracy.¹⁴⁸

Even when this narrative is sometimes circumscribed to Venezuela, Bolivia and Ecuador, the conclusions are extrapolated to the rest of countries. If you look the data, though, the only countries with late constitutional changes are Chile, Ecuador and Bolivia and this narrative is not true even in their cases, even less in the case of the rest of Latin American countries.

(iii) *The agenda of the World Bank was committed, at least in the first stage of the reform (1980-1995), with neoliberal ideology.*

The Washington Consensus is often identified with neoliberal ideology. The prescriptions of the Consensus are supposed to be the quintessential of free market postulates. This was due to a change in the rhetoric of the World Bank, to justify their intervention in development countries. As reported by Santos:

In a subtle but somewhat striking turn of position, performed in the same memorandum interpreting the Bank’s Articles of Agreement, Shihata proposed that

¹⁴⁵ *Id.* at 268.

¹⁴⁶ Gargarella, *supra*, at 15.

¹⁴⁷ *Id.*

¹⁴⁸ Pisarello, *supra*, at 193.

the Bank assist countries in the design of laws related to its mandate, and declared that it was free to condition loan disbursements upon adoption of legal reforms needed to implement agreed economic policies. Moreover, he argued, this focus on the content of the rules was appropriate as long as it was 'based on considerations of economy and efficiency'. This competence of the Bank was to be distinguished, however, from the institutional setup as a prerequisite of economic reform and stability. After all, Shihata seemed to be arguing for the Bank's involvement in the recommendation of specific types of rules, which 'based on considerations of economy and efficiency', the Bank's traditional sphere of action, can serve as best practices for development Countries.¹⁴⁹

Which is the relationship of this with Constitutional Law? Even when the relationship between states and firms can be described –most of the time– as “opportunistic”, in the sense that it leads to “rent-seeking” behavior; there was –supposedly– some confidence in that constitutional rules could help overturn this. Constitutional rules should work as parameters for state action, making the rent-seeking behavior less likely.

When legislation is influenced by interest groups, economic freedom can be eroded as one small piece of special interest legislation after another is passed. Even though interest groups can benefit from the overriding of economic freedom in specific circumstances, everyone would benefit if such activities were generally brought to a halt. Constitutional rules can help curb special interest legislation and counterproductive public policies. Constitutions can establish the general boundaries within which legislators and policy makers work. Potentially, then can limit the erosion of economic freedom by (1) guaranteeing the economic freedom of a nation's citizens, and (2) restricting the activities of the government to prevent legislation that reduces economic freedom.¹⁵⁰

Then, Gwartney and Holcombe analyze a series of specific provisions that –according to them– might be used to protect economic freedom. These provisions are very similar –if not equal– to the prescriptions of the Washington Consensus.

One of the author's mistakes is to forget that constitutional rules themselves are subject to economic pressures. Beard's seminal work¹⁵¹ on the relationship between constitutions and economic interests was clear about the intrinsic “economic nature” of the constitution. A constitution is not a metaphysical document exempt from the dynamics of microeconomics. Constitutions can be used –and are often used- to promote private interests, as any other rule. There is not a good reason why we should consider a constitution as a good way to exit the circle of rent seeking in public policy.

¹⁴⁹ Santos, *supra*, at 271.

¹⁵⁰ James D. Gwartney and Randall G. Holcombe, *The economics of insurgency*, in Mwangi S. Kimenyi and John Mukum Mbaku (eds), *Institutions and collective choice in developing countries: applications of the theory of public choice*, at 39 (1999).

¹⁵¹ Beard, *supra*.

Referring to the object of study of “the economic theory of regulation” (the study of Law using microeconomics), Richard Posner said that:

(...) there is a serious question whether it is proper to define the subject of study as "economic" regulation. Criminal laws, civil rights legislation, legislative reapportionment, and other "noneconomic" regulations affect economic welfare no less than the conventional forms of economic regulation, and it seems arbitrary to exclude them from the analysis: presumably they obey the same laws of social behavior that we think explain economic regulation.¹⁵²

In addition, one can assert that, on the one hand, the prescriptions of the Washington Consensus were not really expressions of free market but of a development rhetoric which puts the state in the middle of the reform; and, on the other hand, that this rhetoric is far from being in a pure state, but rather mixed with a set of justifications to an agenda of reforms championed by the Bank. The supposed neoliberal agenda is, in fact, at best, a pragmatic agenda delivered in an opportunistic manner to promote the interest of firms and the states involved in the reform, while enhancing the reach of the Bank projects.

B. Study and Data

In this section, we will first describe and then show the results of a comprehensive comparative constitutional study. The aim of this study is to analyze the changes and tendencies in the Latin American constitutional reform between 1980 and 2000. Between those years, almost every Latin American constitution suffered a profound change. We are comparing the Latin American constitutions of this period with the past constitution of every Latin American country. For example, in the case of Peru, the 1993 Constitution is compared with the 1979 Constitution. Additionally, in the cases of Chile, Bolivia and Ecuador, we have included a third constitution, post reforms (2000 in advance). In total, we have revised 23 constitutional texts (Appendix 1).

We have divided the analysis in two parts: In the first one, we have compared the constitutional texts with the 10 prescriptions of the Washington Consensus¹⁵³ (Appendix 2). Then, we have divided each prescription into more specific provisions. The “model” for these provisions has being taken from the Peruvian constitution, arguably the constitution

¹⁵² Posner, *supra*, at 353.

¹⁵³ The Washington Consensus prescriptions are:

1. Fiscal policy discipline, with avoidance of large fiscal deficits relative to GDP;
2. Redirection of public spending from subsidies ("especially indiscriminate subsidies") toward broad-based provision of key pro-growth, pro-poor services like primary education, primary health care and infrastructure investment;
3. Tax reform, broadening the tax base and adopting moderate marginal tax rates;
4. Interest rates that are market determined and positive (but moderate) in real terms;
5. Competitive exchange rates;
6. Trade liberalization: liberalization of imports, with particular emphasis on elimination of quantitative restrictions (licensing, etc.); any trade protection to be provided by low and relatively uniform tariffs;
7. Liberalization of inward foreign direct investment;
8. Privatization of state enterprises;
9. Deregulation: abolition of regulations that impede market entry or restrict competition, except for those justified on safety, environmental and consumer protection grounds, and prudential oversight of financial institutions;
10. Legal security for property rights.

which resembles the most the idea behind the Washington Consensus¹⁵⁴. In the second one, we have compared each constitution with the most common “social rights”, as founded in bill of rights or international treaties.¹⁵⁵

Then, we have looked into each constitution in order to found –or not– this provisions or even the opposite provisions. Operatively, for each provision founded, we have assigned one point to the constitution; zero if there was no provision; and, minus one if the opposite provision was found.

