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DOSSIER: FIGHT AGAINST CORRUPTION: STATE OF THE ART AND ANALYSIS PERSPECTIVES

The Lava Jato investigation and the political instability in Latin America: toward a new pattern of the parliamentary control over the Presidents?

A investigação Lava Jato e a instabilidade política na América Latina: rumo a um novo padrão de controle parlamentar sobre os presidentes?

La investigación "Car Wash" y la inestabilidad política en América Latina: ¿hacia un nuevo patrón de control parlamentario sobre los presidentes?

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Abstract: Anti-corruption investigations have always been one of the main causes of political crises in Latin America. However, the last episodes of presidential removal have shown a new activism of the parliaments, which have re-interpreted the constitutional provisions on impeachment proceedings in order to legitimize a change in the governmental agenda. This practice affects the balance between the two representative powers, as it fails to observe the limits of the presidential accountability and paves the way to new instabilities.

Keywords: Coalitional presidentialism. Presidential accountability. Anti-corruption investigations. Lava Jato. Impeachment.

Resumo: As investigações anticorrupção sempre foram uma das principais causas de crises políticas na América Latina. No entanto, os últimos episódios de destituições de presidentes mostraram um novo ativismo dos parlamentos, que reinterpretaram as disposições constitucionais sobre processos de *impeachment*, a fim de legitimar uma mudança na agenda governamental. Essa prática afeta o equilíbrio entre os dois poderes representativos, pois falha em observar os limites da responsabilidade presidencial e abre caminho para novas instabilidades.

Palavras-chave: Presidencialismo de coalizão. Accountability presidencial. Investigações anti-corrupção. Lava Jato. Impeachment.

Resumen: Las investigaciones anticorrupción siempre han sido una de las principales causas de crisis políticas en América Latina. Sin embargo, los últimos episodios de destitución presidencial han mostrado un nuevo activismo de los parlamentos, que han reinterpretado las disposiciones constitucionales sobre los procedimientos de juicio político para legitimar un cambio en la agenda gubernamental. Esta práctica afecta el equilibrio entre los dos poderes representativos, ya que no cumple con los límites de la responsabilidad presidencial y allana el camino a nuevas inestabilidades.

Palabras clave: Presidencialismo de coalición. Accountability presidencial. Investigaciones anticorrupción. Lava Jato. Impeachment.



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Introduction: end of the "progressive cycle" in Latin America?²

The government instability that has affected several Latin American countries in the past three years deserves particular attention as it shows similar origins and gave birth to the same strong tensions among constitutional powers. This trend began at the end of the "progressive cycle" - during which the *izquierda* parties have governed in almost all the countries - when the reduction of growth margins of the regional economies got worse.

The neoliberal turn started in December 2015 with the inauguration of Mauricio Macri's presidency in Argentina.³ Then, it has followed with the spread of Executives which enforced a radically-opposed line to the expansionary budget maneuvers promoted by the ideology of "*desarrollismo*" that was hegemonic at the beginning of the century.⁴

The promoters of austerity have converged in condemning the costs of infrastructures and the lack of transparency in the governance of the state-owned enterprises. According to the view of neoliberal economist, these were accused to be too colluded with the politicians to be able to carry out an economic activity without creating losses for the taxpayer.

However, this conviction has grown along with the scandal raised from the publication of report of the anti-corruption investigations. The prosecutors have used the media extensively in order to spread a detailed reconstruction of the illicit connivance of the last fifteen years, about which the South American government parties and the leaders of the most important companies

in the sector of energy and infrastructure have been blamed (Kerche and Feres Jr. 2018; Martins, Martins, and Valin 2019, 51-67).

The Lava Jato investigation is certainly the most interesting and emblematic case of this trend. The proceeding originated in Curitiba (Brazil), under the jurisdiction of the district judge Sergio Moro, while the country was entering an unfavorable economic situation, which ended a decade of constant growth. Unprecedented outcomes were made possible when the original defendants - specifically, the managers of multinational corporations, as OAS, Odebrecht and Petrobras - became informers of the *Ministério Público*. Nonetheless, the cooperation agreements between the CEOs and the Brazilian Judiciary were questioned, as Judge Sergio Moro gave clear signs of support and direction to the investigative activities.⁵ On the basis of the informants' statements the prosecutors hypothesize the existence of an informal network which provided "extra money" - the so called "*Caixa 2*" - for election campaigns payed with the promise of future procurement contracts from the Federal Government.

Since the Lava Jato investigation started, it was clear that the relationship between the Judiciary and the political bodies would not be the same.⁶ Some Authors observed a renaissance of the so called «Enemy Criminal Law» (Gunther and Cancio Meliá 2016), which had reflexive implications on the geometry of the balance of powers.⁷ Thus, the Lava Jato case marked significantly the last years of some South American democracies, severely testing the ability of parliaments to respond to

² This article is the English version of the text published in DPCE: Paffarini, Jacopo. 2020. L'inchiesta Lava Jato e l'instabilità governativa in America Latina. Verso una nuova frontiera del controllo parlamentare sui Presidenti? *DPCE Online* 41 (4): 2935-2951. <http://www.dpce-online.it/index.php/dpceonline/article/view/843>.

