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# Populism, courts and institucionalidad: a view from Latin America<sup>1</sup>

This paper addresses the relationship between populism and constitutional courts, with reference to the Latin American context. By means of a genealogical reconstruction of the ideas of populism and *institucionalidad*, we study how the debate on judicial activism has been taken up by populist politics. We introduce a theoretical model that sees in contemporary forms of populism a strategy to reparaodoxify the legal system, denying courts the ability to protect the organisational autonomy of the judiciary. This is of interest because, in the last 30 years, the courts have represented a new field for the creation of democratic legitimacy, allowing minority groups to defend their political agendas through fundamental rights litigation.

**Keywords:** democracy, populism, institutions, constitutional courts

## Introduction

It is well established by now that one of populism's main attributes is its tendency towards institutional erosion (Hawkins and Ruth 2015; Rosanvallon 2020; Mudde and Rovira Kaltwasser 2012). Far from being an exception to that, the Latin American case is particularly indicative of how populist politics and

<sup>1</sup> This paper is the result of my work as a Research Fellow at the Center for Advanced Studies: Southeast Europe, of the University of Rijeka (Croatia).

institutions interact, and few other intellectual traditions have dedicated as much attention to this problem.

There is an extensive literature in Latin America that sees populism as the greatest threat to democracy on the continent, precisely because it represents the denial of an effective institutional environment where the action of public agents would be guided by the rule of law. These interpretations, however, are often contaminated by all sorts of biases and end up offering us shallow concepts of both populism and *institutionality* (Rivas Leone 2000). In this paper, we explore a different approach based on the interaction between populism and constitutional courts. Instead of simply affirming that populism is a phenomenon of dedifferentiation where politics corrupts the code of law, we develop a theoretical tool to understand how this dedifferentiation comes about through the re-enactment of the legal system's self-reference paradoxes (reparadoxification). This allows us to locate the field where, contemporarily, the clash between populist politics and democratic citizenship is taking place, and to analyse new forms of political activism that are fostered not *by* the judiciary branch, but *through* it.

Starting from an introductory genealogy of the discussion on institutions in Latin American thought, we show that populism and the idiomatic term *institucionalidad* have represented competing visions on development and on overcoming dependency. This historical rooting offers us not only a better understanding of these concepts, but also a view of the transformations undergone by the legal system in the last 30 years.

In the second part, we study how the debate on judicial activism has been taken up by populism to call into question the authority of constitutional courts.

In the last two sections, we present our central claims. On the one hand, we argue that populism loses its hegemony over popular representation, as historically marginalised minority groups advance their political agendas by litigating in front of constitutional courts. On the other hand, this expansion of democratic citizenship is attacked by populists who advocate not only a majoritarian view of politics, but the possibility of re-inserting a permanent constituent power into the legal system.

## Populism, development and institutions

The Spanish word "*institucionalidad*" has become both an idiomatic and a technical term in the lexicon of social sciences. As Armin von Bogdandy puts it, "[*institucionalidad*] often comes up (...) in order to mark differences from the Northern situation, namely the discrepancies between constitutional text and

constitutional reality” (von Bogdandy 2017: 36). From a pragmatic point of view, the term is usually employed in its negative form, implying a lack of institutional capacity to create a reliable legal and political order.

To begin with, let us reduce the prevailing concept of *institucionalidad* to the following basic insight: institutionality is a set of previously enacted rules, endowed with the power to govern the conduct of social actors, and designed to process, rank and prioritise social problems.

Much of the appeal of the concept of *institucionalidad* is of course related to the so-called “neo-institutional turn” (North 1991; Acemoglu and Robinson 2000; Shirley 2008) and its success in Latin America (Gerchunoff and Bértola 2011). However, questions around institutionality go far back in the history of Latin American thought. A reconstruction of this intellectual tradition may help to locate the distinctive character of populism and its impact on institutions.

