

Chapter IV

Social transformations and the judicialization of social conflict in Latin America

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IV. Social Transformations and the Judicialization of Social Conflict in Latin America

The exercise of power, as Michel Crozier taught us, is the ability to control sources of uncertainty and transfer the cost of the unpredictable to other individuals or social groups. The revolution in modern law imposed a state of universal legal uncertainty on social groups, including the elite. In other words, before the law every person was equal and could expect similar punishment. This meant establishing a system for meting out justice that was immune to the transfer of economic or political power and therefore, obliged those sectors to accept a situation of equality and uncertainty vis-à-vis the legal process. In the liberal vision, the law must ensure its universal nature by according everyone the same treatment; in other words, it cannot allow unequal access to power in other spheres (economic, political and cultural) to invade the legal sphere.⁷⁴ As we have seen, equality before the law was enhanced by the establishment of compensatory mechanisms for regulating contractual relationships between parties with uneven bargaining power.

The advance of the judicialization of social conflict differs among countries and regions. In Latin America the judicialization of social conflict was radicalized by the convergence of, at least, four specific factors:

1) The new constitutions drafted in the aftermath of the cycle of dictatorships of the 1970s and 1980s strengthened the role of constitutional courts, created new entities for the defense of citizen rights, and broadened the rights enshrined in the constitution.⁷⁵

2) Laws created for a particular political juncture, in function of the economic imperative to fight inflation and stabilize the currency, led to legislative inflation and pitted citizens and companies against the Legislative and Executive Branches, thereby transforming the Judiciary into the arbiter of social conflict.

⁷⁴ See Michael Walzer, *Spheres of Justice*.

⁷⁵ For an optimistic view of judicialization processes in Brazilian society, see Luiz Werneck Vianna et al., *Corpo e alma da magistratura brasileira*. Rogério Bastos Arantes offers a critique of the constitutional control system in *Judiciário e política no Brasil*.

3) Ironically, the judicialization of social conflict has evolved at a time when a significant portion of the working population across the continent is experiencing a sense of lost rights (including those in the areas of labor and social security). Paralleling this very real loss of rights was an expansion of rights in other areas (for example, the rights of women and children, or cultural and environmental rights). Therefore, we have before us, in part, a loss of rights (some of which included corporativists' privileges), but also a dislocation of rights, from organized labor to the very poor (through policies of cash transfer).

4) In Latin America, the practice of impunity neutralizes the rule of law and diverts legal power from other spheres of authority (political or economic) undercutting the universal nature of the legal system.

The judicialization of conflict in Latin America cannot be reduced either to a simply positive or negative process. It is, rather, an expression of the democratization of society (the widespread sentiment that each individual deserves equal rights and minimum social conditions) and it fills the vacuum created by political institutions incapable of organizing social conflict within the political party framework.

The gap— and for the poorest a veritable abyss—between the world of law and social reality, seems then to recreate (under new terms) the old dichotomy described by Domingo Faustino Sarmiento.⁷⁶ According to this Argentine politician and intellectual, Latin America is condemned to oscillate between civilization and barbarity, between European values and the social reality of the masses across the continent, between liberal constitutions and peoples incapable of exercising democracy (a result of the hostility of life on the *pampas*, the exuberance of tropical rainforests, or the oppression to which the indigenous peoples and slaves were condemned, among other reasons).

⁷⁶ Regarding the portrayal of Argentina's history based on Sarmiento's work, see Maristella Svampa, *El dilema argentino*.

The contemporary “progressive” version of this perspective asserts that barbarity is the product of the social exclusion produced by the neoliberal model. According to this view, collective actors and grassroots social movements are essentially virtuous, but the policies imposed by international agencies at the service of a particular globalization model generate poverty, misery, social exclusion, and growing social inequality, which chip away at democratic functioning, thus creating the potential for individual and/or collective violence.

