1

Constitutional Justice in the Americas at the Turn of the Millennium

At the end of the twentieth and the beginning of the twenty-first century, constitutions and constitutional courts have become much more central to the politics of the Global South, in some instances transforming the very nature and practice of democracy. A scant few of the constitutional justice systems in the Global South have followed a classical Anglo-European model, in which they guarantee the basic framework for political competition and public decision-making and protect a limited set of negative rights. Many more systems of constitutional justice in the Global South, however, have been designed to play much more expansive roles, for good or ill. Some have the potential to become hotly contested spaces within which to pursue competing visions of the basic purposes of the state and the common good. Groups disadvantaged in ordinary politics can use these systems as an alternative political space in which to protect their basic interests and secure affirmative goals, such as the expansion of public health care or access to education, protection of the environment, and the like. Still other systems are designed to be powerful tools that the Ruling Coalition – the set of actors who are empowered to make binding decisions in ordinary politics, and who are typically the product of the most recent elections – can use to dismantle the existing normative order and build a new one. These systems can serve to quash dissent more than to incorporate it. The role of constitutional justice has fundamentally changed in most countries of the Global South over the last several decades.

It is not just that the context has changed; the increasing centrality of constitutional rights and constitutional courts in politics is based in part on the considerable expansion, over the last forty or fifty years, of the constitutional provisions that define the sphere of constitutional justice. A cursory review of the texts reveals the extent to which constitution makers have added to the list of rights included in constitutions and made these rights available for judicial enforcement, thus expanding the subjects of constitutional concern. Moreover, they have created new constitutional courts and tinkered with existing high courts, often with the avowed goal of providing stronger

judicial enforcement of rights in areas that used to be firmly considered the province of the legislature or the market. Housing, education, health care, the environment, and social provision are only a few of the issues that have come under the aegis of constitutional courts in recent decades. Constitution writers appear to have consciously crafted these newly ambitious systems of constitutional justice,[1] transforming the relationship between the constitution and ordinary politics in the process.

We can trace the roles that various courts have adopted back to their constitutional DNA. Thus, for example, the Venezuelan 1999 Constitution carries in it the seeds of its constitutional court's complicity with the ruling party in dismantling the existing normative framework and suppressing the opposition. Colombia's 1991 constitution sets the foundation for that Constitutional Court's pervasive influence on the politics of social provision. And Pinochet's constitution in Chile successfully crafted a court that was impervious to ordinary politics even after the transition to democracy, and was committed to protecting a conservative project.

This transformation of constitutional justice, ultimately setting the stage for the varied roles that constitutional courts have adopted, has run far ahead of scholars' attempts to grapple with the phenomenon. Our existing conceptual and theoretical tools struggle to describe and compare, let alone explain and evaluate, these changes in global constitutionalism. The normative work on the new constitutionalism of the Global South, which ranges from questioning whether constitutions ought to concern themselves with the social and economic rights that have achieved such prominence, to celebration and hope that mechanisms are emerging for the effective enforcement of long-neglected rights and claims, is often based on unrealistic assumptions about how the system works. The empirical work, in turn, more often focuses on the causes and effects of greater judicial protagonism than on the constitutional texts that contain the DNA of the new constitutionalism of the Global South. We feel there has been insufficient attention to developing conceptual tools adequate to the systematic study of constitutional systems that appear designed to play such varied and important roles in a country's politics. Moreover, we feel that we need to better understand the politics behind the design of the various systems.

In this book, therefore, we turn to a foundational question that has not been fully explored to date. We offer a unifying political account of the origins of the different models of constitutional justice that have emerged in Latin America since the 1970s. We want to know why designers choose to construct different systems of constitutional justice. Some opt for autonomous models that have a relatively limited scope of authority; others craft more ambitious models that appear poised

[1] We refer throughout to systems of constitutional justice – that is, the full package of structural and substantive provisions that define the constitutional court, its attributes, and the panoply of rights it can enforce – rather than to constitutional courts alone. A focus on one aspect or another of the system – say particular rights, or a particular court structure – misses the ways in which these various aspects are designed to work together to produce constitutional justice.

to reshape the politics of nearly every issue in a country, whether at the behest of a quasi-revolutionary Ruling Coalition, or in response to the push and pull of a more inclusive constitutional politics.