³ On November 22, 2015, Mauricio Macri won the ballot against the Peronist Daniel Scioli, while in the country the climate of hostility towards the previous political class was growing after the publication of the contents of the investigation known as "*Cuadernos de las coimas*" ("Notebooks of bribes"). Macri was the first democratically elected President in Argentina belonging neither to the centrist party (*Unión Cívica Radical*) nor to the *Partido Justicialista* founded by Juan Domingo Perón.

⁴ For a critical analysis of recent government experiences in Latin America, see Somma (2018).

⁵ It is a reference to the conversations between the Public Prosecutor and the Judge of the case, Sergio Moro - later, the Ministry of Justice for Bolsonaro's government - which have been published by the website *Intercept Brasil*. The dialogues would show that Moro has constantly supervised and oriented the Prosecutor during the search for evidentiary materials, expressing a clear adversity toward some defendants. See the website's archive: <https://theintercept.com/series/mensagens-lava-jato/>.

⁶ For the Brazilian literature, see Juarez e Prado (2016), Martins, Martins e Valim (2017). For the Italian comparative law doctrine see Trapani (2017), Giannello (2018), Conci (2018) and Cammarosano (2018).

⁷ In this perspective, see the allusion to the «Enemy Constitutional Law» (Carducci 2018). On the same profile, for the Brazilian legal doctrine, see Valim (2017). On the Peruvian context, see the thesis of the exceptional nature of the present constitutional contingency advanced by Eguiguren Praeli (2017).

the crisis of credibility that has hit the political class. After more than a decade of government stability, Latin America seems to have returned to the scenario of the early nineties, when corruption scandals led to the fall of several presidents blamed by mass media and civil society.⁸ Since this period, Latin American countries have implemented their institutional framework in two ways: first, the Judiciary autonomy from political branches was reinforced; second, in order to rationalize the relationship between Legislative and the Cabinet, twelve countries have introduced the no confidence motion. However, in the last period it was precisely these two aspects of the architecture of powers that provided the greatest problems, driving doctrine's attention to the need of effective relief valves in case of political tensions.

The latest presidential crises show a new activism of the parliaments, which offers the factual basis for a critical observation on the performance of the region's government systems. Therefore, some singular circumstances that characterized the interruption of the mandates of Dilma Rousseff in Brazil, Pedro Kuczynsky in Peru and Jorge Glas in Ecuador will be examined, especially the evident infringements of the constitutional discipline of presidential accountability and immunities.

From this point of view, a simple confrontation between those events highlights a strong analogy in the causes - various representatives of Latin American Executives are involved in the statements of Lava Jato informers - and the parliamentary dynamics that determined the government instabilities. The similarities on which we intend to draw attention are: first, a coordination between the accusations supported by the Congresses and the investigative acts of the judiciary; second, the breakdown of alliances or - as in the Peruvian case - the truce

between political forces that had inaugurated the presidential mandate, which are followed by the birth of new coalitions; finally, an interpretative evolution - in some cases, explicit infringement - of the constitutional provisions concerning the responsibility of the Head of State.

The selected episodes show a *de facto* advancement of the constitutional borders that delimit the area of parliamentary control and consequently make clear the limits of the latest reforms of the relations between executive and legislative power - already predicted by the comparative constitutional law doctrine.⁹ Therefore, this paper aims to investigate whether, and to what extent, Latin American presidential systems are "ideologically approaching" the parliamentary experiences of Western Europe, as it can be supposed in the light of the evident "political pragmatism" which have inspired the functioning of the institutional counterweights to the Executive power.

Coalitional presidentialism and the peculiarities of the Latin American system of "checks and balances"

The democratic transitions which have marked the end of the last century gave birth to presidential systems with unique institutional balance, which performances has been strongly characterized by the recurrent use of the presidential legislative functions, as such as emergency decree and the power of initiative for constitution amendments.¹⁰ So, the US prototype of separation of powers was reinterpreted to provide the supremacy of the Executive since the beginning of the Republican experiences. This process counted with the active contribution of two instability factors, which are typical of the Ibero-American region: a weak cohesion of political parties (Duverger 1980, 615-626) and the lack of homogeneity of the federalist

⁸ In this sense, it is worth to remember the *impeachment* of the Brazilian President Collor in 1992, the conviction of Carlos Andrés Pérez by the Supreme Court of Venezuela in 1993 and the *juicio político* against the Colombian President Samper in 1998. On the Judiciary and public opinion's role in those episodes, see [...] *the press can investigate accusation of corruption or abuse of power, ultimately providing the reason to initiate an impeachment procedure, while social movements may activate popular mobilization, destabilize government, and ultimately force legislative action against the executive* (Pérez-Liñán 2007, 63).

⁹ See the classification of Latin American presidential systems proposed by Carpizo (2000, 2007). Among the multiple contributions on this debate, see: Santiago Nino (1994), Valadés (2008) and Enriquez Fuentes (2012).