We have looked only the text of the constitution, not how it has been developed by further legislation or court decisions. In that sense, the analysis is formal. But, on the other hand, we have looked in deep into the constitutional texts, in the sense that we have not chosen a set of words in advance with an automatic result if founded. We have used the traditional European rules of interpretation to determine if a provision is or is not to be found in a given text¹⁵⁶. In that sense, our study has the advantage of being more accurate, but the possible disadvantage of being more subjective and difficult to replicate. In any case, we have consigned every article number on the side of the point (1, 0 or -1), so the reader can check for themselves if each provision is or is not there.¹⁵⁷

For illustration purposes, we have simplified the charts. For that, we have only considered the prescription as a whole, and not the more specific provisions (that can be found in Appendix 2). The provisions, though, are summed (or subtracted) in order to give us the result that we are showing. 1 means that all the sub-provisions are, as well, given 1; -1 meaning that all are given -1. From that, the results are mixed. For instance, if 1 prescription has 3 provisions, and a country only meets 2 of them, it will have 2/3, or, what is the same, 0.66666667. The average of the country is shown as well in the bottom of the chart. This can let us see whether a country has adopted a prescription. Every amount less than 0 just doesn't mean that the prescription hasn't been adopted, but that the country has adopted, in some degree, a contrary provision. 0 stands for a neutral position, nor recognition nor contradiction. Meanwhile, from that to 1, the prescription has been adopted in some degree. We can consider that from 0.5 to above the prescription has received high recognition, but we must still pay attention to the fraction in order to see how much of it. Only 1 means that the prescription has been fully adopted.

Here we present our results:

In the period between 1980 and 2000, every Latin American country revised incremented the presence of Washington Consensus-like provisions. Even countries like Venezuela, Bolivia and Ecuador became more ‘neoliberal’ in this period. In the chart below, you can see the aggregated results, showing a shift to neoliberal policies in the constitutions.

¹⁵⁴ Uprimny, *The recent transformation of constitutional law in Latin America: Trends and Challenges*, supra, at 1594.

¹⁵⁵ Such as the International Covenant on Economic, Social and Cultural Rights and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador”.

¹⁵⁶ These rules can be found in: Giovanni Tarello, *La interpretación de la Ley* (2013).

¹⁵⁷ To make the chart that follows we have employed the *Constitute Project* (<https://www.constituteproject.org>), that compares Constitutions around the world.

Countries like Peru maintained the tendency of the previous constitutions, whereas countries like Chile, Colombia and Ecuador made big changes towards more liberty. Is strange since countries like Colombia and Ecuador are regarded as 'not big followers' of the Consensus. Nevertheless, Colombia is one of the countries which changed the most and Ecuador is in the same level of 'Consensus following' as Chile.

These results are consistent with part of the narrative: There is a regional tendency towards followings the prescriptions of the Consensus. Nevertheless, the third and fourth charts show a different, more complete, story.

Charts 5 and 6: Washington consensus After reform and Washington consensus Before reform

Washington consensus After reform										
Prescription	Peru (1993)	Venezuela (1999)	Chile (1980 – without reforms)	Colombia (1991)	Uruguay (1997)	Bolivia (1967 – with reforms)	Argentina (1994)	Paraguay (1992)	Ecuador (1998)	Brazil (1988)
Indebtedness	1	1	0.33333333	1	0.66666667	0.33333333	0.33333333	0	0.33333333	0.66666667
Redirection of public expending	1	-0.5	0.5	1	0	0	0	0.5	0.5	0.5
Tax reform	1	1	1	0.5	0.5	0	0	1	0.5	1
Rates on loans	1	1	1	1	1	0	0	1	1	1
Exchange rate	1	0.5	0.5	0.5	0.5	0	0	0.5	0.5	0.5
Free international trade	1	0	0	0	0	0	0	0	0	0
Barriers to foreign investment	1	0.5	0	0	0	0	0	0	0.5	0
Privatization of national enterprises	1	-1	1	-1	0	1	0	0	1	1
Deregulation	1	0.33333333	0.33333333	0	0.33333333	0.33333333	0	0	0.33333333	0
Property rights	1	1	1	1	1	1	1	1	1	1
	1	0.38333333	0.56666667	0.4	0.33333333	0.26666667	0.13333333	0.4	0.56666667	0.56666667

Washington consensus Before reform

Prescription	Peru (1979)	Venezuela (1961)	Chile (1925)	Colombia (1886)	Uruguay (1967)	Bolivia (1967 – without reforms)	Argentina (1957)	Paraguay (1967)	Ecuador (1978)	Brazil (1967)
Indebtedness	1	0.66666667	0.33333333	0.33333333	0.66666667	0.33333333	0	0	0	0.66666667
Redirection of public expending	1	0.5	0	0	0	0	0	0.5	0	0
Tax reform	1	0.5	0.5	0.5	0.5	0	0	0.5	0.5	0.5
Rates on loans	1	0	0	0	0	0	0	0	1	0
Exchange rate	0.5	0	0	0	0.5	0	0	0	0.5	0
Free international trade	1	0	0	0	0	0	0	0	0	0
Barriers to foreign investment	0.5	0	0	0	0	0	0	0	0	0
Privatization of national enterprises	0	0	0	0	0	1	0	0	0	1
Deregulation	0.33333333	0.33333333	0	0	0.33333333	0.33333333	0	0.33333333	0	0
Property rights	1	1	1	0	1	1	1	1	1	1
	0.73333333	0.3	0.18333333	0.08333333	0.23333333	0.2	0.1	0.23333333	0.3	0.31666667

As you can see from the chart below, even when every Latin American country adopted more of the Consensus during the relevant period, they adopted more social rights as well. This is true even for countries like Peru and Chile, which were supposedly to be “free market oriented” as well as for countries like Ecuador and Bolivia, which, supposedly, reacted later against the “neoliberal policies” adopted.

Even when the level of adoption of social policies varies from country to country, it is clear that there was a general trend for the adoption of social rights in the constitutions. There was no reaction, as stated by Gargarella and Pisarello¹⁵⁸. The social and more market-oriented aspects of the development discourse of the World Bank flourished in the constitutional texts at the same time, with no exception in any country of the region.

Charts 7 and 8: Social rights After reform and Social rights Before reform

Social rights After reform

¹⁵⁸ Gargarella, supra; and, Pisarello, supra.