### Development, political decisions and institutions

A reconstruction of 20th century Latin American thought means a study of an intellectual landscape centred on the conceptual pair “development/underdevelopment”. As Eduardo Devés Valdés explains, “the concept and the subject of development have constituted what we understand today as Latin American thought” (Valdés 2003: 21).

According to Celso Furtado’s Theory of Underdevelopment, underdevelopment is a form of social organisation within the capitalist system, and not a step for economic development, as the words “emerging countries” and “developing countries” may suggest. For him, underdevelopment is a specific structural process connected to the fact that industrial capitalism creates an international division of labour between centre and periphery: “To isolate an underdeveloped economy from the general context of the expanding capitalist system is to dismiss (...) the fundamental problem of the nature of the external relationships of such an economy, namely the fact of its global dependence” (Furtado and Girvan 1973: 122)<sup>2</sup>. This fundamental idea will set the tone for much of Latin American thought in the 20th century.

Dependency Theory acolytes foster Furtado’s insight, showing that underdevelopment is not only a necessary presupposition of global capitalism, but a form mediated by the political system. Enzo Faletto and Fernando Henrique Cardoso enunciate the following research question at the beginning of their *Dependency and development in Latin America*: if the economic conditions of

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2 For a reconstruction of the center-periphery distinction, see Prebisch (1949) and Wallerstein (1974).

the most prosperous countries of the region were development-prone, “was it that institutional and social conditions did not permit these favorable economic events to express themselves in a development policy?” (Cardoso and Faletto 1979: 5).

Despite the different answers later provided to this question by decolonial theoreticians, neo-institutionalists, neoliberals and Marxists, it seems that Cardoso and Faletto’s formulation of the problem touches on something decisive: the corruptive tendencies that other social systems exercise on the economic system. In other words, economic conditions are necessary but not sufficient for development. The authors assume that historical and material elements of national economies are intertwined with a country’s capacity to decide politically. This is the reason why Cardoso and Faletto use the term ‘dependency’ – “to stress both the economic aspects of underdevelopment and the political process by which some countries dominate others” (Cardoso and Faletto 1979: 173) – rather than ‘periphery’ or ‘underdevelopment’.

When analysing the specificities of 20th century Latin America, Cardoso and Faletto make two important additional claims. First, they affirm that the creation of domestic markets depends on political leadership capable of reconciling the contradictory interests of different social groups. Second, they conclude that different agreements among elites and different institutional arrangements produce different economic outcomes. The kind of political decision that they have in mind here consists of producing and institutionalising pacts between elite groups. Populism is a strategy to accomplish that.

### From a constitutional point of view

During the 1970s, when the structuralist approach to economics and the various dependency theories started being abandoned, other concurring paradigms emerged in Latin American thought. Even though the term “democracy” exerted a certain unifying force in the period, it is hard to make sense of this plurality of theoretical positions with one word, as was the case before with “development”. In this new scenario, reflections on institutionality gain traction through the more elaborate idea of constitutionalism. One of the milestones of this new movement is the creation, in Buenos Aires, in 1974, of the *Instituto Iberoamericano de Derecho Constitucional* (Valdívía and Tapia 1979).

Since then, legal theorists and political scientists have undertaken a large project of comparative scholarship on Latin American constitutional law. This project was not only predicated on the fundamental belief that the rule of law, human rights, and democracy could only be understood together, but also on

the idea that a set of core supra-national constitutional principles already permeated every State Constitution on the subcontinent. Contemporarily, these questions have been addressed under the heading *Ius Constitutionale Commune* (von Bogdandy et al. 2013). Proponents of this brand of Latin American constitutionalism often defend a transformation of social reality through law. They see in the construction of a strong *institucionalidad* a condition *sine qua non* for development. In terms of conceptual pairs, institutionality is the exact contrary to corruption, which is regarded by them as the most pervasive systemic problem in the region. Corruption here means a permanent state of ineffectiveness of public institutions and law (Neves 1994).