More specifically, we will show that the systems of constitutional justice in the region vary significantly in terms of their autonomy from the Ruling Coalition. Moreover, constitutional justice systems vary substantially in terms of the scope of their authority. Some are entrusted with full authority to decide some of the most crucial political questions of the day, on behalf of anyone who might apply, while others have a much more limited agenda, or are encumbered by provisions that sharply restrict applicants' access to the court, or are hamstrung by a lack of decisive capacity and authority. It is the combination of these dimensions – authority and autonomy – that determines the role of the constitutional justice system in the politics of a country. Our goal is to explain both why some systems have more autonomy than others, and why some systems seem to have constitutionalized vast swaths of policy that, in other systems, are matters for ordinary politics.

The project is empirical and focused on constitutional texts, but in the course of providing an account of the political origins of these new constitutional justice systems, we challenge some of the basic assumptions that underlie both normative and empirical explorations of the new constitutionalization of politics. In particular, we reconceptualize and unpack the notion of judicial independence, which we label autonomy. Moreover, we show how, at least in the imagination of constitutional designers, systems of constitutional justice are simultaneously political spaces and sites of contestation that follow a very distinct constitutional logic. As a consequence, courts are at once creatures of a country's contemporary politics and (potentially) distinct political actors within the political system.

The explanations that have been offered for why particular constitutions read the way they do vary considerably. Some scholars believe that countries draw from international sources in designing their constitutions. In this view, constitutions are produced largely through copying specific foreign (or previous domestic) models, or are written to express global ideological trends like liberalism or, more recently, neoliberalism. Others believe that constitutions reflect domestic ideological views, and find constitutions to be akin to party manifestos, or a relatively straightforward byproduct of increasing democratization. Still others have suggested that particular constitutional features, such as judicial review or the allocation of powers across the executive and legislature, respond to the power dynamics of the moment of design. We find ourselves mainly in this last camp, with some important differences driven by our acknowledgment that courts are doing much more than our theories have traditionally assumed, and that they are more influenced by contemporary politics than those same theories have assumed.

Our argument emphasizes the joint roles of ideology and the distribution of power in the constituent assembly, in producing constitutional justice systems with greater or lesser authority, and more or less autonomy, as we preview in the next section. The driving motivation for designers of systems of constitutional justice is to craft

political spaces that will reflect their interests, serve their purposes, and secure a role for their successors in governing in the future. Which issues designers place in that space depends both on their ideological goals and on whether they expect that they will need constitutional help if they are to influence ordinary politics in the future. Similarly, designers will craft more pluralistic and inclusive mechanisms to govern the system of constitutional justice, to the extent they are themselves a more pluralistic and inclusive coalition. The international influences, in our view, are at best secondary, and cannot explain why particular countries choose the models they do, even though they provide a ready source of alternative models. Designers certainly look abroad, but they pick and choose among available options to suit their governance goals.

1.1. RECENT TRENDS IN THE DESIGN OF CONSTITUTIONAL JUSTICE SYSTEMS

In its system of constitutional justice, a country's foundational text often specifies the ends of government that are required, permissible, or forbidden, and establishes a framework within which to pursue those ends. Some – perhaps most – of the policy choices involved in governing are consigned to the sphere of ordinary politics. These choices are entrusted to the current Ruling Coalition with very little constitutional supervision or constraint. The decision to use a more or less progressive or regressive taxing system, or to raise the minimum wage, for instance, is understood as a matter for ordinary politics. Other choices are explicitly subjected to constitutional oversight and thus consigned to the sphere of constitutional politics – such as the procedures that must be followed before searching someone's home or imprisoning a criminal suspect. Abstract discussions of constitutionalism sometimes sound as if the distinctions between matters for constitutional justice and matters for ordinary politics are universally true for all constitutions. The traditional prescription, for instance, was that constitutions should always be short and focus on structures and procedures, not substantive rights. But different constitutions have more or less ambitious constitutional justice projects, and many constitutions of the Global South have, over the last half century, both opted for a more expansive sphere of constitutional justice and placed constitutional courts at the center of the framework for pursuing that justice.