Social Right	Peru (1993)	Venezuela (1999)	Chile (1980 – without reforms)	Colombia (1991)	Uruguay (1997)	Bolivia (1967 – with reforms)	Argentina (1994)	Paraguay (1992)	Ecuador (1998)	Brazil (1988)
Right to health	0	0.666667	0	0	0	0.33333333	0	0	1	0
Right to social security	0	1	0	0.333333	0	0.66666667	0.666667	0.333333	1	0
Right to education	0.333333	0.333333	0.33333333	0.33333333	0.33333333	0.66666667	0	0.333333	0.666667	0.333333
Right to work (and labor rights)	1	1	0.285714286	0.571428571	0.285714286	0.571428571	0.714285714	0.857142857	0.428571429	0.714285714
Environment protection	1	1	1	1	1	1	1	1	1	1
Right to housing	0	1	0	1	1	0	1	1	1	0
Consumer protection	1	1	0	0	0	0	1	0	1	1
Culture protection	1	1	1	1	1	1	1	1	1	1
Constitutional court	1	0	1	1	0	1	0	0	1	1
	0.592593	0.777778	0.402116402	0.582010582	0.402116402	0.582010582	0.597883598	0.502645503	0.899470899	0.560846561

Social rights Before reform										
Social Right	Peru (1979)	Venezuela (1961)	Chile (1925)	Colombia (1886)	Uruguay (1967)	Bolivia (1967 – without reforms)	Argentina (1957)	Paraguay (1967)	Ecuador (1978)	Brazil (1967)
Right to health	0	0.333333333	0.333333	0	0	0.333333333	0	0.333333	0.333333	0
Right to social security	0	0.333333333	0	0	0	0.333333333	0.333333	0.333333	0.333333	0
Right to education	0.333333	0.333333333	0.333333	0.333333333	0.333333333	0.333333333	0	0.666667	0.333333	0.333333
Right to work (and labor rights)	0.857142857	0.857142857	0	0	0.142857143	0.571428571	0.714285714	0.571428571	0.428571429	0.714285714

Environment protection	1	0	0	0	0	0	0	0	0	0
Right to housing	1	0	0	0	1	0	1	1	1	0
Consumer protection	0	0	0	0	0	0	0	0	0	0
Culture protection	1	1	0	0	1	1	0	1	1	1
Constitutional court	1	0	1	0	0	0	0	0	1	0
	0.57 6719 577	0.3174 5185 60317	0.18 03703 185	0.037 1322 7	0.275 1322 75	0.28571428 6	0.227 51322 8	0.433 86243 4	0.492 0634 92	0.22 7513 228

In general, after combining both results, we can tell that only Peru and Chile had –and maintained– a positive balance of –supposedly– neoliberal policies. These results are better explained, probably, in continuities or endogenous factors, rather than in the influence of the World Bank. After all, Peru and Chile were the only countries with a positive “freedom” balance before the reforms inspired in the Consensus.

Considering this, the idea of a general tendency in the region towards “market friendly” provisions is not compatible with the data. Almost every country in the region transit to a stage in which, on average (subtracting social rights from the enactment of pro-market policies), the intervention of the government was more intense.

Of course, this is true only at a “formal” level, because we are not considering the impact of each provision in reality in every country in the sample. In the case of Peru, as we noted earlier, the impact of the provisions was limited. This is obvious if we consider that constitutional provisions are frequently ignored in Latin American countries and Constitutional courts (often in charge of implementing them) have not enough power. In the same sense, a “privatization” provision can be understood as pro-market, but –in reality– privatization can be followed by intense regulation and rent-seeking, for example.

In addition, we are assuming that “social rights” and “economic liberties” somehow are opposites. Nevertheless, this is not necessarily the case. In some instances, having some degree –and type– of welfare could be compatible with the respect of economic freedom and the pursuit of efficiency.

Finally, we do not necessarily assume that a provision of the consensus is pro-market in every sense and a provision included in our “social rights” chart is always a redistributive policy. For example, having a Central Bank is not necessarily a pro-market provision. A libertarian like Freedman or Misses will argue that a Central Bank is indeed the opposite. On the other hand, having a constitutional court could help protecting not only social rights, but negative liberties. We will explain more about this in the next section.

In these last two charts, you can see the results of the three Latin American countries which made constitutional changes after the period of study. These countries are supposed to represent –along with Venezuela– a “reaction” to the Consensus. As we already

see, there was no reaction. These countries, with the exception of Ecuador, maintained the Consensus into their constitutions. In addition, with the exception of Bolivia, they did not incorporate more social rights than in their previous constitutions.

Charts 9 and 10: Washington consensus Post after reform and Social rights Post after reform

Washington consensus Post after reform			
Prescription	Chile (1980 - with reforms)	Bolivia (2009)	Ecuador (2008)
Indebtedness	0.3333333333	0.6666666667	1
Redirection of public expending	0.5	0	0.5
Tax reform	1	0.5	0.5
Rates on loans	1	1	1
Exchange rate	0.5	0.5	0.5
Free international trade	0	0	0
Barriers to foreign investment	0	-1	-1
Privatization of national enterprises	1	-1	-1
Deregulation	0.3333333333	0.3333333333	0
Property rights	1	1	1
	0.5666666667	0.2	0.25

Social rights Post after reform			
Social Right	Chile (1980 - with reforms)	Bolivia (2009)	Ecuador (2008)
Right to health	0	0.3333333333	0.3333333333
Right to social security	0	0.6666666667	1
Right to education	0.3333333333	0.3333333333	0.3333333333
Right to work (and labor rights)	0.285714286	0.857142857	0.571428571
Environment protection	1	1	1
Right to housing	0	1	1
Consumer protection	0	1	1
Culture proteccion	1	1	1
Constitutional court	1	1	1
	0.402116402	0.798941799	0.804232804

C. The Results Explained

If you look the constitutional reform in Latin America from 1980-2000 trying to see a wave of neoliberal provisions implemented thanks to the pressure of the World Bank, the reform will make no sense.

The agenda of the World Bank in the region was the one of development or rule of law. The rule of law agenda of the Bank was contradictory and pragmatic in principle. The World Bank had no real commitment with neoliberalism or with a more social agenda. The Bank has interests and different rhetoric's which help justifying the intervention of specific agencies in different periods and countries.