Contemporary Latin American societies, however, have undergone profound changes. The dichotomous vision contrasting a “real” social world with a “formal” legal world no longer applies, just as the notion of a “profound” and virtuous reality whose potential accomplishments are thwarted by external factors has been debunked.⁷⁷

From the moment the contrast between the real society and the formal institutions stopped serving as the yardstick for understanding where we are and what we need in order to arrive at the “ideal point”—based on a paradigm in which the sociologist could demonstrate the true phase of society while the “positivist” jurist appeared to live in a castle lacking social foundations—we have to develop new explanatory models. Rather than resort to new versions of the same old dichotomy between the formal legal world and the real social world, we should explain the paradox of a society that would like to be egalitarian, upholding and identifying strongly with liberal and social justice values, but continues to generate inequality and violate the norms of social coexistence.

Citizenship in Latin America: Variations on Modernity

As we saw in the first chapter, citizenship was created in the framework of national communities, based on shared values that were rooted in the history of nation-building and in general, related back to a founding myth. In a sense, citizenship in Latin America was condemned, albeit in the changing contexts of each country and

⁷⁷ See for instance Angelina Peralva’s analysis of the paradoxical relationship between democracy and rising violence in Brazil in *Violência e democracia*.

time period, to vacillate between the idea of a desirable citizenship and society, according to a foreign model, and the search for an authentic national culture upon which the inherent nature of the social collective could be built.

Up until the second half of the 20th century, Europe, more than the United States, was the main source of inspiration for Latin American elites. For the elites, achieving modernity meant forgetting the indigenous or African past and rebuilding the national community based on “European ideals”.⁷⁸ The socialist and communist parties did not in general deviate from the tendency to disparage the past and adopted a discourse in which the popular culture had to be purged of its spurious elements, particularly religion.⁷⁹

Periodic attempts were made to recover the cultural world of the oppressed in Latin America. This recovery found its first significant expression in the Hispanic American indigenous-centered movement of the early 20th century, while its broadest cultural impact has been associated with the Mexican Revolution and its many artistic manifestations, conceptualized by José Vasconcellos based on the notion of a new “universal race.” But such efforts, revitalized by nationalistic movements, failed to modify the dominant mimetic hope of repeating locally the dominant communist or capitalist models available at the time.

This vocation for imitation varied according to country and time period, just as the dissatisfaction with “what we are” had a tendency to change its target. **Into this space of dissatisfaction between what we are and what we would like to be, was inserted the hypertrophic expectations of salvation of each new government and the feeling of living in a society that always falls short of its desires.**

The constant wish to be a mirror image of advanced or revolutionary countries was apparent even in the social sciences, which were split between a

⁷⁸ The schizophrenia of the Latin American political elite was masterfully portrayed in literature, in particular in *El siglo de las luces* by Alejo Carpentier and in *Yo el supremo* by Augusto Roa Bastos.

⁷⁹ In the 1930s, some Marxist authors such as Peruvian writer Mariátegui, found in the Inca experience inspiration for a primitive Communism, although one without significant consequence for Marxist theory or Latin American socialist movements. .

dominant trend, inspired by the classic authors of social thought based on the histories of their own countries, and another current willing to recognize the unique civilizing features in national cultures that cannot be derived from a general theory of modernization.⁸⁰

This proclivity to see oneself reflected through the rose-tinted prism of the experience of central capitalist countries explains the divergent visions of modernity espoused by Latin American and European social theory. As Martuccelli points out, in classical social theory the modern experience is regarded as a tragedy: that of a human condition that has lost its guideposts in the world, along with the sustaining pillars of faith and tradition. Conversely, in Latin American social theory, modernity is an ideal to be attained, and modernization the path toward greater harmony and happiness. Put another way: in Europe, the tragedy is to be modern; in Latin America the tragedy is to think that we have failed to be modern.

Citizenship studies in Latin America undeniably are infused with an idealized vision of the modern experience and a viewpoint that defines itself through a manufactured image of what citizenship should be. Even the most developed versions of citizenship fail to transcend this vision. Let us look, for example, at Wanderley Guilherme dos Santos' concept of "regulated citizenship" which argues that the roots of citizenship "are found not in a code of political values, but in an occupational stratification system [...] defined by a legal norm."⁸¹

Wanderley Guilherme dos Santos is referring mainly to the key role the Employment Card (*Carteira de Trabalho*) played for decades in Brazil as a means of access to social rights and of symbolic and practical recognition. The concept of regulated citizenship is developed in contrast to the universal scope of "political" citizenship. However this wasn't a local deformation of the original model. The different historical incarnations of citizenship were subject to regulatory practices based on legally sanctioned forms of social stratification. In most European

⁸⁰ See Bernardo Sorj, *A construção intelectual do Brasil contemporâneo*, part two; Sérgio Costa, *As cores de Ercília*; José Mauricio Domínguez, "A dialéctica da modernização conservadora e a nova história do Brasil"; and Jessé Souza (ed.), *O malandro e o protestante*.