A simple Venn diagram helps visualize the change in the constitutional texts of the region. As seen in Figure 1.1a,[2] we can depict three distinct sets of issues as subsets

[2] Figure 1.1 is inspired by Larry Sager's (2004) similar depiction of the normative relationship between adjudicated justice (the inner circle), constitutional essentials (the middle circle), and the full scope of political justice (the outer circle). His point is that not all issues of political justice need to be the subject of constitutional concern and that not all subjects of constitutional concern need to be finally decided by a court. In our case, Figure 1.1 is not a normative argument, but simply a positivistic description of the ambition of different constitutional texts, and how much they purport to subject to constitutional adjudication.

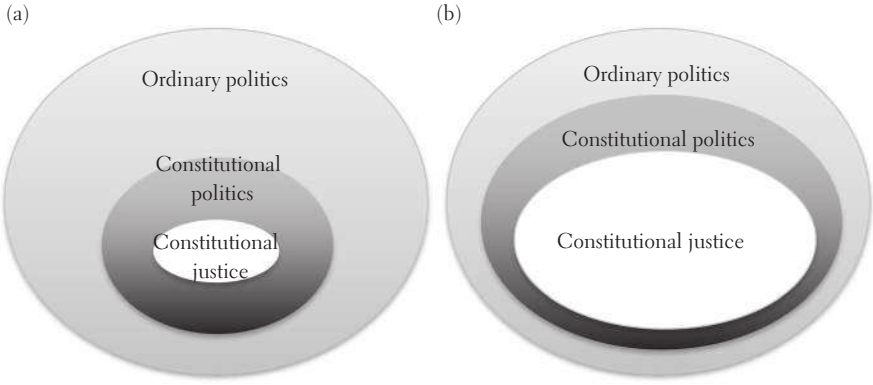

FIGURE 1.1. Constitutional justice in (a) classic and (b) new Global South constitutionalism

of each other: the possible ends of government as pursued in ordinary politics; the constitutionally favored ends of government, which are supported by constitutional arguments but lack judicial enforcement; and the sphere of constitutional justice, in which there is the potential for judicial intervention to protect constitutional principles. In ordinary politics, the Ruling Coalition can pursue all the possible ends of government that are neither required nor forbidden by the constitution, without much allusion to constitutional principles. But some ends are constitutionally favored, without being subject to enforcement in a system of constitutional justice. These constitutionally inflected issues are included in the middle sphere, the sphere of constitutional politics. The innermost sphere is reserved for those issues that are expressly placed under judicial supervision. The nested sets signal that issues do not disappear from ordinary politics simply because they have been constitutionalized. Rather, they are subject to multiple decision-makers and decision-making structures, as well as to the standards and principles of constitutional justice.

The conventional image is that at least until the second half of the last century, Latin America's constitutions, and perhaps those of most other countries of the Global South outside the Communist Bloc, followed a classic, liberal, separation of powers model, with a more negative-rights, procedural vision of constitutional justice, as depicted in Figure 1.1a.

Meanwhile, the literature on the new constitutionalism of the Global South suggests that – on average, around the globe – countries are dramatically expanding the sphere of constitutional justice, to produce the high-justiciability, social rights-oriented, constitutionalism of the Global South represented in Figure 1.1b (Bonilla Maldonado 2013; Brinks et al. 2015).