As putted by Santos:

These conceptions [neoliberalism and social rights] are overlapping but there are also tensions and contradictions between them. It seems hard that they could all be advanced simultaneously. In the following section, I will argue that, despite the promising inclusion of an intrinsic rule of law conception, there seems to be a simultaneous use of all rule of law conceptions that works as a shield. By advocating several conceptions at once, it becomes easier to justify the goals of any given project. Criticism to any one of the conceptions can be deflected by alternating between the purposes of the different conceptions at play. Looking at how projects of legal and judicial reform are justified in practice will help to clarify how the rule of law conceptions are deployed and with what purposes. A look at its official rhetoric enables one to see that the Bank has moved a long way from the initial justification to participate in the reform.¹⁵⁹ [The added text is mine].

This explains why there can coexist neoliberal policies and social rights: The so-called neoliberal policies are not neoliberal, are part of the development narrative. In addition, once you decide that there is a need for state intervention, the question is not about neoliberalism or socialism, but about the most convenient degree and way of performing the intervention. Every time we think the intervention of the state is justified, for economic or social reasons, we are departing from neoliberal ideas. Moreover, even when we think we are helping the market, it is not clear which policies are market-oriented and which are interventionist.

As Kennedy illustrates:

The difficult question for neoliberal policy at the national level was to determine which government actions supported and which impeded market activity, and to prioritize and order market supportive initiatives in the most effective way.¹⁶⁰

¹⁶¹

Here, we will illustrate this with three examples of how “market friendly” policies may well turn being a policy in contradiction with free enterprise and more associated with “welfare rights”.

Consumer protection

Consumer law is encouraged by one of the Washington Consensus prescriptions¹⁶² Consumer protection is more like state regulation or more like “helping business”? Some of

¹⁵⁹ Santos, *supra*, at 276.

¹⁶⁰ Duncan Kennedy, *Three globalizations of law and legal thought: 1850–2000*, in David M. Trubek and Alvaro Santos, *The New Law and Economic Development. A Critical Appraisal*, at 132 (2006).

¹⁶¹ As a result: “The reform strategy has broadened to acknowledge an important role for the state in regulating the market. The task becomes one of delimiting the appropriate regulation to promote and encourage business activity. The goal is to generate a market-friendly and enterprise-led growth while reducing poverty and helping people improve their quality of life”. Santos, *supra*, at 275.

¹⁶² “Deregulation: abolition of regulations that impede market entry or restrict competition, except for those justified on safety, environmental and consumer protection grounds, and prudential oversight of financial institutions”.

the creators of the national agency of consumer protection in Peru (Indecopi) saw their work as facilitating business. Some of them, like Alfredo Bullard, are recognized advocates of free market in Peru and they argued at the time that Indecopi was not a regulator, but a supervisor¹⁶³ of the well-functioning of the market.

The market failure rhetoric –product quality and safe, in this case– was used to justify the existence of Indecopi. In that sense, Indecopi was friendly to a market economy.

Nevertheless, now Indecopi is regarded as a regulator, which aims more to ‘protect’ de consumer than to achieve economic efficiency.¹⁶⁴ For example, considering that products should comply with minimum quality standards, in disregard of the specific contract arrangements between a firm and a client.

Consumer protection, understood in this last sense, can be regarded as “pro-firms”, not pro-market. As putted by Withman:

Legislation intended to guarantee the quality and safety of consumer goods can easily have the effect, intended or unintended, of protecting existing producer interests. This has to do largely with the dynamic of competition. High quality and safety standards may tend to protect the position of existing competitors in a given industry. If there are such consumer protection standards in place, new entrants cannot break in by offering relatively low-quality goods.¹⁶⁵

For this reasons, at least when making claims about product standards, consumer protection is easily found to be an anti-market policy.

Another area where Consumer Law is supposed to help achieving efficiency is by correcting the market failure consistent in information asymmetry.

In the interest of economic freedom, we would place no restrictions on the good and services that individuals are allowed to exchange, but there is a potential role of the government in requiring information that sellers have about their products be shared with buyers in order to help buyers make better-informed purchasing decisions.¹⁶⁶

Now we know that mandate disclosure is far from being a sound –pro market– policy but rather a failed one, which not only imposes costs to society but that is often in the benefit of established producers, as any other type of regulation¹⁶⁷.

¹⁶³ Alfredo Bullard, *Indecopi: ¿Por qué no es un Organismo Regulador?*, 8 *Advocatus*. (2001).

¹⁶⁴ Carlos A. Patrón, *Un acercamiento preliminar a la función económica de la protección al consumidor*, in Oscar Súmar (ed), *Ensayos sobre Protección al Consumidor en el Perú*, (2000).

¹⁶⁵ James Q. Whitman, *Consumerism Versus Producerism: A Study in Comparative Law*, 117 *Yale Law J.* 369 (2007).

¹⁶⁶ Gwartney and Holcombe, *supra*, at 55.

¹⁶⁷ “(...) mandated disclosure can have anticompetitive effects. Disclosure costs are substantially “fixed costs”; many of them do not vary with the scope of activity or with the frequency of disclosures. These fixed costs—collecting information, drafting forms, training employees—are roughly the same for large and small disclosers. This gives larger disclosers an advantage: their burden of disclosure per “unit” is smaller. This, in turn, hurts small companies trying to enter and compete in the mark”. Omar Ben-Shahar and Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 *Univ Penn Law Rev.* 738 (2010).

Titling projects

One of the prescriptions of the Consensus states the importance of the recognition of “property rights”¹⁶⁸. On that light, there is the idea, championed by De Soto¹⁶⁹, by which titling projects would lead to development. De Soto claims that the explanation of the difference in development levels between the North and the South lays in the definition of property rights. Property rights are better defined in the US or Europe, while are undefined in South America or Africa. De Soto is considered a right wing libertarian in Peru.

Nevertheless, apart from the fact that his explanation about the difference between countries is at least incomplete if not openly mistaken¹⁷⁰, titling projects are great examples of a policy that can be sold as a free market one or –at the same time– as a policy related to poverty alleviation. The “less fortunate” are part of the De Soto rhetoric in a bigger extend than in any other ‘free market’ advocate discourse.

How can De Soto be a “free market” advocate and a defender of the poor at the same time? His paradoxical discourse is inspired in the rhetoric of the World Bank, in which the “rule of law” can easily explain the prescriptions of the Consensus as well as the inclusion of more socially-oriented policies.

Regulation

The Washington Consensus also has a prescription about deregulation:

“(The) abolition of regulations that impede market entry or restrict competition, except for those justified on safety, environmental and consumer protection grounds, and prudential oversight of financial institutions”.

In relation to the quantity of regulation, the privatization process that was also promoted by the Washington Consensus lead to more regulation in Latin American countries. The state stopped being an entrepreneur but this gave birth to the “regulatory state”.