⁸¹ See Wanderley Guilherme dos Santos, *Cidadania e justiça*, p. 75.

countries, citizenship was initially census-based, in other words, suffrage was associated with property and income. In some cases, exclusion was based on religion and, in others, gender (it is remarkable how recently women were granted suffrage in advanced countries), or race (suffice it to say that only a few decades ago, racial segregation was governed by statute in the United States).

Social rights only achieved somewhat universal coverage in Europe after the postwar period. The Work Card was an invention of the French Revolution that subsequently was appropriated by Fascism. Likewise, in Europe in the first half of the 20th century, social rights always were unevenly distributed between rural and urban areas and among different sectors of workers. More recently, we have only to mention the large number of “undocumented” currently working in Europe and the United States without the benefit of social rights and living in constant fear of imminent deportation.

Therefore, the point here is not to discuss the Brazilian experience as a case of regulated citizenship compared to a *normal* model of citizenship that is universal in nature, but instead to reconstruct the concept of citizenship itself, based on the Brazilian experience, as one of the possible variations on the universal problem of regulating citizenship, meaning the differential rhythms and diverse criteria that enable different sectors of the population to enjoy citizen rights.

Marcelo Neves, who has authored original works on the sociology of law, also falls into the trap of setting up direct comparisons between central and peripheral countries, when what we are dealing with is more a progression or a matter of degree. His most recent works reveal a deepening propensity to generalize excessively the Brazilian experience or to transfer it to the group of countries “on the periphery of the contemporary international system.”⁸² Drawing from the Luhmannian model in which the legal system’s features are self-contained and based on operational closure defined by the legal/illegal dichotomy, Neves argues that peripheral countries fail to preserve the autonomy of their legal system because the latter is invaded by other social codes. Thus, guiding behavioral principles such as

⁸² See Marcelo Neves, “Et si le deuxième chameau venait à manquer ?”.

power/no power or friend/enemy end up colonizing the legal sphere, preventing it from functioning as an autonomous subsystem and destroying the internal mechanisms through which the legal system recreates itself. The result is social practice that promotes the constant intervention in the legal process by elements external to the self-referenced system, capable of usurping the space for legality and constitutional principles.

According to Neves, the constant incursion of private interests in the legal system leads to legal inconsistency. It destroys the coherence between the legal rule and the ruling and precludes the consolidation of the legal subsystem, which constantly is being undermined by the intrusion of external forces, particularly the power of money and politics. This fuels the chaotic production of norms and regulations not contemplated in legal texts. In this context, the constitution's role as a domesticator of politics is rendered ineffective and it becomes instead a symbolic system, devoid of legal effect and used at random to legitimize ad hoc measures. Social interaction in the post-traditional world in peripheral countries, therefore, is condemned to a state of extreme unpredictability, since it exists in a context of "unchecked legal insecurity."⁸³

Ironically, Neves' work alludes to a posthumous publication by Luhmann,⁸⁴ in which the latter acknowledges a growing trend in advanced countries to sabotage the codes underlying social subsystems, in particular the legal subsystem. The increasingly pervasive invasion of the legal system by the economic power elite is not, therefore, a phenomenon confined to peripheral countries, nor is the trend toward privatization of security systems transferring the use of force to private hands outside of law enforcement frameworks.

Taken literally, the image of a blocked Judiciary, as Marcelo Neves perceives it, confronts us with the specter of chaotic societies incapable of functioning in the capitalist market. Yet this is not the case. In peripheral societies—and taking into account the enormous variations among national situations—social subsystems

⁸³ Ibid, p. 118.