Latin American constitutionalists have criticised the plebiscitary approach to democracy common to populists and authoritarians in the region. They have argued that populist and authoritarian leaders alike promote concentration of power and disdain for typically liberal civil and political rights. As a consequence, so goes the argument, political systems in the region have tended towards a highly inflated executive branch (*hyper-presidentialism*) and a low respect for the rule of law. As Roberto Gargarella puts it:

[Latin American scholars] suggested that the elimination of hyper-presidentialism could reduce the levels of instability, and thus reduce the risk of a return to authoritarianism. This was the first time in a long period that activists and scholars from different countries and origins agreed on criticizing a central aspect of the dominant organization of power (Gargarella 2013: 150).

In the 1980s and 1990s, during the wave of democratic transitions that took place in Latin America, this diagnosis of lack of institutionality was largely agreed upon. The newly written constitutions reflected the idea that human rights and democracy are equally primordial and gave great weight to the separation of powers. The discourse on the constitutional requirements of *institucionalidad* shaped an important part of the academic elite, especially in law schools. This is one of the reasons why Latin American Constitutional courts rank among the institutions that have been more deeply (at least discursively) connected to this ideal. Whether in virtue of their institutional design or the educational background of their members, the elite of the judiciary has exhibited a propensity to describe itself as the final guarantor of institutionality.

## Populism and judicial activism

In a very influential paper published in 1989, Professor Ingeborg Maus critically referred to the judiciary as a “Super-Ego of Society” (Maus 1989). She argued that post-World War II Constitutionalism was characterised by an objective

enlargement of the functions of courts – a political and legal change that was accompanied by a “religious veneration of courts” (Maus 1989: 121).

An important literature on the topic of “judicial activism” has emerged in the last 50 years. Although the idea of criticising the excesses of judicial legislation is probably as old as modern constitutionalism (Thayer 1891), the concern with judicial activism rises exponentially in the second half of the 20th century (Gerhardt 2002). Despite the vagueness that surrounds the terms of this debate, scholars agree in general to a minimal definition of judicial activism: “(1) invalidation of the arguably constitutional actions of other branches, (2) failure to adhere to precedent, (3) judicial ‘legislation’, (4) departures from accepted interpretive methodology, and (5) result-oriented judging” (Kmiec 2004: 1442).

Judicial activism in the 20th century is correlated with the expansion of the semantics of fundamental rights, in a process that has been sometimes described as a “hypertrophy of fundamental rights” (Bettermann 1988). But how is it connected to courts becoming a central “political factor” (Gusy 1982)? The answer to this question is to be found in the very idea of fundamental rights. A right is to be called fundamental not only because of its superior status inside a legal order, but also because of its structuring capacities. “Fundamentality” reorganises law as a whole, exerting pressure towards material consistency, coherence and “integrity” (Dworkin 1986). Since the safeguarding of fundamental rights is based on the institutional readiness to interpret the law, courts became the cornerstone of the “constitutional edifice” (Fromont 1975: 64).

Fundamental rights theory is adjacent to a political theory that boosts the political authority of the judiciary. The result is that Supreme Courts are no longer mere guardians of the constitution: they “transition from the idea of basic rights as subjective rights to objective principles” (Benvindo 2010: 57), thus becoming architects of an objective order of values (Limbach 2000).

Throughout the political spectrum, scholars have criticised the expansive tendencies of courts. They have insisted on what was perceived as the courts’ deficit of democratic legitimation, and a dangerous centralisation of society’s most pressing decisions in the judiciary. Four ideal-typical objections have been formulated to judicial activism since then: i) *popular constitutionalism* literature criticises the elite-driven political ontology of courts, and proposes a return to bottom-up constitutional practices (Tushnet 2000); ii) advocates of the “dignity of the legislation” argue that one cannot assume an inherent epistemological superiority of the judiciary’s protection of rights over the legislature’s protection (Waldron 2006); iii) scholars such as Adrian Vermeule have championed a post-Madisonian Republic based on the authority of the executive branch (Posner and Vermeule 2011); and iv) the idea of “constitutional dialogue” has assembled

proponents of more dialogical institutional designs, fostering a cooperative relationship between courts and other institutions (Hogg 1997).