But this linear narrative is only partially true, especially if the implication is that it simply responds to global trends. In the first place, the more historical analysis of our case studies shows that Latin America's early social constitutionalism was

characterized by an expanded sphere of constitutional politics, while the sphere of constitutional justice was both severely restricted and undermined by the lack of autonomy. So Latin America, at least, experimented with an intermediate model that boasted an expanded sphere of constitutional politics. The sphere of constitutional politics contracted, where it did, in response to the wave of coups and Right-wing dictatorships that swept the region in the middle of the last century. Secondly, although by the end of the last century and beginning of this one we do find a vastly expanded sphere of constitutional justice, there is still considerable variation in the scope of constitutional justice across countries. Just as importantly, this variation in the scope of constitutional justice is coupled with varying degrees of autonomy. Finally, we can show that these models are not simply the product of a global fashion, but rather can be traced back to power dynamics and particular political projects at constitutional moments.

At least as early as 1917, the Mexican Constitution inaugurated a concern for social constitutionalism that sought to expand the sphere of constitutional politics beyond civil and political rights to include economic and social rights, such as labor rights and the right to land. Many of the region's constitutions followed its lead, as Gargarella (2013) has chronicled. But most of these experiments in social constitutionalism ended quickly, often in brutal military regimes, and by the 1970s the original experiments had been replaced by more restrictive documents. The last four or five decades, therefore, truly do mark an expansion of the constitutional ends of government. If we measure by what is in the text, many countries of the Global South have settled on a much more inclusive set of constitutionally favored ends than they had before – and certainly more so than most constitutions in the Global North (see, e.g., Brinks and Forbath 2011, 2014; Bilchitz 2013; Brinks et al. 2015). The 1988 Brazilian Constitution, for example, was initially much criticized for its excessive regulation of ordinary politics, and subsequent constitutions have not become shorter or less detailed.

More to the point for our project, in the last four decades or so, many constitutions have also expanded the sphere of constitutional justice. They have explicitly subjected more of those constitutionally favored ends to oversight by constitutional courts (and by other institutions that are not the subject of this book, including ombuds organizations and prosecutors with ample constitutional agendas),[3] turning them justiciable to one degree or another. If there is one thing that is truly new about the new constitutionalism of the Global South it is this concern with the institutional framework for making claims under the new, more robust bills of rights. In other words, not only are we more likely now to find constitutions that establish a larger sphere of constitutional politics, but

[3] Political scientists noticed these new mechanisms of horizontal accountability long before they began paying attention to courts (Mainwaring and Welna 2003; O'Donnell 2003).

we are also more likely to find constitutions that expand the sphere of constitutional justice (see, e.g., Brinks et al. 2015).

As the concentric circles suggest, expanding the spheres of constitutional concern implies layering a new set of constraints on an increasingly large subset of our politics.[4] The effect is not so much to remove the issues from politics but to – at most – narrow the range of possible policy choices and outcomes that are available to the Ruling Coalition by subjecting them to constitutional arguments and procedures. In the middle sphere, constitution-makers are presumably counting on the persuasive and mobilization effects of declaring constitutional goals, but ultimately entrusting the Ruling Coalition to pursue these ends. This was, by and large, the strategy followed by Latin America's original social constitutionalism. Mexico 1917, Argentina 1949, Bolivia 1938, and Guatemala 1956[5] all pursue social constitutionalism, but do not significantly empower the judiciary to enforce all constitutional ends. The doctrine of the social function of property, for instance, which is an important component of this social constitutionalism, was understood to empower the Ruling Coalition, not the courts, to redistribute land. Indeed, opponents feared that it shrank the sphere of constitutional justice, weakening the ability of courts to protect property rights.

By the 1980s and 1990s, however, Latin American designers were no longer willing to entrust the Ruling Coalition with these goals. They were all too aware of the critique that mere words on paper were insufficient to motivate the Ruling Coalition, and they focused on strengthening the mechanisms that might turn parchment into action. They turned, therefore, to expanding the sphere of constitutional justice: constitutional courts and other legal actors became important players in the long-term governance of the issues included in the innermost circle. Our evidence shows, moreover, that neither were Latin American constitution makers prepared to trust in a mechanistic model of adjudication, in which it is sufficient to write down the goals and trust to the discipline of law to keep judges to those goals. They paid close attention to the mechanisms that tie these systems of constitutional justice to their political context, and our theories should do the same if our goal is to present a realistic and empirically sustainable account of the political calculations that lead to the creation of these more ambitious systems of constitutional justice, in all their variety.