⁸⁴ See Niklas Luhmann, "La restitución de douzième chameau".

continue to function, despite their fragility and defects. What we are seeing, then, are gradations rather than black and white situations that idealize one side while demonizing the other. In any event, a historical analysis would reveal in any country a state of continual invasion of each subsystem by the others, and reactions against such invasions,⁸⁵ Italy, for instance, offers a revealing example of a political system characterized by corrupt political parties that was challenged by Operation Clean Hands, which in turn was the target of a backlash from the affected groups.

Notes on Latin American Individualism

State protection evolved very differently in Latin America. In a general sense, citizen integration revolved around the rural-urban dichotomy. Up until the 1960s, rural populations across most of the continent remained almost untouched by public services, with little or no access to the institutions of civil and political citizenship. In urban areas, the protection of the State usually reflected a divide between social sectors which enjoyed access to public services and population segments largely excluded from the distribution of State-channeled wealth.

Access to government-distributed goods, in general, was guided strongly by corporatist interest of the middle classes and organized labor, while the dominant classes, including many politicians regarded the State as booty, as spoils ripe for the plundering.⁸⁶ As the State gradually became more modernized, middle class sectors permeated the government apparatus and enterprises, acquiring a series of social rights that enabled them to enjoy access to public goods and privileges not available to the rest of the population, absorbing a large portion of the national budget social expenditures. Finally, salaried sectors, particularly those situated in large corporations, were integrated into public policies either directly, through social benefits, or indirectly, through labor agreements that accorded them access to the services offered by government enterprises. The rest of the urban and rural population remained excluded from the resources administered by the State.

⁸⁵ As Albert Hirschman shows in *Saída, voz e lealdade*.

⁸⁶ See Bernardo Sorj, *A nova sociedade brasileira*.

This vision, however, should be examined in a more nuanced way. For instance, countries such as Argentina, Uruguay, Costa Rica, and to a lesser degree, Chile—which were made up mainly of European immigrants and had no history of slavery or of subjecting the rural indigenous populations to servitude—became urbanized early on, integrated much of the population into a formal wage structure, and ensured access to urban public services and basic education, to a large part of the population. By the mid 20th century, the social structure in those countries featured a solid middle class and lower levels of social inequality relative to the rest of the continent.

The expansion of the State in contemporary Latin America was a two-tiered process: first, it acquired more tools for optimizing economic management—modernizing some of the government apparatus, expanding its role in production, developing infrastructure and educational, scientific, and technological systems. At the same time, it remained enormously permeable to internal colonization by dominant groups.⁸⁷

In recent decades, the growing democratization of culture and social expectations, economic transformations, the waning social and political influence of the industrial working class, and pressures from the international financial system in the context of anti-inflationary policies promoting greater fiscal austerity, caused the traditional model of State colonization by dominant groups and the middle classes to implode.

The dissolution of longstanding ties based on patronage and the demise of traditional forms of domination in modern urban Latin American societies, does not necessarily imply the emergence of a type of individualism imbued with the values of respect for the public interest or for personal merit and a work ethic, as classical modernization theories assumed. Put another way, the *vacuum* left by the disappearance of the old traditional loyalties and hierarchical systems does not automatically engender a liberal society. While it may be possible to detect many of

⁸⁷ Ibid, Ch. 1.

the traits described in sociological literature from the central countries in the predominant form of Latin American individualism, the latter also has specific qualities shaped by the local cultural and institutional context. Below, in summary form and using the Brazilian situation as a particular point of reference, we describe some of the specific features of individualization processes on the continent:

1) The first characteristic is hyper-reflexivity. While in central countries reflexivity and, by extension, uncertainty in social relations is played out in the sphere of intersubjective private or market-related behaviors, Latin American individuals must act under an assumption of total uncertainty on the rules of the game, even when interacting with government institutions. In other words, the world of public agencies is part and parcel of the sphere of reflexive action and uncertainty. For example, when a police officer imposes a fine, the citizen can decide whether to pay it or to attempt a bribe; when a tax is levied, he or she must evaluate whether it is more worthwhile to pay the tax or tip the taxman; a citizen who is robbed must evaluate whether or not to report the crime to the police, as this might attract the attention of crooks or kidnappers connected to the “public security forces;” he or she likewise must ponder whether it is worth pursuing a legal process, considering that the other party might try to circumvent the legal system through economic might; finally, in economic pursuits, the individual can decide whether or not to circumvent government controls and evaluates each government regulation or law mindful of the possibility of evading the legal norm.⁸⁸

