

SYMPOSIUM:
THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW IN LATIN AMERICA
IUS CONSTITUTIONALE COMMUNE EN AMERICA LATINA:
OBSERVATIONS ON TRANSFORMATIVE CONSTITUTIONALISM

*Armin von Bogdandy**

A new approach

Ius Constitutionale Commune en América Latina (ICCAL) constitutes a new approach to constitutionalism in the region. It has transformative aims and draws its energy from the perception of unacceptable conditions of a systematic nature. Like many legal concepts it refers both to positive law as well as to the legal discourse connected to it. In terms of positive law, it is above all based upon the American Convention on Human Rights and other inter-American legal instruments, the concordant guarantees of national constitutions, the constitutional clauses opening up the domestic legal order to international law as well as pertinent national and international case law. In terms of legal discourse it is characterized by a disciplinary combination of national and international legal scholarship, a comparative mindset, and a methodological orientation towards principles.

The proponents of this approach set a stark accent on rights and the transformation of political and social realities but reject plebiscitary presidentialism and the centralization of power as a transformative strategy. Accordingly, the separation of powers and independent institutions are accorded great weight. ICCAL supports the regionally secured realization of the central promises of national constitutions, the embedding of the national legal orders in a larger context, and the transformation of society through law.

The existence of a *Ius Constitutionale Commune* becomes most palpable in the interaction of domestic authorities with the Inter-American Court. Most states in the region have recognized the supremacy of international human rights law in their domestic legal orders—either through express constitutional provisions or by constitutional adjudication. Moreover, the Inter-American Court has developed the legal doctrine of conventionality control according to which all domestic authorities are under the obligation to determine whether their acts are in conformity with the American Convention and the Court's interpretation of it. As a result of inter-American jurisprudence states have repealed and amended laws, including the Constitution; national Courts, especially constitutional courts, have relied on inter-American case law in salient cases;¹ and administrative agencies have crafted countless policies to comply with far-reaching reparations. There is little doubt that this system constitutes the normative core of the *Ius Commune*.

** Professor of Public Law and International Law at the law faculty of Goethe University Frankfurt and Director of the Heidelberg Max Planck Institute for Comparative Public Law and International Law.*

Originally published online 11 November 2015.

¹ Striking down amnesty laws for example, Corte Suprema de la Nación [CSJN] [National Supreme Court of Justice], 14/6/2005, “Simón Julio Héctor y otros,” Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (2005-328-2056) (Arg.); Sabalsagaray Curuchet, Blanca Stela, Denuncia, Excepción de inconstitucionalidad arts. 1, 3 y 4 de la Ley no. 15.848, 19 octubre 2009, M.R.: Jorge O. Chediak González, FICHA 97-397/2004, Sentencia No. 365 (Uru.).

By addressing the enormous social challenges faced by the region through a common discourse on human rights, democracy and the rule of law, ICCAL has significant potential to guide legal scholarship and practice. This essay is an attempt to describe this novel approach and to highlight the opportunities it presents.

Core concerns

ICCAL shares main features of transformative constitutionalism as it is known in other parts of the world.² Thus, it highlights the capacity of law to transform societies and emphasizes law's response to problems such as widespread poverty, violence and social exclusion.³ ICCAL aims at changing political and social realities in the region in order to create the general framework for the full realization of democracy, the rule of law, and human rights.⁴ As vague as this appears at first, the concern is in fact quite concrete. It arises out of the deeply troubling experience of unacceptable living conditions for broad parts of the population.

Indeed, the question of inequality is at the very center.⁵ Inequality is particularly deep, stubborn, and even explosive when entire groups of the population are not able to participate in the achievements of the welfare state, including healthcare, education, the economy, politics, and even the law. The concept of exclusion describes this challenge. It summarizes the problems of a society whose capacities for social integration falter because many people are not given due consideration within its institutions. A society will never minimize structural inequality if it cannot overcome such exclusion. ICCAL strives towards this goal. Overcoming exclusion serves as the conceptual focus. This does not mean; however, that ICCAL subscribes to any particular political ideology. The project encompasses different, even conflicting approaches to social integration, including questions of the desirable economic order, just redistribution, free trade or investment protection.

To advance with this agenda, ICCAL chooses human rights as its linchpin: the *Ius Constitutionale Commune en Derechos Humanos*. There are three essential reasons for this. First, the transformative element of constitutions is above all contained in their fundamental or human rights guarantees. Second, these rights enable the mobilization of civil society through strategic litigation. Third, judicial decisions oriented towards fundamental and human rights, which are often sought by excluded groups, provide legal support to the projects of such groups. These rights have had a deep and transformative impact in Latin America, regardless of the fact that they are often not effectively guaranteed. Human rights have developed into a common language, legal—but also political and social—that did not exist 20 years ago, to discuss challenges of exclusion and available remedies not only amongst legal professionals but also in broader public discourse.