[4] Gauri and Brinks (2008: 4), for example, define the "legalization of politics" as "the extent to which courts and lawyers . . . become relevant actors, and the language and categories of law and rights become relevant concepts, in the design and implementation of public policy." They go on to say (p. 5), "courts more often add a relevant actor and relevant considerations than seize decision making power from other actors."

[5] For convenience, we use *countryname year* to identify constitutional texts and amendments – thus, Mexico 1917 is Mexico's 1917 Constitution, and Argentina 1994 is Argentina's 1853 Constitution as modified by the 1994 amendments.

1.2. CONSTITUTIONAL GOVERNANCE THEORY IN A NUTSHELL

Why, then, did these apparently new models emerge now? Although there are recognizable trends, the new constitutions are not converging as much as this narrative might suggest. It seems clear, therefore, that constitution-makers were often trying to accomplish very disparate ends with their new systems of constitutional justice. Critics of expanded constitutionalism tend to assume that drafters were uniformly surrendering flexibility in governing to unaccountable judges, withdrawing these issues from politics to put them in an apolitical legal realm. Others have argued that they were, in a relatively unsophisticated, or at least apolitical, way merely following global fads or technocratic prescriptions, whether neoliberal or social-democratic. Even the very brief overview we have given so far of the region's constitutional history, however, suggests that this process was the result of a great deal of struggle between the Left and the Right, motivated by competing ideologies and based on different economic theories.

Our argument, therefore, focuses on the ways in which the politics of the constitutional moment – whether in writing a new constitution or amending an existing one – bring these ideologies into constitutional texts. Using qualitative and quantitative data, we show that constitutional designers did not imagine that they would succeed in locking issues away from politics, in an apolitical sphere ruled by lawyers and judges, disciplined by principles and juridical logic alone. Instead, they sought to build dynamic systems of constitutional governance that would evolve the full meaning and concrete implications of the principles they were laying down, in response to more or less broad coalitions of actors who would have influence in the sphere of constitutional justice. This coalition – the set of actors whose consent is required to exercise control over the system of constitutional justice – is what we call the Constitutional Governance Coalition.

Our argument has several distinct components. First, we argue that designers understand constitutional justice to respond, in very consequential ways, to contemporary politics, rather than exclusively to the founding moment or the foundational text. They understand, for the most part, the indeterminate and evolving nature of constitutional meaning. As a result, designers are not designing systems that are meant to mechanically enforce a set of commitments cast in stone at the constitutional moment. They are, rather, designing systems that they understand will actively govern the sphere of constitutional justice into the future. They build in levers of control, through mechanisms of appointment and removal, through term limits and reappointment clauses, through standing provisions and decision rules. Their goal, whether they ultimately succeed or not, is to extend their influence into the future by giving their successors in interest a role in controlling the system of constitutional justice long after the constituent moment is past.

For this reason, the power relations and ideological struggles of the founding moment translate directly into power relations in the post-constituent sphere of

constitutional justice. Different systems empower very different coalitions of control. Sometimes – when the expected Ruling Coalition dominates the constitution-making process – the Constitutional Governance Coalition is indistinct from the Ruling Coalition, and the courts are set up primarily to advance and legitimize the interests of the government. At other times – when the expected Ruling Coalition is a relatively minor partner in the design process – the system responds to a broadly inclusive or minoritarian oppositional coalition of control, and is established mostly to check the Ruling Coalition, should it seek to shift from the status quo on matters subject to constitutional justice. The system of constitutional justice is not unaccountable; it is simply accountable to a coalition that is conceptually (if not always empirically) distinct from the Ruling Coalition.