2) The second characteristic is that the new mechanisms of anonymous domination, forms of domination tied to personal power persist, which means that powerful groups (a generic concept which, depending on the context, may include the police or tax inspector) still have the potential to impose their will without regard for legalities, while low income sectors must accept situations of submission to authority and loss of legal rights. Both foment a lack of accountability: in the case of the dominant group, by creating incentives for impunity, and in that of the dominated

⁸⁸ Obviously peripheral countries do not hold a monopoly on this situation. In the central countries, universal procedures are never totally respected across the board; in particular, dominant groups never fail to wield their influence to obtain greater impunity for their actions.

group, by stimulating feelings of victimhood. If it is true that social inequality informs and transforms individualization processes in all modern societies, this is more easily discerned in peripheral countries where social inequality is extreme. A paradigmatic case is found, for example, in the presence of the domestic employee in family relations, a presence that reorganizes relative positions within the family and engenders relationships of exploitation and submission among women.⁸⁹

The fact that most Latin American feminists usually have not included in their theoretical constructs and research, the central role of domestic work in the formation of gender and family relations illustrates the limits associated with transferring theoretical frameworks and struggles for rights developed in central countries.

3) In Latin America, the individualistic “presentism” of the modern condition, in other words, the search for instant gratification and the absence of a sense of history as a collective construct conferring a shared past and future, does not eliminate a sense of collective “futurism,” the hope that “something” or “someone” will provide a solution to society’s problems. This is evidenced in the hypertrophy of expectations deposited in the political world, in the constant danger of institutional excess given the social expectations placed in a “savior of the country” and in the feeling that the nation is re-founded following each election.⁹⁰

4) There is a growing disjuncture between the international ideal standards and the national reality. As we have seen, Latin American elites, and in recent decades, the middle classes, experienced their national reality through the mirror of, and in comparison to, the central countries or, in the leftist tradition, communist

⁸⁹ This obviously is not to say that men do not benefit equally from the services of the domestic worker. However, as a contemporary indicator of the increasing individualization of low income sectors and the changing sexual habits of the middle classes, we need only point out, in the Brazilian case, the virtual disappearance of the traditional practice involving the sexual initiation of adolescents with domestic workers.

⁹⁰ According to Giorgio Alberti, the salient feature of Latin American politics, which he terms “movimientismo” is found in the unrealistic expectations deposited in politics, which revolve more around individual than collective interests. See “Democracy by Default; Economic Crisis, “Movimientismo” and Social Anomie in Latin America.”

countries. The globalization of communications—through widespread access to radio and television—democratized expectations and induced a prevailing sense of relative deprivation among virtually the entire population as one’s personal or national reality was contrasted with that of more advanced countries. We live in an age of “reflexive citizenship”, in which each individual looks at the relative position of his/her country in the different world scales of wealth, democracy, human development, etc.

5) Finally, because social subsystems have limited autonomy, personal networks become critical when it comes time to mobilize support against situations of institutional arbitrariness. Lasting personal relationships of dependence solidified around economic inequality and a sense of belonging to a society *by default*, in other words, of being caught up together in a tangled web of problems (violence, inequality, and corruption) reduces social alienation in that it discourages the tendency toward isolation between individuals, society, and culture, so characteristic of modern societies. Put another way, the powerful interpenetration of social subsystems, together with a sense of societal “chaos,” have had an effect on limiting the autonomization of individuals, and, at the same time diminishing their immersion in a tragic personal subjectivity, isolated from the rest of the world.⁹¹

⁹¹ Perhaps it is no coincidence that the feeling of tragic individualization in Latin American literature is most prominent in the work of Juan Carlos Onetti, an author whose country of origin, Uruguay, presents socio-cultural characteristics that closely resembles those of central countries.