² The concept of transformative constitutionalism finds its roots in the Global South, where legal institutions and scholars have developed innovative theories, doctrines and practices of modern constitutionalism, better suited to their particular history and reality. In the region, Colombia is perhaps best known for its transformative constitutionalism. See MANUEL J. CEPEDA, *INTRODUCCIÓN A LA CONSTITUCIÓN DE 1991: HACIA UN NUEVO CONSTITUCIONALISMO*, 173-186 (1993). For the concept *Ius Constitutionale Commune*, see *Cabrera García and Montiel Flores v. Mexico*, Preliminary Objection, Merits, Reparation, and Costs, Concurring Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, Inter-Am. Ct. H. R. (ser. C) No. 220 (Nor. 26, 2010).

³ Daniel Bonilla Maldonado, *Introduction: Towards a Constitutionalism of the Global South*, in CONSTITUTIONALISM OF THE GLOBAL SOUTH: THE ACTIVIST TRIBUNALS OF INDIA, SOUTH AFRICA, AND COLOMBIA 1, 21-22 (Daniel Bonilla Maldonado ed., 2013).

⁴ Rodolfo Arango, *Fundamentos del Ius Constitutionale Commune en América Latina*, in IUS CONSTITUTIONALE COMMUNE EN AMÉRICA LATINA. RASGOS, POTENCIALIDADES Y DESAFÍOS 25 (Armin von Bogdandy et al. eds., 2014). See also Karl E. Klare, *Legal Culture and Transformative Constitutionalism* 14 S. AFR. J. HUM. RTS. 150 (1998).

⁵ Flávia Piovesan, *Ius Constitutionale Commune impacto del Sistema interamericano*, in IUS CONSTITUTIONALE COMMUNE EN AMÉRICA LATINA. RASGOS, POTENCIALIDADES Y DESAFÍOS 61, 63 (Armin von Bogdandy et al. eds., 2014).

The focus on exclusion is a core feature of Latin American human rights discourse. The indivisibility and interdependence of human rights, in particular of civil and social rights, has been emphatically highlighted.⁶ Thus, the equality principle is not understood as a mere ban on discrimination. Rather, it demands recognition for, as well as the overcoming of, at least the most massive forms of social inequality. In this regard, transformative constitutionalism as we find it in Latin America is not readily discernible from that of India or South Africa.⁷ The Colombian Constitutional Court is exemplary in this regard: it has attempted to realize social rights despite the absence, by-and-large, of welfare entitlements and a functioning welfare state administration.⁸

Latin American human rights discourse targets another form of exclusion, that of being subject to extreme violence. This explains the origin of specific Latin American innovations in human rights law, such as the prohibition of amnesties for grave human rights violations, femicide, or enforced disappearance of persons. This is perhaps the best known contribution of Latin American case law to the global discourse dealing with the worst forms of human aberration.

ICCAL's Idea of Commonality

Two components justify the claim of commonality implicit in ICCAL. The first is a new openness of the national legal orders to a common substrate of international law, in particular the American Convention on Human Rights. ICCAL captures the idea that national constitutional law and the relevant international law should jointly realize common guarantees and promises in a mutually reinforcing “constitutional bloc” (*bloque de constitucionalidad*). The openness of national legal orders is thus not only the expression of a common development but also lends the national legal orders a common orientation. It thus seems quite logical for the Inter-American Court to describe human rights treaties as a body of law or *corpus iuris*.⁹ The fact that new interpretations, doctrines and practices of modern constitutionalism are regionally entrenched sets ICCAL apart from other stripes of transformative constitutionalism.

Secondly, the concept stands for a common legal discourse. Its characteristics are a disciplinary combination of national and international legal scholarship, a comparative mindset, a methodological orientation towards principles, and a focus on rights. The combination of international and national legal scholarship is a breakthrough, as the two sub-disciplines have traditionally been separate academic fields. An important forum for common legal discourse is the *Instituto Iberoamericano de Derecho Constitucional*. Since its foundation in 1974 it has put comparative constitutional discourse at the service of democratic aims. This orientation can also be observed in various journals that strive to develop a Latin American legal-scholarly discourse: the *Revista Latinoamericana de Derechos Humanos*, the journal *Derecho de la Integración: Revista Jurídica Latinoamericana*, the *Anuario de Derecho Constitucional Latinoamericano*, the *Revista Latinoamericana de Derecho*, the *Revista Latinoamericana de Derecho Social*, and most recently the *Revista Derecho y Crítica Social*.