¹⁰ For a comparative perspective see Cheibub, Elkins, and Ginsburg (2011), Nohlen (2016). On the Brazilian experience, see Orrù (2008).

model (Benito Sánchez 2017).¹¹

The economic situation, characterized by strong territorial asymmetries, and the traditional propensity for the division of offices have encouraged the spread of a "coalitional presidentialism", whose prototype has matured within the Brazilian democratic experience started under the 1988 *Constituição Cidadã* (Passarelli 2016).¹² The most recent example of this trend is represented by the Mexican constitutional reform of 2014, which have recognized and disciplined coalition agreements. The amendment aimed to avoid the problems of informality which had troubled the last presidencies, when the election results did not give the possibility to continue the tradition of "one-party governments".¹³

The coalition has therefore become the center of gravity of government power in the Ibero-American region to the extent that the transition to democracy has progressively reduced the incidence of single-party government or the hegemonic position of one party in the political system. However, this trend was considered anomalous because of a prejudice that sees coalitions as a factor of instability in those countries where the Head of State is elected.¹⁴ Nonetheless, there have been completely opposite interpretations of the phenomenon which have recognized greater longevity of the coalitions in presidential government experiences rather than in parliamentary contexts (Cheibub 2017, 79). In all cases, however, the growing sharing of political functions between Presidents and legislative assemblies has produced an expansion of the control functions of the latter: a fact that makes Latin America a real "institutional laboratory" (Roca 2016).

The rationalization of the "*frenos y contrapesos*" has actually pursued the objective of reducing

government instability: parliamentary interrogation of ministers has been introduced in fourteen constitutions, in twelve countries it has been disciplined the motion of no-confidence against members of the Cabinet and, finally, in Peru, Venezuela and Uruguay the presidential dissolution of parliaments is permitted when those repeatedly obstruct the government agenda (Orozco and Zovatto 2009, 90-91).

The comparative doctrine has advanced several readings on the innovations that have occurred in the last two decades, in some cases interpreting them as a "parliamentarization" of the Latin American presidential systems (Valadés Rios 2008), in others, as the initial signal of a transition towards a true semi-presidentialis (Pegoraro 2017, 92-93). However, the success of these reforms has been partial, as evidenced by the outcome of the last-six-year-crises: three Presidents (Lugo in Paraguay, Rousseff in Brazil and Kuczynski in Peru) and a Vice-President (Glas in Ecuador) terminate their mandate before the end of the term. The last three cases of those mentioned originated in contexts of bribery scandal raised from the declarations of Lava Jato informers, especially those who had managerial positions in the Odebrecht company.

The Lava Jato investigation at the origin of Dilma Rousseff's impeachment in Brazil

The first case attributable to this trend is represented by the controversial impeachment process that led to the removal of Dilma Rousseff from the Presidency of the Republic of Brazil. When they depicted this story several representatives of the Brazilian academic world

¹¹ See also the monographic section edited by Pavani and Cock (2018).

¹² The concept of «presidencialismo de coalizão» was described for the first time by the Brazilian political scientist Abranches (1998). Among the most recent reflections, see Chaisty, Cheeseman, and Power (2018).

¹³ See the new Article 89, XVII, Of Mexican Constitution which explicitly mentions the "*gobierno de coalición*". The 2014 constitutional reform, in fact, formalizes a political practice implemented, more recently, by the former President Enrique Peña Nieto, who, in 2012, signed a pact with the leaders of three parties represented in the Congress. The text contained a government program resumed in 95 points divided into 5 articles. The Mexican constitutional doctrine, however, identified the main flaw of these informal agreements in the fact that they could only bind the signatory leaders and not the party-affiliated parliamentarians. For this reason, it was called «*coalición imperfecta*» and it became clear the need of a specific constitutional discipline. On this point, see D. Valadés Rios (2018). For Italian doctrine, see Tarchi (2017).

¹⁴ Among the numerous contributions, see Mainwaring, Shugart, and Lange (1997), Linz and Stepan (1996) and more recently, Pérez-Liñán (2007).

have used the term "legislative coup" (Jinkings, Doria, and Cleto 2016),¹⁵ alluding to the fact that the impeachment promoters, rather than ascertaining the allegations, aimed to a new government coalition controlled by political parties that were defeated in the 2014 presidential election.

The electoral weakening of the *Partido dos Trabalhadores* (PT) have made possible the position taken by the Congress against Rousseff: along the process, the most important ally of PT in terms of the number of seats occupied in Parliament - *Partido do Movimento Democrático Brasileiro* (PMDB) - abandoned the coalition and started a dialogue with the center and right-wing parties. It must be reminded that the *coligação eleitoral* which supported the previous three Executives driven by PT (two of Lula and one of Rousseff) suffered a strong reduction of voters 2014 election. Thus, in order to implement the Government agenda, it has been necessary to enlarge the Congress support base, which reached nine parties in the last two years of Dilma's Executive.