In relation to the quality of the regulation, it has been said that “Any laws should be structured so that they are objective and non-arbitrary, and so that they apply uniformly to all members of a society”.¹⁷¹

In the case of Peru, we are now a “regulatory state” where public ownership has been replaced by regulations. And the quality of the regulation is far from good. For instance, a recent study of the OECD had found that Peru has not a centralized office to analyze

¹⁶⁸ Prescription 10: “Legal security for property rights”.

¹⁶⁹ Hernando De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else*, (2003).

¹⁷⁰ Santos, supra, at 287-289; and, Richard Webb, Diether Beuermann and Carla Revilla, *La construcción del derecho de propiedad El caso de los asentamientos humanos en el Perú*, (2006).

¹⁷¹ Gwartney and Holcombe, supra, at 54.

the quality of regulation.¹⁷² Also, most regulators and the Congress do not use a Regulatory Impact Assessment before passing and act or regulations.¹⁷³

D. Conclusions of this chapter

We have started this essay describing the existing narratives about the constitutional reform in Latin American countries in the period between 1980 and 2000. We had found that –contrary to previous believes– all Latin American countries adopted the prescriptions of the consensus, at least in some degree. They also adopted more social rights in the same period.

This results seem contradictory, which is normally assume that the consensus has a clear pro-market orientation and that social rights are contrary to efficiency. Nevertheless, on the one hand, the consensus is a part of a bigger rhetoric used by the World Bank, which is supposed to bring growth to Latin America. The inclusion of social rights in constitutional texts is not contrary with that larger rhetoric.

In addition, we have shown the texts of constitutions, but how this texts are used in reality is a different story that we have just beginning to tell. Some pro-market provisions can be used to promote private interest or can be just ignored. The same can be said about social rights.

BALANCE AND PRESCRIPTIONS FOR A BETTER CONSTITUTIONAL DESIGN

At the end of this dissertation, the question remains about “(...) which government actions supported and which impeded market activity, and to priorities and order market supportive initiatives in the most effective way”¹⁷⁴. We have shown that the Latin America constitutional reform, at least partially, is align with rhetoric arguments, both at the domestic and the international level.

In this last chapter, we will give some advice about which constitutional provisions are more convenient. There are some more specific questions to answer about how we should write a constitution in order to deliver “efficient” outcomes. For instances: Do we have to create more “substantive rights” or concentrate in improving “procedures”? Should we prefer “open norms” like principles or specific rules? Should we regulate specific aspects of social, economic or political life or create general rules? Are welfare rights incompatible with economic liberties? How can be promote competition using constitutional provisions?

Substantive or procedure?

The recognition of substantive rights by itself does little for protecting an interest. In Latin America we have experienced a “explosion” of welfare rights and economic liberties which

¹⁷² OECD, *Regulatory Policy in Peru: Assembling the Framework for Regulatory Quality*, (2016).

¹⁷³ Antonio Peña, Luis Valdivieso and Félix Arias-Schreiber, *Balance y perspectivas de la aplicación del Análisis Costo Beneficio ACB en los proyectos de ley del Congreso de la República del Perú*, (2015).

¹⁷⁴ Kennedy, *supra*, at 132.

not necessarily correspond with reality. There is a relevant difference between 'de iure' and 'de facto' protection or economic interests. Latin America ranks very low in the later.

Although constitution-making is often surrounded by high hopes and aspirations for a better future, the track record of countries complying with their constitutional rights commitments is dubious at best. Some of the world's worst human rights offenders offer robust rights protections in their constitutions. Afghanistan, the country with the lowest literacy rate in the world, guarantees a right to education, while the constitution of North Korea shamelessly grants every citizen the freedom of expression.¹⁷⁵

Not only that. Sometimes, the recognition of more rights could be counterproductive. According to Kennedy, referring to the human rights movement, rights create a false idea of 'community', the fantasy of a 'friend' which is here to help us emancipate. Nevertheless, political actors have interests in the real world.¹⁷⁶

The same can be told about economic liberties. According to Mueller:

The kind of constitutional provisions that best protect the market from state and private encroachments are not, therefore, definitions of rights to property that resemble other definitions of rights in the constitution; rather, they are procedural impediments to state interference with the market, and legal impediments to private interference. Supermajority requirements to pass legislation that interferes with the market, along with antimonopoly and anti-cartel clauses, have been suggested.¹⁷⁷

Principles or rules? (neutrality or promotion of social values through Law)

At least from a libertarian perspective, Law should be neutral to the values of different people in a society. This view is also compatible with efficiency considerations. Once we have decided that Law should remain neutral; another question remains: Which lawmaking method is more compatible with this search of 'neutrality'?

From one perspective, rules can serve this ideal better, since the balancing test is a way in which rule makers can incorporate their own subjective values into the Law.¹⁷⁸ Nevertheless, this approximation can be flawed if one considers that—in the case of rules—the incorporation of values is still present, but was made before the current decision.¹⁷⁹

¹⁷⁵ Adam Chilton and Mila Versteeg, *Do Constitutional Rights Make a Difference?*, University of Virginia School of Law Public Law and Legal Theory Research Paper Series 2014-43. (2014).

¹⁷⁶ David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 Harv Hum Rts J. 101, 117 (2002).

¹⁷⁷ Mueller, *supra*, at 234.

¹⁷⁸ Mario J. Rizzo, *Rules versus Cost-Benefit Analysis in the Common Law*, 4 Cato Journal. 865 (1985).

¹⁷⁹ Guido Calabresi, *An Introduction to Legal Thought: Four Approaches to Law and to the Allocation of Body Parts*, 55 Stan L Rev. 2113 (2002-2003).

In addition to this, in responding the question about how discretionary is the Law, is not entirely clear if we should prefer rules or principles. Principles appear to be more discretionary, but a rule can be complicated to administer thanks to multiple exceptions made over the years, as exemplified in antitrust cases governed by *per se* rules.¹⁸⁰

In the next subsection we will clarify how a neutral approach can help us achieve efficiency when dealing with welfare rights.

Are social rights contrary to efficiency considerations?