Second, we argue that constitutional designers are primarily interested in governing to advance their political goals, unconstrained and through ordinary politics whenever possible, and through constitutional justice otherwise. We often imagine that constitutions are somewhat like manifestos, an opportunity to declare all those things that are most important to the designers or that are on some international list of "must-have" provisions. But if we are right thus far, then constitutional justice defines those issues on which the Ruling Coalition must share governance with a Constitutional Governance Coalition. And, for that reason, we should expect a self-confident Ruling Coalition to be reluctant to put everything that it most highly values into that sphere. Indeed, what we find, despite the length of many recent constitutions, is that designers, by and large, put into the sphere of constitutional justice only those issues that cannot be entrusted to the Ruling Coalition because of the country's recent history and expected post-constituent politics. As a result, when the expected Ruling Coalition dominates the design coalition, it exposes less of its agenda to the scrutiny of the future Constitutional Governance Coalition, retaining more of it for ordinary politics and its own unconstrained choices and strategies – the innermost sphere shrinks, even if the middle sphere might remain quite expansive.

Concretely, this means designers will place into the spheres of constitutional justice not necessarily those elements of their political agenda on which there is full consensus, but rather those issues that they feel they cannot entrust to the sole authority of the Ruling Coalition. A strong Left party, for example, can pursue a more statist agenda without resorting to constitutional justice. But a weak Left party that finds leverage in the constitutional moment can put most of its agenda into the constitution in order to pursue it later through the less majoritarian mechanisms of the constitutional justice system. A less statist Right party, on the other hand, does not have much to constitutionalize beyond property and personal autonomy rights, so it may not seek to expand the sphere of constitutional justice, regardless of its leverage at the constitutional moment.

Constitutions, at least insofar as their systems of constitutional justice are concerned, then, should be read not as manifestos, but rather as lists of the hopes and fears of designers that cannot be entrusted to the hazards of ordinary politics.

It is undoubtedly true that constitutions express values (Galligan and Versteeg 2013: 8–18), but designers are far more likely to include those values and to translate them into structures that affect power if they feel they are threatened. We do not completely disagree that constitutions can be read as mission statements (King 2013a), but, from our reading of the evidence, the key provisions of constitutional justice are not so much statements of what the government is going to do or not do, as they are statements of what the government will most likely need extra prodding, supervision, or help to do or not do. Broad and bold declarations in preambles may contribute to the scope of constitutional politics, but the sphere of constitutional justice reflects the threatened and uncertain goals of the constituents, not (necessarily) their most basic principles. The growth in constitutional justice issues, then, is primarily attributable to the increasing pluralism of the design coalitions, and not to global fashions.

The combination of these design choices – more or less supermajoritarian coalitions of constitutional governance that contribute to the autonomy of the system, and more or less expansive spheres of constitutional justice that contribute to the scope of its authority – configures the new systems of constitutional justice that have emerged in Latin America and elsewhere in the Global South. Perhaps most basically, our research shows that these choices are the result of relatively well-considered decisions in response to domestic political conditions. To account for the origins of the operational elements of the constitution, we cannot look to the logic of global fads, institutional inertia, blind faith in rights, or bombastic declarations of political identity. Those motivations tell us much less about the way constitutions are written than does the logic of self-interested pursuit of power in service of ideological goals and interest protection. It is this logic of constitutional governance that dominates the design of the new systems of constitutional justice emerging in the Global South.

Two recent books on Latin American constitutionalism cover similar empirical material, but are actually quite distinct. Negretto (2013) has explored in great detail the way that Latin American constitutions structure the space of ordinary politics. His theoretical approach is similar to ours, focusing on struggles over the distributive effects of constitutional arrangements, but the dependent variable is very different. He explores how decision-making is organized in the largest of the three circles and why countries differ in this regard, while we look at the innermost circle. Gargarella (2013), meanwhile, explores the different conceptions of constitutionally favored ends that are present in Latin American constitutionalism, and how the middle circle has been expanding. His focus is on the ideas that construct both the middle and inner circles, but the "engine room" provisions he addresses – primarily those provisions that define the balance of power between executives and legislatures – remain mostly in the realm of ordinary politics. Our focus, on the other hand, is on how the politics of constitutional design structures the innermost circle – the sphere of constitutional justice – in the constitutions of Latin America since the mid-1970s.