It has been observed that in these circumstances the performance of Brazilian presidentialism is comparable to the experiences of multiparty or multipolar parlamentarisms, in which the stability of the government is often ensured by the transfer of key executive roles to the allies in Parliament (Mainwaring 1997, 69-74).¹⁶ Beyond the distribution of ministerial and public administration offices, the coalition is involved in the identification of the candidates for the most important elective functions: for example, since 1988 all Brazilian Presidents - except Jair Bolsonaro - have had an ally party exponent as vicar. This last feature has produced a further and less studied distorting effect on the function of Brazilian form of government: the impeachment become an instrument through which a minor party of the coalition achieves the "replacement"

of a President who does not enjoys good relations or fails to push through his proposals in Congress. So, in the Rousseff case a first step towards the coalition's metamorphosis took place with the presentation of an alternative government program - called "*A bridge to the future*" - by the then Vice-President Michel Temer (PMDB) at a press conference held in Brasilia when the proceedings against Rousseff had not yet begun.¹⁷

The Executive of Dilma Rousseff fell under the pressure of the anti-corruption investigations that began with the depositions of the leaders of Petrobras and Odebrecht, who agreed to collaborate with the magistrates in exchange for important reduction of their punishment. The impeachment was invoked by the majority of Congress in the name of a transparent management of public funds despite Rousseff has never been formally investigated and, above all, the offenses pursued by the Lava Jato do not correspond to the impeachable offences listed at Article 85 of the Federal Constitution. However, during the Congress debate, the impeachment promoters have frequently made references to the informer's statements that the prosecutors of Curitiba have used to ground the accusations against Lula and others PT companions. From this perspective, it is possible to denote an overlap between the evidentiary material of the Lava Jato investigation - not yet examined in trial at that time - and the assessment of the alleged "*crimes de responsabilidade*". In other words, the impeachment was opportunistically presented to the public opinion as a decisive battle in the war against corruption. Nonetheless, after excluding the allegations of obstruction of justice which were included in the initial complaint, the special commission of the Chamber of Deputies has decided to proceed against the President for crimes against the budget law (the so-called "*pedaladas*

¹⁵ Among the various comments published in the international press, see Carvalho, Laura. 2016. The Ousting of Brazilian President Dilma Rousseff Constitutes a Coup. *The New York Times*, 18 April 2016. Accessed on 12 December 2019. <https://www.nytimes.com/roomfordebate/2016/04/18/in-brazil-a-house-cleaning-or-a-coup/the-ousting-of-brazilian-president-dilma-rousseff-constitutes-a-coup>.

¹⁶ See also "Presidents in Brazil have tottered between the two poles; they dominate decision-making power, yet when their political base erodes, they cannot implement major reforms" (Mainwaring 1997, 106).

¹⁷ See the news Chagas, Paulo Victor. 2015. PMDB apresenta documento com propostas para a retomada do crescimento. *Agência Brasil*, October 29 2015. Accessed on September 16, 2019. <https://agenciabrasil.ebc.com.br/politica/noticia/2015-10/pmdb-critica-excessos-economicos-do-governo-e-aumento-de-impostos>.

fiscais").¹⁸ The Congress therefore welcomed the reconstruction of the impeachment promoters, deeming Rousseff guilty for having fictitiously created a surplus in the public finances in order to cover two spending decrees, and so eluding the necessary authorization of the legislative assembly.

The outcome of the impeachment process was severely criticized for the instrumentalization of the federal budget rules and for the lack of decisive evidences that could personally involve Rousseff in the *pedalada fiscal*. From the first point of view, it has been found that the delay in the transfer of money between two public bodies - although it can be classified as an administrative infringement - does not constitute a credit transaction for which congressional approval is required. In support of this interpretation it must be recalled the constant jurisprudence of the *Tribunal das Contas da União*, which has endorsed identical maneuvers during the examination of the annual financial statements presented by the five previous Executives. On the second profile, it should first be remembered that the Brazilian legislation on impeachment aims to ascertaining responsibilities deriving from intentional conduct, as negligent behaviours - even serious - cannot legitimately ground a conviction verdict.¹⁹ Anyway, as recognized by the technical report of the Senate, the process did not produce sufficient evidence of the President's awareness of the lack of budget when the spending decrees were issued - rather, the President of the National Treasury should have known.²⁰

Brazilian presidentialism seems to experience a "parliamentarian" turn due to the growing discretion with which Congress conducts the phases of the procedure and the evaluation of the

minimum requirements to impeach the Nation's highest representative. In support of this reading, consider the circumstances which have brought - one year after Rousseff's conviction - to the rejection of two impeachment claims and one request of authorization to proceed for crime of corruption promoted against Her successor Micheal Temer. The large majority formed around the new President prevented the consumption of a new government crisis despite, the serious indications of responsibility which have caused various tensions among the parliamentary groups. Furthermore, it should be noted that the opinion on the impeachment claims issued by the *Comissão de Constituição e Justiça e de Cidadania* expresses an aprioristic stance against the suitability of Roxin's theory of act dominion (*Tatherrschaft*) for the involvement a public officer (Dubber 2012, 77). Thus, according with the commission's advice, it cannot be admitted the assumptions of the Attorney General of the Republic, Rodrigo Janot, which had identified in the Head of the State the commander of an extensive criminal organization engaged in corruption practices and obstruction of justice. The rapporteur Bonifacio de Andrade - belonging to the presidential party (PMDB) - had in fact denied that holding the highest office of the State entails absolute power of control over the other members of the Executive and the administrators of the State enterprises.²¹ Those statements of the commission are in clear contradiction with the arguments used against Rousseff: the theory of act dominion then permitted to directly blame the top of the Executive for the "*pedaladas fiscais*" even though no commands in this sense were addressed to the National Treasury Secretariat.

