Relaxed remedies and standing are generally relaxed in constitutional matters. The specialized tribunal, where the constitutional adjudication authority is required to follow the European practice of constitutional law, is an important element of the constitutional practice in Latin America.

Constitutions are generally characterized by a detailed set of rights and freedoms, with some limitations. These include the right to education, the right to property, and the right to freedom of speech. The role of the Constitutional Court has been to interpret and apply these rights and freedoms in a way that is consistent with the principles of constitutional democracy.

Moreover, the Constitutional Court has been instrumental in protecting the rights of the individual, including the right to privacy, the right to free association, and the right to freedom of movement.

Constitutional law in Latin America has evolved significantly over the years, with the adoption of new constitutions following democratic transitions. These new constitutions have provided a framework for the protection of human rights, the rule of law, and the separation of powers.

By Robert S. Garner (Duquesne University)
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constitutional chambers have been established within the supreme courts of El Salvador (1983), Costa Rica (1989), and Venezuela (1999). Mexico’s 1994 reforms have made the country’s Supreme Court a constitutional tribunal in fact, though not in name. Similarly, since the adoption of the 1988 Constitution, Brazil’s highest court, the Supreme Federal Tribunal, has been given exclusive jurisdiction over so much constitutional litigation that it too may be considered a constitutional court. With the exceptions of Argentina (whose system of judicial review, like that of the United States, is diffuse) and Cuba (which has no judicial review), every Latin American country has concentrated some or all constitutional jurisdiction in a single court or chamber. Almost everywhere these reforms have been accompanied by an increase in the amount of constitutional litigation and in the number of declarations of unconstitutionality, and in some countries—most notably Colombia and Costa Rica—the decisions have provoked lively ongoing debates over alleged “judicial activism.”

Closely related to these adjudicatory reforms has been the tendency, almost everywhere, to increase the number of constitutional guarantees, particularly in social and economic matters, again in the European manner—guarantees of health, social security, gainful employment, adequate pensions, good education, adequate housing, and a clean environment have been added or embellished in recent years. The best example of this, no doubt, is the Brazilian Constitution of 1988.

Another phenomenon, again related to the above, is the trend toward the incorporation of international law into constitutional law. Argentina’s 1994 constitutional reforms expressly give constitutional status to ten international human rights conventions, and provide for a similar elevation of other treaties in the future. Brazil’s Constitution does much the same. The jurisprudence of Costa Rica’s Constitutional Chamber has given various international conventions, as interpreted by international tribunals, supra-constitutional status (leading to a declaration, in one case, that a provision of the country’s Constitution was itself unconstitutional because it violated an international convention).

Several countries—most notably Brazil and Argentina—have engaged in brief flirtations with European-style parliamentarism. In 1993, in response to the mandate of the Constitution, Brazil held a referendum on whether the country should adopt a parliamentary form of government. The parliamentary option was soundly defeated. Argentina’s 1994 constitutional reforms included the creation of the position of “Chief of Cabinet,” a presidential appointee freely removable by the Congress. This innovation was widely advertised as a step toward legislative control over the executive; however, it appears to have had no appreciable effect, political or juridical.

While it is clear that in most Latin American countries, constitutions are now better-respected and constitutionalism is taken more seriously than ever before, there is in some places a disturbing counter-trend. A number of countries have been moving away from constitutional government and toward what might best be described as pseudo-populist dictatorship. Interestingly, these anti-constitutional movements are, in general, proceeding under the guise of “constitutional reform.” The most obvious example of this phenomenon is, of course, Venezuela, where the judiciary has been thoroughly subordinated to the presidency, independent bar associations have been subjected to persecution and government takeovers, opposition media are being silenced, a Marxist curriculum has been imposed on all elementary schools, and private property is being confiscated with increasing frequency. In Bolivia, the executive, through blatant abuse of the criminal process, has attacked non-subservient individuals and institutions, including the country’s Supreme Tribunal, effectively destroying it in 2007. Since then a new (2009) Constitution, ostensibly more “popular” than its predecessor, is marginalizing traditional legal concepts and institutions and replacing them with more-easily-manipulated mass organizations.

In Honduras, in 2009, an attempt by the then-president to perpetuate himself in office in defiance of the Constitution was, fortunately, defeated by the legislative and judicial branches, which followed constitutional procedures in removing the president, and thus strengthened the rule of law in that country. At this writing, an attempt by Nicaragua’s president to retain power beyond the constitutionally-imposed term limit has been ongoing for some months, and the outcome of that effort is yet uncertain. No mention need be made of the Cuban dictatorship, except to note that it has been a conspicuous participant in the anti-constitutional movements that are underway elsewhere in the hemisphere.

The constitutional picture in Latin America is mixed, but, on balance, the situation is positive. In most countries of the region, constitutional norms and principles are increasingly likely to be taken seriously by those in and out of power, and the judiciary is more likely to be independent of the political branches of government (and of other improper influences) than ever before. There is thus reason to be hopeful, but not wildly optimistic. Dictatorships are being consolidated, or threatened, in some countries, and corruption—though less pervasive than in the past—continues to impede the administration of justice in many places.

As the Honduran and Nicaraguan situations illustrate, the events of the next few years are likely to determine whether constitutionalism will grow and thrive in Latin America.