The populist strategy in the 21st century seems to mirror in many ways the critique of judicial activism. Populists often target the judiciary or, more specifically, constitutional courts as their main institutional adversaries, reiterating the case against judicial review and judicialisation of politics. If, as Ran Hirschl suggests, the new constitutionalism conceals a *juristocracy* (Hirschl 2009), wouldn't it be correct to see populism as a reaction to judicial elitism?

According to Pierre Rosanvallon, populism is structured around three tenets: i) a predilection for direct democracy; ii) a polarised and hyper-electoralist vision of the sovereignty of the people; and iii) the firm belief in the possibility to apprehend the general will in its spontaneous expression (Rosanvallon 2020). Populists are allergic to any sort of intermediary body in politics, which explains why they usually try to domesticate non-elected institutions. The attack against constitutional courts is a "key element" of this project, for it aims at "eliminating the various existing safeguards to executive power" (Rosanvallon 2020: 195).

In a recent paper, professor Dieter Grimm formulated the central question of this debate as follows: even though constitutionalism was designed to counter majoritarianisms of every sort, how can it counteract populism "if the [populist] transformation begins with the paralysis of constitutional courts?" (Grimm 2021: 321). This question seems even more complex when reflected upon in the context of Latin American *institutionality*. As we have shown before, the discourse on *institutionalidad*, which was essential to the evolution of a *ius constitutionale commune* in the continent, not only portrays populism as its counterpart, but also postulates that "[w]eak institutions are often linked with populist politics" (von Bogdandy et al. 2017: 13). Latin American scholars often see in populist leaders the culmination of a long tradition of concentration of power and disdain for civil and political rights.

The problem with this assumption is that, as Theotônio dos Santos wrote in 1969, "[p]opulism has been the predominant form of popular political participation in Latin America during the last 30 years" (Dos Santos 2020), and popular sovereignty is at the core of modern constitutionalism. Besides, the idea that populism is an anti-institutional form of politics is extremely biased. In the last decade, a growing literature on the topic has studied populist institutionality, especially from the point of view of the institution of new rights (Stoessel et al. 2020). Historically, populists such as Lázaro Cárdenas in Mexico, Getúlio Vargas in Brazil, Jorge Gaitán in Colombia and Juan Perón in Argentina are at the origin of the labour and social rights institutionality in the subcontinent. The idea of populism is also relevant for the Bolivarian institutions both in Venezuela and in Bolivia,

and for the kind of neoliberal institutions created by Alberto Fujimori in Peru and Carlos Menem in Argentina.

Where would the fundamental distinction lie between populism and institutionalism? The history of Latin American thought offers an interesting insight to examine this question. Did the evolution of the problem of development not bring us exactly to the irritations caused to the economic system by the political system? Let us now study how the legal system poses a threat to the populist reason in its idea of politics.

## The expansion of citizenship through the legal system

This paper does not aim at defining populism. The literature on the topic is certainly very interesting, and it comprises important theoretical and ideological decisions that we cannot study here in detail (Canavan 1999; Laclau 2005; Kaltwasser and Hawkins 2018; Mudde and Rovira Kaltwasser 2012; Riker 1988; Rosanvallon 2020). Despite Ernesto Laclau's well-argued critique of the discourse on the impossibility of defining "populism", which he sees as a strategy to discredit it, it seems that the dazzling philosophical question surrounding populist politics is not of a semantic nature. The problem is not defining but articulating populism with its historical and conceptual ecosystem. In what follows, we shall sketch an articulation of that sort.

In order to advance the main hypotheses of our research, we will draw mainly on Kolja Möller's critical systems theory approach, according to whom populism is a mechanism of re-entry that "blurs the line between regular and constitutional politics [and] re-inserts the claim to embody the people against the elites within the regular procedures of the political system" (Möller 2021: 7). More than an ideational content, what matters here is the form: since populism does not recognise the difference between ordinary and constitutional politics, and since the established powers are supposed to derive their legitimacy from popular sovereignty, democratic procedural and rule constraints can be changed perpetually. Möller calls this an use of the "immanent foundational paradox of popular sovereignty" (Möller 2019).