The term *Latin America* is to be taken carefully. Identifying the land mass between the Rio Grande and Tierra del Fuego as one region should not be taken to presume significant political, social, economic or legal homogeneity, let alone unity. The differences between Chile and Honduras are not lesser, and perhaps greater, than

⁶ HÉCTOR GROS ESPIELL, LOS DERECHOS ECONÓMICOS, SOCIALES Y CULTURALES EN EL SISTEMA INTERAMERICANO 16-17 (1986); Flávia Piovesan, *Derecho sociales, económicos y culturales y derechos civiles y políticos*, 1 SUR REVISTA INTERNACIONAL DE DERECHOS HUMANOS 21 (2004).

⁷ Oscar Vilhena Vieira et al., *Introduction*, in TRANSFORMATIVE CONSTITUTIONALISM: COMPARING THE APEX COURTS OF BRAZIL, INDIA AND SOUTH AFRICA 3, 3-4 (Oscar Vilhena et al. eds., 2013)

⁸ Néstor Osuna, *Panorama de la justicia constitucional colombiana*, in 1 LA JUSTICIA CONSTITUCIONAL Y SU INTERNACIONALIZACIÓN 623 (Armin von Bogdandy et al. eds., 2010).

⁹ *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, Inter-Am. Ct. H R. (ser. A) No. 16, para. 115 (Oct. 1 1999).

those between Sweden and Romania. Furthermore, the existing regimes of economic integration among Latin American countries are much weaker than in Europe. Moreover, they do not work towards an overarching Latin American “community” comparable to the European Union.

In recognition of this fact, the idea of commonality underlying ICCAL does not strive towards the economic, social, or political integration of Latin America according to the European model, nor the formation of a regional bloc. The ICCAL project is rather a regionally embedded realization of the central promises of the involved national constitutions. The concept of *Ius Constitutionale Commune* gives it a name, provides orientation, and aims at generating and structuring academic, political, and judicial communication.

Institutionalidad and the New Role of Courts

As a concept for understanding Latin American constitutionalism, *Institutionalidad* is as idiosyncratic as it is helpful. In Latin America, constitutional text and constitutional reality frequently diverge. Certainly, some Latin American states, in particular Chile, Costa Rica, and Uruguay, have a rule of law performance record which exceeds that of, for example, Bulgaria, Greece, Italy, or Romania.¹⁰ But on the whole, structural deficits in the rule of law have been a frequent and continuous concern in Latin America. The lack of *Institutionalidad* means the lack of a clear separation between the public interest to be pursued by public institutions and the private or corporatist interests of office-holders, resulting in widespread corruption.

The promotion of *Institutionalidad* is a central concern for ICCAL. In contrast to hyper-presidentialism, it accords great weight to the separation of powers and independent institutions. Highly significant for the realization of democracy are, for example, independent institutions which carry out and supervise political elections. The contribution of these institutions to the fairness of elections in many countries has resulted in the increased responsiveness of the political system which in turn is crucial for inclusion as advocated by ICCAL.

Of course, the protection of rights calls for courts. While the trust placed on the judicial branch is generally quite low,¹¹ courts appear to be the key actors. The jurisprudence of the Colombian Constitutional Court and the Inter-American Court demonstrate that this aspiration is no rose-tinted utopia. It is nonetheless clear to all that courts cannot and will not automatically support a transformational project. The persistent question is this: what can be done so that the Latin American courts, which traditionally have not challenged the executive power or practices of exclusion, will take up these difficult tasks with some prospect of success?

In order to succeed, ICCAL requires many elements: judicial training, procedural and institutional reform, an interested public, a reform of legal education as well as a constructive but critical legal scholarship. There is a consensus that the increase in judicial power must be closely accompanied by executive and legislative policies. The legal system can make an important and specific contribution to the transformational process, but it clearly cannot replace politics in the broad sense.

The Role of Regional Institutions

Another feature of ICCAL that distinguishes it from older transformative conceptions is that it transcends the national horizon: it weaves together constitutional law and international law and ascribes significant autonomy to international institutions. Of course, compared to Europe, one finds in Latin America a much more profound skepticism towards international economic and financial institutions, such as the World Bank, the International Monetary Fund, international investment arbitration, as well as the recent free trade agreements.

¹⁰ See WORLD BANK, Worldwide Governance Indicators, key word: rule of law; Reference Year: 2012; see also THE WORLD JUSTICE PROJECT, RULE OF LAW INDEX 2014.

¹¹ Latin American Public Opinion Project (LAPOP).

These institutions are often associated with the neo-liberal “Washington Consensus,” which left behind deep but not always welcome traces, since it often sharpened social exclusion. The representatives of ICCAL are not interested in a blanket opening-up of state sovereignty, but rather more narrowly in securing human rights, democracy, and the rule of law. Sovereignty therefore remains a relevant principle. However, the character of sovereignty has changed from final and conclusive to functional: it now stands in the service of fundamental principles.¹² *International* institutions, which strengthen constitutional principles, are thus understood as *constitutional* achievements.