¹⁸ The term "fiscal pedaling" was coined to indicate an accounting expedient that consists in delaying the exit from the coffers of the National Treasury of funds intended to cover the sums advanced by public banks in execution of the State investment plans. This operation takes place at the same time as the presentation of the final balance sheet of the State, in which, therefore, the figures concerned still appear available to the Executive despite having already been spent. In the Brazilian case, the Senate commission which have analyzed the impeachment articles concluded that the operation allowed Rousseff to maintain social and economic spending programs without resorting to loans for which Congress's authorization would have been required. The accusers of Dilma Rousseff have therefore identified in this practice a plan to circumvent the control functions that belong to the Legislative.

¹⁹ On this point, see Tavares and Prado (2016, 56). Among the Brazilian constitutional lawyers which excluded the relevance of "not malicious fiscal pedaling" see Figueiredo (2016, 147): "Inoltre ci sarebbero problemi per determinare la responsabilità personale del presidente. Sarebbe necessario dimostrare, a mio parere, un intento deliberato di falsare il bilancio, la correttezza nella gestione delle risorse pubbliche, che finora non si è verificata, in questo senso. Inoltre si sostiene che la responsabilità per le cosiddette "pedaladas" (pedalate) sarebbe del Segretario del Tesoro e non del Presidente della Repubblica".

²⁰ On the impeachment process against Rousseff, see Paffarini (2017), Oliviero and Paffarini (2019).

²¹ On this point, see Gianello (2018, 436 et seq.).

The spread of Lava Jato investigations and the presidential crises of Peru and Ecuador

The plea bargain involving Odebrecht CEOs have caused important repercussions across borders: the evidentiary material from Curitiba helped Ecuadorian and Peruvian judges to promote similar charges against their country's politicians. First of all, it is necessary to point out a similarity with the Brazilian case at the level of political dynamics: in both countries the government crises led to the breakdown of the agreements between the parties that had inaugurated the presidential period. So, when Kuczynski and Glas fell, they were already engaged in a long fight with the Assemblies. Thus, their removal give birth to new coalition agreements with the inclusion of opposition figures in the government team.

The prolongation of Peru's political instability is the result of the deterioration of the already difficult relations between the minority presidential party (*Peruanos Por el Kambio* - PPK) and the opposition party that holds the majority of seats in Congress (*Fuerza Popular*- FP). The first episode of the crisis dates back to October 2017, when Kuczynski was summoned by the Congress Commission of Inquiry set up to shed light on the facts narrated by the informers of Lava Jato. This was an initiative that raised a considerable controversy, as the provision at Article 139 of the Peruvian Constitution discipline only the Ministries' interrogation, while the President of the Republic just answer when *impeached*. Besides, the *Comisión* Lava Jato is accused of partiality for submitting a report which focuses mainly on the alleged ties between Odebrecht and Kuczynski, despite the testimony of the Ecuadorian CEOs involved both Government members and opposition leaders.

A second element that led to the aggravation of the crisis is represented by the scarcity of

the constitutional discipline on presidential accountability. The Article 117 of the Peruvian Constitution permits the presidential impeachment ("*juicio político*") only for crimes against the homeland, the regular conduct of the elections and for the dissolution of the Congress outside of the constitutional provisions. Therefore, corruption is not an *impeachable* offence, but a common crime which, as can be deduced from the above-mentioned Article, cannot be persecuted for the entire duration of the mandate (Cairo Roldán 2017). However, in the wake of important procedural implications from abroad,²² the opposition has decided to circumvent the constitutional constraints on the President's responsibility by invoking Kuczynski's moral emptiness ("*incapacidad moral*") pursuant to Article 113 of the Constitution and proceeded with the declaration of vacancy of the presidential office.

The cynical move of *Fuerza Popular* has generated numerous criticisms among constitutional lawyers, first of all, for the decision to use an institution - the *declaration de incapacidad moral* - whose effective scope has never been clarified, despite being part of the constitutional order of Peru since 1860. There is just one case in the recent constitutional practice, which dates back to 2000 when it served to declare the removal of Alberto Fujimori after his escape in Japan. Not even the intervention of the *Tribunal Constitucional* -²³ which had been request to integrate the procedural discipline on that occasion - touched on the issue of the scope of the institution. It is therefore appropriate to rely on the prevailing orientation of the doctrine, according to which the «permanent physical or moral incapacity» - as in Article 113, 2, of Peruvian Constitution - refers exclusively to the hypotheses of infirmities that prevent the ordinary performance of the presidential function. From another point of view, instead of reforming the Constitution, the Congress preferred to amend its internal regulation by aligning the characteristics and requirements

²² The reference is to the sentence that led to the imprisonment and impeded the candidacy of Ignacio "Lula" da Silva in the 2018 presidential elections of Brazil.

²³ Constitutional Tribunal. 2003. Expediente 0006/2003, AI-TC, *Diario Oficial El Peruano* December 3, 2003. Accessed on January 3, 2019. <https://bit.ly/2AJh8U3>. The *Tribunal Constitucional* has finally reformed the "vacancy declaration" procedure, which was equalized to the *juicio político* (Article 117 Const.): thus, as specified by the sentence, the destitution effect can only occur with a two-thirds majority vote.

of the procedure with those already provided by Article 117 of the Constitution for the presidential impeachment (Eguiguren Praeli 2007, 223).