Let us take one step further and look again at the Latin American context. We have argued that the constitutionalist tradition in the continent inherits the problem of development, and addresses it by focusing on the notion of institutionality. We have also argued that national Supreme Courts have been highly influenced by this theoretical and political framework, especially in the last 30 years. This coincides with the expansion of the semantics of fundamental rights, with the correlate extension of the authority and political importance of

the judiciary. We have seen how the critique of judicial activism represents a reaction to this movement, but why is it no longer able to grasp what is at stake with populist practices?

Critics of judicial activism were right about the risks of turning constitutional democracies into judicial aristocracies. But, for the most part, they assumed a model of national democracy that is beset with several representation deficits. Expressions such as “partial democracy”, “intermittent democracy”, and “low-intensity democracy” have been used in the literature to refer to democratic environments where significant segments of the population were kept apart from political participation. The theoretical framework of the “judicialization of politics” was unable to recognise that demands for more democracy were usually met with a blocked political system. In Latin America, one of the main alternatives found by marginalised groups was to litigate before constitutional courts. Think of the way in which the agendas of LGBTQIA+ (Caballero 2011; Bahia and Iotti 2013)<sup>3</sup>, feminists (Ruibal 2015, 2021; Elias 2021), indigenous (Brinks 2019; Rodríguez-Garavito and Arenas 2005; Fuenzalida 2015), and Afro-Latin Americans (Radomysler 2013; Peria and Bailey 2014) groups have progressed on the continent.

Professor Chris Thornhill (2018) offers an interesting perspective on these transformation movements spearheaded by minority groups. According to him, the logic of broadening access to rights in partially exclusionary democracies presupposes the existence of a right to democracy that goes beyond national legal orders. Minorities came to defend an idea of democracy that necessarily communicates with international standards of human rights protection (universal or supra-national). For historical reasons linked to the semantics of fundamental rights, it was the constitutional courts that, at the institutional level of national states, gave support to these demands, in dialogue with international law. This explains Thornhill’s argument that contemporary demands for an inclusive democracy have required the creation of functional equivalents, i.e., structures within the legal system that served as alternatives to the production of legitimacy:

In this system, the concept of material/political participation loses importance as a primary source of legal authority, and many law-creating acts bypass the political system. Instead of a system of participation, democracy becomes a system of inclusion, and democracy is increasingly defined as a condition in which courts construct generalized norms for the expansive inclusion

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3 During Jair Bolsonaro’s tenure in office, the Brazilian Supreme Court considered that homophobia is comprised within the crime of racism (*Ação Direta de Inconstitucionalidade por Omissão nº 26*). The court has also struck down several municipal and state laws that prohibited the so-called “gender ideology” in schools.

of society. Basic functions of integration and legislation attached to democratic citizenship are configured around functional equivalents inside the legal system. This condition is not restricted to particular geographical territories, and, given its reference to a generic form of the citizen, it necessarily extends across historical boundaries between states and societies (Thornhill 2018).

Under the transformative pressure of minorities, *institucionalidad* means access to rights of participation and, therefore, a development of the democratic framework. Although Latin American thought has generally recognised populism as the most successful form of mass participation in 20th century politics, it is also true that engagement with *institutionality* through litigation forms now a functional equivalent to citizenship practices. If neither centralised governments nor parliaments can claim the monopoly of democratic representation, what is left of populism if not unmitigated agonism against the functional equivalents of the legal system?