In general, distribution of goods through the State implied regulation or direct intervention of the Government. In that sense, there is a tradeoff between distribution (in the form of positive economic rights, also known as “social rights”) and negative economic rights (also known as “liberties” or just “economic rights”). According to Cooter:

In practice, implementing welfare rights involves regulating markets and redistributing income, so liberty rights and welfare rights trade-off with each other. The poles of the trade-off span the rival political philosophies of the right and the left that figure prominently in modern political disputes.¹⁸¹

Nevertheless, constitutional redistribution provisions making redistribution a social function of the State can be align in the search of efficiency in, at least, two ways. First, on some instances, the intervention of the State can be justified because the intervention can help people to obtain more utility of redistribution. Assuming that some people derive utility from altruism, in some cases, the best way of being altruistic, can be with the help of the Government. First, I may not get utility of helping one person alone, but the hall class. In these cases, the Government is best suited to convey efforts of independent people to help a large number of citizens. Second, sometimes the target of help appears suddenly, for example, because of a natural disaster. In these cases, institutions may have problems on meeting the requirements of the affected populations on time.¹⁸²

Second, the inclusion of redistribution provisions in the constitutional text can help dampening the political struggle and opportunistic behavior that usually comes with redistribution. The idea here is that the constitution will have some neutral and general provisions about redistribution, that will enable the debate about helping more certain groups over others. These provisions will not affect utility so much, in the case that they do not distort private elections of combinations of goods. In that sense, a constitution that select certain type of business for subsidies and make some goods free is reducing utility.¹⁸³

Nevertheless, the extend in which welfare right are compatible with efficiency depends on how this rights interfere with people’s autonomy. As suggested by Cooter:

¹⁸⁰ Thomas A. Lambert, *The Roberts Court and the Limits of Antitrust*, 52 Boston Coll Law Rev. 871, 883 (2011).

¹⁸¹ Robert D. Cooter, *The Strategic Constitution*, at 261 (1999).

¹⁸² Mueller, *supra*, at 238-239.

¹⁸³ Cooter, *supra*, at 261.

“(...) states that pursue egalitarian ideal typically impose paternalistic restrictions on private contracts and regulate markets”.

How to promote competition through the constitution?

One more time, the ideal rule is not entirely clear in this case. For example: one can say that a federal government is superior to a centralized government. The ‘competition’ of jurisdictions is a dream for some policy analysts. Nevertheless, it’s possible that the competition between jurisdictions lead us to a bad result, as suggested by Vogel¹⁸⁴ in his famous work about the ‘California Effect’. According to him, firms will advocate for states to equal the maximum level of regulation that they are obligated to comply with.¹⁸⁵ The same can be told in the case of competition between authorities. The separation of powers can increase the cost of subverting the system but, at the same time, increasing the cost of subversion can be useful for some firms.

In the case of competition between privates, one more time, there is not a unique way to resolve the matters. Some antitrust rules can appear as useful but there is some discussion about how antitrust affects competition. Sometimes, practices that can appear as contrary to society, can be efficient, if we take a ‘social cost’ –rather than a ‘consumer interest’– approximation to antitrust.¹⁸⁶

Since the conclusion is that there is no a ‘rule of thumb’ on how to write a constitution, every country should rely in evidence and in an open democratic debate about which constitutional provisions suits better their social and economic needs, as well as their particular idiosyncrasy.

The experience in the last great Latin American constitutional reform is that it was the product of violent and confusing times; and that their texts respond more to pre-made rhetoric arguments that to a rational and plural debate about the convenience of the adoption of some prescriptions.

Chart 11: Examples of better rules

Category	Efficient rule	Example	Rhetoric rule	Example
Substance vs. procedure	Procedure	Voting rule	Welfare right	Education
Neutral or value oriented	Neutral	Negative liberty	Value oriented	Positive right

¹⁸⁴ “Vogel’s model (and its generalizations) are more accurate than Tiebout-type models and the race-to-the-bottom in terms of modelling the preferences of governments, firms, and NGOs”. Claudio M. Radaelli, *The Puzzle of Regulatory Competition*, 24 J Publ Pol. 1, 6 (2004).

¹⁸⁵ Vogel, *supra*.

¹⁸⁶ Dennis Carlton, *Does Antitrust need to be Modernized?*, 21 J Econ Perspect. (2001).

Social rights?	General	Minimum income for citizens	Subsidization of specific good	Free health
Competition?	Reduce costs	Allow monopolies when efficient	Outcome-oriented	Strict rules against monopolies

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Appendices

Appendix 1

Post after reform									
Chile (1980 with reforms up to 2011)			Bolivia (2009)				Ecuador (2008)		
After reform									
Peru (1993)	Venezuela (1999)	Chile (1980)	Colombia (1991)	Uruguay (1967 with reforms up to 1996)	Bolivia (1967 with reforms up to 1994)	Argentina (1994)	Paraguay (1992)	Ecuador (1998)	Brazil (1988)
Before reform									
Peru (1979)	Venezuela (1961)	Chile (1925)	Colombia (1886)	Uruguay (1967)	Bolivia (1967)	Argentina (1853 with reforms up to 1957)	Paraguay (1967)	Ecuador (1978)	Brazil (1967)

Appendix 2

After reform																					
Pre-scription	Constitutional provision	Peru (1993)		Venezuela (1999)		Chile (1980 - without reforms)		Colombia (1991)		Uruguay (1997)		Bolivia (1967 - with reforms)		Argentina (1994)		Paraguay (1992)		Ecuador (1998)		Brazil (1988)	
In-debtedness	In-debtedness has to be specified in an act	1	75	1	312	1	60.7	1	364,346	1	85.6	0	0	0	0	0	0	1	130.14	1	163.11
	All public expenditures have to follow a procedure	1	76	1	311, 312, 313 and 314	0		1	345	1	86	1	59.3	1	75.8	0	0	0	0	1	37.21
	The economic balance principle is recognized	1	78	1	311	0		1	341	0		0	0	0	0	0	0	0	0	0	0
Redirection of public expending	The State prioritizes the spending in areas like education, health and infrastructure	1	9, 10, 11, 12 and 13	1	299, 300, 302 and 303	1	19.9 y 19.10	1	49,65 and 67	0		0	0	0	0	1	176	1	42.55 and 66	1	198.2°, and 208