On 22 December 2017, therefore, the process began according to the provisions of Article 89-A of the Congress rules, which require the cross-examination of the evidentiary basis, the President's right to be represented by a lawyer and, finally, the favorable vote of 87 of the 130 members of the assembly to produce the removal effect. The hearing, which lasted fourteen hours, was actually an early judgment on the documents and depositions collected during the investigations by the *Ministerio Público* (prosecutor office), during which the defense of the President supported the lawfulness of the consultancy contracts with Odebrecht and renewed the availability to collaborate with the Judiciary by waiving bank secrecy, if required. However, the final vote did not reach the qualified majority for the dismissal effect and, above all, it has almost perfectly reproduced the divisions between the parliamentary groups. This fact thus corroborates the hypothesis that the impeachment procedure has been influenced by political purposes. On this point, with regard to the congressional debate, a «confusion has been reported, whether through ignorance or in a deliberate form, between the nature and scope of the *juicio político*, the removal by *incapacidad moral* and the use of a sort of parliamentary "political censorship" against the President» (Eguiguren Praeli 2017, 77). This confusion was partly attributed to an intentional lack of distinction between those that are conceived as relevant conducts for the President's impeachment and the concept of political responsibility which refers to Ministers instead.

On the Ecuadorian side, the events that lead to the removal of Jorge Glas from the Vice-Presidency of the Republic deserve attention because they are characterized by important critical profiles, due to some contradictions and gaps in the constitutional text that political opponents have readily taken advantage of.

Shortly after the depositions of José Conceição (former Odebrecht CEO) to the Public Prosecutor's Office, the Head of State Lenin Moreno issued a decree by which he withdrew the functions attributed to his Vice,²⁴ claiming the validity of the act by virtue of the provisions contained in Article 149 of the Ecuadorian Constitution. Even if the two office are elected by a single poll, the Article mentioned states that "the Vice President of the Republic, when She/He does not replace the President of the Republic, shall exercise the functions assigned by Her/Him". So, it can be observed that the constitutional provision configures a relationship of functional dependence between two offices that enjoy the same democratic legitimacy. This particular hierarchy was certainly designed to remedy organizational needs inside the Executive branch, but - as the present case shows - it can be used as a "political weapon". A second critical profile is linked to the beginning, on 23 August 2017, of the judicial proceeding against Jorge Glas for criminal association, after the National Assembly voted unanimously the authorization to proceed - as the Vice-President himself asked to be processed and wanted its parliamentary base to approve the motion. A few months later, in the course of the investigations, the prosecutor added three new indictments (corruption, money laundering and bribery) and ordered the pre-trial detention of Glas, which was carried out over two days. The court and the prosecutor have therefore interpreted the authorization to proceed as a "surrender" of the accused, capable of giving legitimacy to any further act or restriction that the authorities deem appropriate. Such a position is incomprehensible if compared to the "double protection regime" that the Ecuadorian legal system prescribes to protect the members of the parliament. So, Article 128, ph. 2, of the constitutional text, first, requires the approval of the *Asamblea Nacional* in order to open a judicial procedure against a congressman or congresswoman and, second, specifies that he or she may be deprived of his or

²⁴ Republic of Ecuador. 2017. Decree of the President of the Republic of Ecuador n. 100 of 3 August 2017. Accessed on December. <https://bit.ly/2C31hRG>.

her freedom only «in case of flagrant crime or final sentence». The imprisonment of Glas is a decisive fact in the solution of the conflict at the top of the State: the prolonged absence from the Vice-Presidency's Office gave rise, after ninety days, to the declaration of dismissal ("*falta definitiva*") by President Moreno which was followed by the beginning of the replacement procedure through parliamentary election.²⁵ In other words, the initiative of the Judiciary, endorsed by the inertia of the National Assembly, allowed the removal of Moreno's main political opponent without going through the procedural burdens required by impeachment rules.²⁶

However, the Odebrecht scandal has caused much wider consequences, which have been opportunistically used to reduce the spaces of political pluralism and the guarantees of independence of the Public Administration and the Judiciary. During the troubled events that led to the imprisonment of the Vice President Jorge Glass, the majority party split and thirty parliamentarians withdrew their support from the President Lenin Moreno. In response, the latter formed a new executive with the support of some opposition parties and announced a "referendum for the fight against corruption", which included the constitutional reform of the main institutions of the "*Revolución Ciudadana*" promoted by the former President, Rafael Correa.²⁷ Among the questions submitted to the consultation and approved by the vote of 4 February 2018 there were: the exclusion from the political life of the condemned for embezzlement of public funds