## Do constitutional courts resist populism?

If we assume that populism is a re-entry mechanism that blurs the line between ordinary and constitutional politics, we understand why Supreme Courts are a preferred target of populist governments. Whereas courts fulfil the role of guardians of the constitution, institutionalising the distinction between *pouvoir constituant* and *pouvoir constitué*, populism is the political practice of conflating popular sovereignty and institutional order. This is why the emergence of functional equivalents to democratic legitimacy production disrupts the 'populist reason'. Once popular political participation outside of parliamentary majorities becomes possible, the affirmation of a universal value for acclamatory legitimation loses its apodictic character. One cannot justify the populist re-entry if the political representation of historically marginalised groups depends less on the general will, and more on functional equivalents having an institutional nature.

## Organisation and the foundational paradox of the legal system

Populist assaults against constitutional courts target the very ability of the legal system to organise itself. Organisations produce decision-making possibilities that only exist in institutional environments. In that sense, they string together decisions with the possibility of other decisions. According to Niklas Luhmann, courts are placed at the centre of the legal system because they internalise the risk of decision-making in a context where the ultimate foundation of legality is paradoxical: "This means it is a paradox. Decisions can only be made if undecidability is given as a matter of principle (and it is not merely something

which is undecided!)” (Luhmann 2004). This is not an isolated theoretical position. From a different philosophical standpoint, Jacques Derrida reaches a very similar conclusion in his famous *Force of law* (Derrida 1992). Derrida refers to the idea of deciding the undecidable as a condition of possibility of normativity. He also elucidates how courts stabilise the legal system’s paradoxical constitution by adjourning the “entry” into the law, i.e., by shielding and hiding the access to the foundations of (legal) normativity.

Although Luhmann and Derrida value differently the consequences of the legal system’s foundational paradox, both characterise it as an example of self-reference. Since the autonomy of the legal system presupposes its ability to establish and reproduce its own code (legal-illegal), the foundational moment is at the same time legal and illegal. In modern society, the autonomy of the legal system is predicated on its institutional capacity to hide or export this paradox. The hierarchical structure of the judiciary functions as one of these de-paradoxification mechanisms, because reasons for decisions can always be referred to a superior instance. At the apex, national supreme courts fully internalise the paradox, and their authority depends on continuously deferring challenges to the legality of the entire system.

### Institutional resistance

Populism targets courts’ ability to deparadoxify the legal system. In other words, populists assail the organisation and hierarchy of the judiciary, elevating the symbolic costs of decision-making. Those attacks can assume many forms, but, since Juan Perón initiated a famous impeachment procedure against four judges of the Argentine Supreme Court in 1947, the standard examples of populist assaults against the judiciary are the removal of judges and court-packing. Court-packing consists in changing the configuration of a certain tribunal by subtracting or adding members. Andrew Arato has proposed a useful taxonomy that expands this paradigm to also include: jurisdiction reduction; manipulation of rules of appointment; and changing of vote rules (Arato 2019).

Still, populists may resort to a larger array of tactics. Besides systematic critique and public campaigns against judges, populist governments use the executive branch’s prerogatives to undermine the authority of the courts. Jair Bolsonaro’s clash with the Brazilian Supreme Court (Supremo Tribunal Federal - STF) is paradigmatic in that sense. Bolsonaro has not yet been able to persecute the Supreme Court members or pass any sort of court-packing legislation. Rather, he has positioned himself as a non-institutional alternative to constitutional adjudication.

Bolsonaro's interactions with the STF, whether through litigation<sup>4</sup>, veiled and open threats over the press (Freelon 2022), or addresses to his supporters, can be classified as an attempt to *re-paradoxify* the legal system, i.e., to show that legal decisions are ultimately deprived of foundations and, thus, nothing but political decisions. The Brazilian president continually claims that the Supreme Court Justices usurp the powers of the other branches of government and act politically, without however having been validated by popular vote. By mimicking the judicial activism critique, contemporary populism contests something other than the soundness of arguments or the competence of judges: it challenges the organisational character of the legal system in its very ability to decide. Bolsonaro voices the claim that the organisation of decision-making is legally impossible or, in other words, it is just sheer politics without electoral validation. Accordingly, only political decisions that apply the code "power-superiority/power-inferiority" can be justified as truly willed by the people. Examples of these dynamics can be found in the legal dispute over Bolsonaro's pro-gun decrees<sup>5</sup>.