	All new rights demanding expenditures are to be applied in a progressive (not automatic) way	1		Elev enth final dis- posi- tion	0	0		1	334	0	0	0	0	0	0				
Tax reform	All taxes have to be in an act	1	74	1	317	1	62 y 62.1	1	338	1	87	0	0	1	17 9	1	130.6	1	150.I.
	Taxes could not have a confiscatory effect	1	74	1	317	1	19.2 0	0	0	0	0	0	0	1	18 1	0	0	1	150.IV
Rates on loans	There is an independent central bank with the task of regulating rates on loans	1	83	1	318	1	97,9 8	1	371	1	196	0	0	1	28 5	1	261	1	164
Exchange rate	There is an independent central bank	1	83	1	318	1	97	1	371	1	196	0	0	1	28 5	1	261	1	164
	Citizens are allowed to have	1	64	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

	for- eign cur- rency and use it in the na- tional terri- tory with- out limita- tions																	
Free inter- na- tional trade	Inter- na- tional trade is free	1	63	0	0	0	0	0	0	0	0	0	0	0	0			
Barriers to foreign invest- ment	For- eign in- vest- ment will re- ceive na- tional treat- ment and no dis- crimi- nation	1	63	1	301	0	0	0	0	0	0	1	244.1	0	0			
	It is re- cog- nized inter- na- tional arbi- tra- tion for dis- putes with the State	1	63	0	0	0	0	0	0	0	0	0	0	0	0			
Privat- ization of na- tional enter- prises	Only for na- tional inter- est the State could act like a pri- vate entre- pre- neur	1	60	- 1	299 , 300 , 302 and 303	1	19.2 1	- 1	334	0	1	141	0	0	1	244.6	1	173

De-regulation	The right of free enterprise is recognized	1	58	1	112	1	19.21	1	333	0	1	144.11	0	0	0	1	170				
	The State can subscribe Stabilization contracts	1	62	0	0	0	0	0	0	0	0	0	0	0	1	271	0				
	Monopolies created by law are prohibited	1	61	0	0	-1	336	-1	85.17	0	0	0	0	0	0	-1	177				
Property rights	Property is recognized as a right	1	70	1	115	1	19.24	1	58	1	32	1	22	1	17	1	109	1	30	1	5.XXII
	Takings have to follow a procedure that includes a compensation	1	70	1	115	1	19.24	1	58	1	32	1	22.11	1	17	1	109	1	33	1	5.XXIV
		1		1		1		1		1		1		1		1		1		1	
		9		9		0		9		6		5		3		7		0		0	

8
8

After reform																					
Social Right		Peru (1993)		Venezuela (1999)		Chile (1980 - without reforms)		Colombia (1991)		Uruguay (1997)		Bolivia (1967 - with reforms)		Argentina (1994)		Paraguay (1992)		Ecuador (1998)		Brazil (1988)	
Right to health	Governmental	-1	9	1	83	-1	19.9	-1	49	0		1	7.k	0		-1	69	1	44	-1	197
	Free	0		0		0		0		0		0		0		0		1	43	0	
	Universal	1	7	1	83	1	19.9	1	49	0		0		0		1	68	1	42	1	196
Right to social security	Obligatory	0		1	86	0		1	48	0		0		1	14 bis	1	95	1	55	0	
	Universal	1	10	1	86	1	19.18	1	48	0		1	158.II	0		1	95	1	55	1	201.1o
	Governmental	-1	11	1	86	-1	19.18	-1	48	0		1	158.I	1	14 bis	-1	95	1	55	-1	201.8o
Right to education	Governmental	-1	15	-1	106	-1	19.11	-1	68	0		1	184	0		-1	76	1	66	-1	209
	Free	1	17	1	102	1	19.10	1	67	1	71	1	177.III	0		1	76	0		1	206.4
	Universal	1	13	1	102	1	19.10	1	67	0		0		0		1	73	1	66	1	205
Right to work (and labor rights)	Minimum wage	1	24	1	91	0		0		0		1	157.I	1	14 bis	1	92	0		1	7.4
	Employment stability	1	27	1	93	0		1	53	0		1	157.II	1	14 bis	1	94	0		1	7.1
	Unionization	1	28	1	95	1	19.19	1	39	1	57	1	159	1	14 bis	1	96	1	35.9	1	8
	8 hours	1	25	1	90	0		0		1	54	1	157.I	1	14 bis	1	91	0		1	7.13
	Non-discrimination	1	26.1	1	89.5	1	19.16	0		0		0		1	14 bis	1	88	0		1	7.31
	Inalienable rights	1	26.2	1	89.2	0		1	53	0		0		0		1	86	1	35.3	0	
	Favorable interpretation	1	26.3	1	89.3	0		1	53	0		0		0		0		1	35.6	0	
Environment protection	1	66, 67, 68 and 69	1	127, 128 and 129	1	19.8	1	79	1	47	1	7.m	1	41	1	7	1	86	1	225	

Right to housing	0		1	82	0		1	51	1	45	0		1	14 bis	1	100	1	32	0	
Consumer protection	1	65	1	113	0		0		0				1	42	0		1	92	1	5.31
Culture protection	1	21	1	98, 99, 100 and 101	1	19.10	1	70	1	34	1	192	1	41	1	81	1	62	1	215
Constitutional Court	1	201	0		1	81	1	239	0				1		0		1	275	1	102

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Before reform																					
Pre-scription	Constitutional provision	Peru (1979)	Venezuela (1961)	Chile (1925)	Colombia (1886)	Uruguay (1967)	Bolivia (1967 - without reforms)	Argentina (1957)	Paraguay (1967)	Ecuador (1978)	Brazil (1967)										
Indebtedness	Indebtedness has to be specified in an act	1	140	0	0	0	1	85.6	0	0	0	1	46.11								
	All public expenditures have to follow a procedure	1	143	1	227	1	21	1	207	1	86	1	59.3	0	0	0	0	0			
	The economic balance principle is recognized	1	197	1	20.3	0		0	0	0	0	0	0	0	0	0	0	1	66.2		
Redirection of public expending	The State prioritizes the spending in areas like education, health and infrastructure	1	12, 15 and 21	1	76,78 and 94	0		0	0	0	0	0	0	1	94	0	0	0	0		
	All new rights demanding expenditures are to be applied in a progressive (not automatic) way	1	Sixth final disposition	0		0		0	0	0	0	0	0	0	0	0	0	0	0		
Tax reform	All taxes have to be in an act	1	139	1	224	1	45	1	204	1	87	0		0	0	1	47	1	53	1	150.29
	Taxes could not have a	1	139	0		0		0	0	0	0	0	0	0	0	0	0	0	0	0	

	confiscatory effect	1													
Rates on loans	There is an independent central bank with the task of regulating rates on loans	1	148	0	0	0	0	0	0	0	0	1	54	0	
Ex-change rate	There is an independent central bank	1	148	0	0	0	1	196	0	0	0	1	54	0	
	Citizens are allowed to have foreign currency and use it in the national territory without limitations	0		0	0	0	0	0	0	0	0	0	0		
Free international trade	International trade is free	1	117	0	0	0	0	0	0	0	0	0	0		
Barriers to foreign investment	Foreign investment will receive national treatment and no discrimination	0		0	0	0	0	0	0	0	0	0	0		
	It is recognized international arbitration for disputes with the State	1	136	0	0	0	0	0	0	0	0	0	0		
Privatization of national enterprises	Only for national interest the State could act like a private entrepreneur	0		0	0	0	0	1	141	0	0	0	1	163.1	
Deregulation	The right of free enterprise is recognized	1	115	1	98	0	0	-1	145	0	1	95	0	1	157.i