and illicit electoral financing, the limitation to two consecutive mandates of the main elective offices and, above all, the delegation of extensive control and censorship functions on the high offices of the State to a new *Consejo de Participación Ciudadana and Controle Social Transitorio* (CPCCST) nominated by the President of the Republic.²⁸ According to the 2008 Constitution the CPCCS is an independent body elected after an open competition by the National Assembly - which, among other competences - carries out an assessment of the performance of specific authorities - as the Attorney General of the Republic, the *Consejo de la Judicatura* ²⁹ and the head office of the *Contraloría General del Estado*. At the moment, 17 opposition MPs respond to administrative and criminal proceedings for alleged irregularities in the management of the election campaign funds and corruption practices. Finally, it is not exaggerated to say that the guarantees of due process have been compromised, as the magistrates of the highest courts have been replaced and the members of the Constitutional Court have been suspended by the CPCCST in contradiction of the constitutional provisions.³⁰ An example of how this change of competences has exacerbated the political conflict is represented by the process that led the former President of the Republic and current opposition leader, Rafael Correa, to answer for the crime of association for crime and kidnapping. The judicial proceeding, known as "Balda case" was initiated on the impulse of the Republic General Prosecutor nominated by the Transitory-CPCCS

²⁵ According to the art. 150 of the Constitution of Ecuador, "*En caso de falta definitiva de la Vicepresidenta o Vicepresidente de la República, la Asamblea Nacional, con el voto conforme de la mayoría de sus integrantes, elegirá su reemplazo de una terna presentada por la Presidencia de la República. La persona elegida ejercerá sus funciones por el tiempo que falte para completar el periodo*".

²⁶ Specifically, the qualified majority of two thirds of the members of the Assembly required by art. 130 of the Constitution of Ecuador for the removal of the two top representatives of the executive. On the subject, see Oyarte Martines (2005).

²⁷ The constitutional amendment by means of a popular referendum convened by the Head of State, is disciplined by articles 441 and 442 of the Constitution of Ecuador. For an analysis of the distorting effects of the referendum on the balance of constitutional powers, see Salgado Pesantes (2018).

²⁸ According to the Art. 207 of the Constitution of Ecuador, the 7 members of the *Consejo de Participación Ciudadana y Control Social* are chosen after an open competition based on qualifications among the candidates proposed by the social and civic organizations recognized by the *Consejo Nacional Electoral*. Art. 120, 11, gives to the National Assembly the competence of the formal investiture.

²⁹ According to the art. 181 of the Constitution of Ecuador, the *Consejo de la Judicatura* is the body responsible for guaranteeing the autonomy and independence of the Judiciary

³⁰ The *Consejo de Participación Ciudadana y Control Social Transitorio* does not have powers of removal towards the holders of the offices over which it exercises the control function. Pursuant to art. 431 of the Constitution of Ecuador, moreover, the members of the Constitutional Court "no estarán sujetos a juicio político ni podrán ser removidos por quienes los designen". After the suspension of the judges, which took place on 23 August 2018, the new members were appointed only five months later, on 28 January 2019. See: <https://www.elcomercio.com/actualidad/consejo-participacion-ceso-corte-constitucional.html>.

after the dismissal of his predecessor through a censure vote of the National Assembly. The affair appeared as an "*ad hoc designation*", to the extent that the succession rules of the Prosecutor's office were not respected: those would have brought the jurisdiction on this case to the Deputy Prosecutor that was in service at the time of the notification.³¹

Final considerations

Although not exhaustive, the episodes examined offer an important point of observation regarding the inconsistency between the text and the constitutional practices in Latin American presidentialisms. Consequently, it is relevant to examine the operating difficulties that this specific system of government encounters in highly polarized political and social contexts (Linz and Valenzuela 1995). Furthermore, South American presidential crises renewed the activism of the Courts in the judicial review of Congress' decisions: on this perspective, it is relevant to point out some innovative doctoral contributions inspired by the last Brazilian impeachment.³² On this perspective, two sentences of the Inter-American Court of Human Rights - *Camba Campos and others. v. Ecuador* and *Tribunal Constitucional vs. Peru* - explicitly required the assemblies to observe the due process and strictly formal legal rules when they are performing judicial functions.³³ However, there is still some hesitation to admit the possibility of reversing the final decision, especially in those legal systems where the appeal against the Congress' verdict is explicitly prohibited by the Constitution - as in Mexico and Brazil.³⁴

When a comparative lawyer immerses himself/herself into the Ibero-American constitutional dynamics, undoubtedly, he/she needs to interpret some clear departures from of the doctrine's

models about the systems of government. The frequent activation of Congress' counterweights to the Executive branch not rarely fulfills the designs of the political elite rather than the preservation of the balance between powers. In this sense, the accusation of immorality from one side to the other serves to legitimize the explicit and selective infringement of constitutional rules by the Legislative in the act of managing the "transition". This point permits to reinforce the comparative doctrine's descriptions which have underlined the non-hegemonic characteristic of «constitutional normativity» within the overall framework of the legal formants (Carducci 2018, 120 et seq.).

The end of the "normality" in institutional relations is best represented by the failure to comply with the provisions regarding the presidential accountability and the criminal immunity of the political bodies, which is frequently justified through the reference to the "exceptional nature" of the crisis of confidence that has affected the representative bodies. However, if in the past this component threatened the continuity of the elective institutions of the region and opened the way for the intervention of the military sectors, today the political crises are resolved within the Parliament-Presidency binomial through a partisan implementation of the constitutional guarantees. From a comparative point of view, the lack of an effective emancipation of the impeachment process from the political and economic actors confirms the similarity of Latin American experiences to those of other developing countries, in which the effectiveness of constitutional law is still threatened by recurrent awakenings of the "rule of political law".³⁵

Along with the consolidation of the democratic institutions, the examined region is

³¹ On this point, as well as for a reconstruction of Ecuador's constitutional and political events of the past two years, see the *Lawfare Institute* report. Accessed on 24 September 2018: <http://lawfareinstitute.com/?p=597>.