The Brazilian case is illustrative of the argument we have developed here. More than a simple clash between populism and the State *institutionality* represented by the judiciary, it is clear that the populist strategy tries to curb the political activism that is exercised through the constitutional courts. We are referring, therefore, not only to a judiciary resistance, but to a popular resistance that uses the courts as means for political action.

A feedback structure is thus created between constitutional courts and the political community. One need only look at what jurists have identified as the proliferation of structural litigation. In structural litigation cases, "courts issue complex equitable remedies, and then remain seized of the matter until the remedies are implemented, with judges guiding and monitoring — at times in great detail — the creation or transformation of state bureaucracies" (Huneus 2015). They presuppose a systematic failure, in terms of public policy, to implement a certain fundamental right. On the one hand, it seems that courts, in order to restore their organisational dimension and, therefore, the autonomy of the legal system, have validated procedural requests that imply a growing dialogic dimension. The STF has recently accommodated this systemic pressure in various cases: prohibition of armed operations in the *favelas* (ADPF 635)<sup>6</sup>;

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4 See, for instance, *Ação Direta de Inconstitucionalidade*(ADI) n° 6464, in which Bolsonaro challenges the constitutionality of the judiciary ordering the blocking or banning of social media accounts. This lawsuit has endless consequences for the fight against fake news.

5 See ADIs 6.119; 6.139; and 6.446.

6 The acronym ADPF stands for *Arguição de Descumprimento de Preceito Fundamental* [Action Against a Violation of a Constitutional Fundamental Right].

vaccination of Indigenous and *quilombola* populations against Covid-19 (ADPF 709 and ADPF 742, respectively). On the other hand, social movements also use the judiciary to advance their political strategies in an institutional environment where legislature and government are in open combat against minorities.

## Concluding remarks

The theoretical model outlined in this paper suggests that populist attacks against constitutional courts target the de-paradoxifying function played by the judiciary in the legal system. The evolution of *institucionalidad* in Latin America has allowed historically marginalised groups to advance their political agendas by litigating before constitutional courts. This entailed the translation of international and regional human rights standards into domestic legal orders. In a context where parliaments are often obstructive to popular participation, minorities have found in the judiciary a potential avenue to broaden the concept of citizenship.

The populist attacks deny to courts the legal character of their decisions. Emulating the critique of judicial activism, contemporary populists act to assert the view that judicial decisions are political operations not endowed with electoral validity. Once the “organising” function of the courts is negated, then all that is left is the re-entry of a permanent constituent power exercised by elite-driven majorities.

According to this theoretical position, we do not think that courts can respond to the populist challenge by simply accumulating political power, in some kind of majoritarian counter-attack. Further research on the contemporary examples of judicial resistance to populism may show that it is in the interest of democracy that courts preserve their judicial authority through organisational autonomy, retaining the difference between majoritarian politics and fundamental rights litigation.

However, there is no doubt that this goal can only be achieved by reinforcing citizen action through the use of functional equivalents. Constitutional courts in Latin America have historically resorted to democratic irrigation to face political crises. Examples of that are the Argentinean Supreme Court’s public hearings (*audiencias públicas*), created after the 2001 Great Depression (Benedetti and Sáenz 2019); the *tutela* litigation before the Supreme Court of Colombia, which played an important role in checking the populist tendencies of President Uribe (Thornhill and de Araújo Calabria 2020); and the Brazilian Supreme Court structural litigation proceedings, which are reshaping the public policies neglected by President Jair Bolsonaro.

The analysis of some of the paradigmatic cases in the region might allow us to conclude that courts have created new structural couplings between the legal system and its environment. This means new possibilities to export or adjourn the self-reference paradoxes of legality. A successful strategy to resist populism may be then connected to maximising the political agenda of minorities in the context of human rights litigation. When courts successfully resist populist attacks, they tend to increase the irrigation between centre and periphery of the legal system. This may deepen the idea of a democratic political community.

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