	The State can subscribe Stabilization contracts	0		0		0		0		0		0		0		0		0		0	
	Legal monopolies are prohibited	0		0		0		-1	85.17	0		0		0		0		-1		157.8	
Property rights	Property is recognized as a right	1	125	1	99	1	10.10	1	32	1	32	1	22	1	17	1	96	1	48	1	150.22
	Takings have to follow a procedure that includes a compensation	1	125	1	101	1	10.1	-1	33	1	32	1	22	1	17	1	96	1	47	1	150.22
		14		7		4		2		5		3		2		5		5		6	53

Before reform																					
Social Right		Peru (1979)		Venezuela (1961)		Chile (1925)		Colombia (1886)		Uruguay (1967)		Bolivia (1967 - without reforms)		Argentina (1957)		Paraguay (1967)		Ecuador (1978)		Brazil (1967)	
Right to health	Governmental	-1	16	0	76	1	10.14	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	Free	0		0		0		0	0	0	0	0	0	0	0	0	0	0	0	0	0
	Universal	1	15	1	76	0		0	0	1	7.a	0	1	93	1	19.13	0				
Right to social security	Obligatory	0		0		0		0	0	0		1	14	1	108	0					
	Universal	1	12	1	94	0		0	0	1	158	0	0	0	1	29	0				
	Governmental	-1	14	0		0		0	0	0		0	0	0	0						
Right to education	Governmental	-1	30	-1	79	1	10.7	0	0	-1	181	0	0	0	0	0	0	0	0	0	0
	Free	1	25	1	78	0		1	41	1	71	1	177	0	1	89	1	27	1	168.3.II	
	Universal	1	21	1	78	0		0	0	1	177	0	1	89	1	27	1	168			
Right to work (and labor rights)	Minimum wage	1	43	1	87	0		0	0	1	157	1	14	1	105	0				1	158.I
	Employment stability	1	48	1	88	0		0	0	1	157	1	14	1	105	0				1	158.XIII
	Unionization	1	51	1	91	0		0	1	57	1	159	1	14	0		1	31.h	1	159	
	8 hours	1	44	1	86	0		0	0	1	157	1	14	1	105	0				1	158.VI
	Nondiscrimination	0		1	87	0		0	0	0		1	14	0	0					1	158.III
	Inalienable rights	1	57	1	85	0		0	0	0		0	0	1	105	1	31.d	0			
	Favorable interpretation	1	57	0		0		0	0	0		0	0	0	0	1	31.e	0			
Environment protection	1	123	0		0		0	0	0	0		0	0	0	0						
Right to housing	1	10	0		0		0	1	45	0		1	14	1	83	1	13	0			
Consumer protection	0		0		0		0	0	0	0		0	0	0	0						
Culture protection	1	36	1	83	0		0	1	34	1	191	0		1	92	1	26	1	172		
Constitutional Court	1	296	0		1	78	0	0	0	0		0	0	0	0	1	140	0			
		11		10		3		1		4		8		7		10		9		7	

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Post After Reform							
Prescription	Constitutional provision	Chile (1980 - with reforms)		Bolivia (2009)		Ecuador (2008)	
Indebtedness	Indebtedness has to be specified in an act	1	63.7	1	322.I	1	289
	All public expenditures have to follow a procedure	0		1	158.I.8	1	293
	The economic balance principle is recognized	0		0		1	286
Redirection of public expending	The State prioritizes the spending in areas like education, health and infrastructure	1	19.9 y 19.10	1	321.II	1	286
	All new rights demanding expenditures are to be applied in a progressive (not automatic) way	0		-1	109.I	0	
Tax reform	All taxes have to be in an act	1	63.14 and 65.4.1	1	323.II	1	301
	Taxes could not have a confiscatory effect	1	19.2	0		0	
Rates on loans	There is an independent central bank with the task of regulating	1	108, 109	1	327	1	303

	rates on loans						
Exchange rate	There is an independent central bank	1	108	1	327	1	303
	Citizens are allowed to have foreign currency and use it in the national territory without limitations	0		0		0	
Free international trade	International trade is free	0		0		0	
Barriers to foreign investment	Foreign investment will receive national treatment and no discrimination	0		-1	320.1	-1	339
	It is recognized international arbitration for disputes with the State	0		-1	366	-1	422
Privatization of national enterprises	Only for national interest the State could act like a private entrepreneur	1	19.21	-1	316.4	-1	315
Deregulation	The right of free enterprise is recognized	1	19.21	1	308.11	0	
	The State can subscribe Stabilization contracts	0		0		0	

	Monopolies created by law are prohibited	0		0		0	
Property rights	Property is recognized as a right	1	19.24	1	56.1	1	321
	Takings have to follow a procedure that includes a compensation	1	19.24	1	57	1	323
		10		5		6	

Post After reform							
Social Right		Chile (1980 - with reforms)		Bolivia (2009)		Ecuador (2008)	
Right to health	Governmental	-1	19.9	-1	36.II	-1	362
	Free	0		1	18.III	1	362
	Universal	1	19.9	1	18.I	1	32
Right to social security	Obligatory	0		0		1	367
	Universal	1	19.18	1	45.ii	1	367
	Governmental	-1	19.18	1	45.vi	1	367
Right to education	Governmental	-1	19.11	-1	77.iii	-1	345
	Free	1	19.10	1	81.II	1	28
	Universal	1	19.10	1	78.I	1	28
Right to work (and labor rights)	Minimum wage	0		1	49.II	1	328
	Employment stability	0		1	48.II	0	
	Unionization	1	19.19	1	51.i	1	326.7
	8 hours	0		1	49.II	0	
	Nondiscrimination	1	19.16	1	48.II	0	
	Inalienable rights	0		1	48.III	1	326.2
	Favorable interpretation	0		0		1	326.3
Environment protection		1	19.8	1	33	1	14
Right to housing		0		1	19.1	1	375
Consumer protection		0		1	75	1	52
Culture protection		1	19.1	1	98-102	1	21
Constitutional Court		1	92	1	196	1	429

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