³² On the Brazilian impeachment, Bahia, Bacha e Silva, and Oliveira (2016). For a broader overview of the episodes of courts' activism on public policy, see Paffarini and Reginatto (2016).

³³ See the cases *Tribunal Constitucional vs. Perú*, judgment of January 31, 2001, and *Tribunal Constitucional (Camba Campos y otros) vs. Ecuador*, judgment of 28 August 2013. For a comment on the first case, see Bustamante Alarcón (2003).

³⁴ It is worth to remind that the Inter-American Court of Human Rights declined the request for an advisory opinion on some profiles of the institute of Presidential impeachment forwarded by the Commission on 13 October 2017 - after the cases Zelaya (Honduras), Lugo (Paraguay) and Rousseff (Brazil). The refusal was motivated by the inopportune of a pronouncement "in abstract" on a topic about which the Court may have the opportunity to rule "in concrete" on a case-by-case basis. See: <https://bit.ly/34Ntc2Z>.

³⁵ See the classification of Mattei (1997). Among the most recent writings that have returned to the topic, see Pegoraro (2017)

thus characterized by a high frequency in the interruption of Presidential mandates following renounce or impeachment.³⁶ After the renounce to authoritarian tendencies, parliaments find themselves more sensitive to pressures from new political actors (party leaders are often overtaken by protest movements) and widespread economic interests (primarily, foreign investors and international finance organizations). So, when deemed necessary, they take responsibility for the transition and contain possible constitutional breakdowns. It seems appropriate to point out that the Brazilian case is pioneer in this trend, as it was clear the decisive role of the judicial inquiry, the media and social movements in supporting the allegation against the President and exerting pressure on the Legislative during the stages of the impeachment judgment. The phenomenon presents "structural causes" that can be traced inside the system of checks and balances, which, despite the innumerable peculiarities that every country presents, has followed the same evolutions throughout the region (Amorim Neto 2003).

The Latin American Constituent Assemblies have in fact encountered a common reference model in Presidentialism, although this was immediately contaminated by equally vivid components in the tradition of Ibero-American governments. Thus, during the nineties democratic transitions, in a context characterized by a strong criticism toward military autocracies, the Head of State's election gained a symbolic significance: the return to popular sovereignty together with the guarantees of political pluralism (Gargarella 2014, 272). However, the Constitutionalism which spread in the region at that time has handed over the structure of powers to a "political variable": an asymmetric electoral systems which associate the direct and majority choice for the Executive with the search for proportional representativeness of congresses. Subsequently, the reforms that

gave continuity to the democratic transition are considered as the initial step towards the consolidation of a "two-speed constitutionalism": on the one hand, a vertical and concentrated pattern of powers is maintained, and in some cases strengthened with the expansion of the presidential prerogatives in legislative functions, on the other, the catalog of rights and the judicial remedies for their protection have been enlarged, as well as the institutional mechanisms for citizen participation in decision-making processes (Gargarella 2014, 285).

Finally, the concentration of powers at the highest level of the State - which many Authors have described - appears strongly linked to the specific weight of the presidential party in the coalition and in the Parliament.³⁷ If the leader is unable to keep the coalition united, the risk of "reversals" at the top of the State is higher, despite the recent introduction of rationalization mechanisms in the system of government, as the Cabinet's motion of no confidence.

The provisions which have institutionalized a mutual control between Presidents and Parliaments were hailed as a late adaptation to the plural composition of the assemblies, to the extent that it enhances the representative effects of the electoral systems.³⁸ On the other hand, while the concentration of legislative and executive competences remains intact, it is clear that the political agenda still remains a prerogative of the President. Moreover, the organs representing the coalition - variously named, according to the country, "*consejo de ministros*", "*consejo de gabinete*" or "*gabinete de ministros*" - fail to guarantee the mediation and enlarged representation of the Parliament for which they were designed. Political crises still directly affect the government stability and the "replacement" of alliances at the helm of the Executive remains a frequent outcome in the South American context. Therefore, one of the main effects of the political polarization is the use of the constitutional

³⁶ For a detailed reconstruction of the Latin American events that led to an early end of presidencies, see, Pérez-Liñán (2007, 62-63). If we consider only the post-authoritarian period (from 1990 to today), there have been twenty-seven government crises, thirteen of which have led to the removal of the President. In seven cases, the parliaments have provided by means of the impeachment procedure or the declaration of incapacity to govern, in the remaining, Presidents have resigned before the vote.

³⁷ On this subject, see Pereira and Mueller (2002) and Amorim Neto (2002)

³⁸ For that opinion, see Valadés Rios (2018, 37) which described a "parlamentarization of the presidential form of government".

guarantees as "weapons" for the political struggle, which has led to identify a "parliamentarian behavior" of the Latin American Presidentialisms.

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