The internationalization of constitutional law and the constitutionalization of international law are phenomena well-known in the global North. However, the developmental dynamic in Latin America is noteworthy for its originality. The new openness of domestic legal orders operates legally through an institution which has been borrowed from Europe, but which has been ingeniously reengineered in Latin America: the *bloque de constitucionalidad*.¹³ Whereas in France and Spain the idea of the constitutional bloc broadened the standards for constitutional jurisdiction, in Latin America, by contrast, the *bloque de constitucionalidad* integrates international norms into the domestic legal order, and thus strengthens those national courts which are pushing the constitutional agenda.

The international law component of Latin American constitutionalism arises from many sources. However, there is a common core: the inter-American system for the protection of human rights. The significance of this system is great enough to merit the description of the whole process as one of *Inter-Americanization*.¹⁴ Of course, the Inter-American Court can do little by itself, and indeed mainly operates by strengthening likeminded domestic actors.¹⁵ The essential function of the international level is to shift the balance within domestic conflicts so that the constitutional project can advance.

The Court, with a total of 173 cases to date (its *corpus iuris*), has generated a remarkable case law tailored to Latin American problems. The pivotal point of this discussion is the doctrine of convention control (*control de convencionalidad*), introduced in the case of *Almonacid Arellano v. Chile*.¹⁶ The doctrine requires that domestic courts apply the Inter-American Convention and do so according to the standards laid down by the Court in its case law. In accordance with this doctrine, which is still being developed, all state acts must be reviewed for their conformity with the convention; if there is a conflict, the measure cannot be carried out. This encroaches deeply upon the domestic order of competence, calling into question the relationship of the judiciary to the other institutions of the state as well as the hierarchy within the judiciary.

Since the Inter-American Court ascribes to its decisions direct effect and priority in the domestic legal order, it impedes state actions, requires domestic legislation, and orders state institutions to implement a plethora of measures. The constitutional implications of this development are obvious, especially because it often relates to highly political matters in deeply divided societies. Thus, it is no surprise that a rich debate has unfolded

¹² Héctor Fix-Zamudio, *El derecho internacional de los derechos humanos en las Constituciones latinoamericanas y en la Corte Interamericana de Derechos Humanos*, 1 REVISTA LATINOAMERICANA DE DERECHO 141, 147-151 (2004).

¹³ Manuel E. Góngora Mera, *La difusión del bloque de constitucionalidad en la jurisprudencia latinoamericana y su potencial en la construcción del ius constitutionale commune latinoamericano*, in IUS CONSTITUTIONALE COMMUNE EN AMÉRICA LATINA. RASGOS, POTENCIALIDADES Y DESAFÍOS 301 (Armin von Bogdandy et al. eds., 2014).

¹⁴ See MARIELA MORALES ANTONIAZZI, Ph.D. Dissertation (on file with author).

¹⁵ For a detailed analysis see Óscar Parra Vera, *El impacto de las decisiones interamericanas. Notas sobre la producción académica y una propuesta de investigación en torno al “empoderamiento institucional”*, IUS CONSTITUTIONALE COMMUNE EN AMÉRICA LATINA. RASGOS, POTENCIALIDADES Y DESAFÍOS 383, 383-384 (Armin von Bogdandy et al. eds., 2014).

¹⁶ *Almonacid Arellano v. Chile*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 154, para. 124 (Sep. 26, 2006).

concerning the conventionality control. The powerful effects of this body of law has raised democratic legitimacy concerns. Criticism emanates not only from institutions that themselves do not wish to be criticized, but also from authors who fundamentally agree with the creativity and thrust of the court's jurisprudence.¹⁷

Prospects

Ius Constitutionale Commune en América Latina provides a dynamic approach to law, which takes up the enormous social challenges of the region through a common discourse on human rights, democracy, and the rule of law. It can rely on the great legal-historical and cultural affinities in Latin America, which are based on the Iberian colonization, the influence of the *Corpus Iuris Civilis* and the *Corpus Iuris Canonici*, the U.S. Constitution, the Constitution of Cadiz as well as French constitutional and administrative law, but also the idea of Latin American unity and the failure of its realization. It struggles, along and in cooperation with other social actors, with common problems, in particular inequality and the exclusion of large segments of the population, the legacy of authoritarian regimes, the shadow cast by U.S. interests, as well as *hyperpresidencialismo* and the weakness of many public institutions. It formulates a broad consensus on the way forward: a rights-based, supranationally embedded and regionally rooted constitutionalism.

What are the chances for this transformative constitutionalism? Whoever looks for reasons to cast doubts will quickly find them in historical trajectories, cultural characteristics, economic structures, geopolitical givens, political power relationships, and social conflicts. However, on the whole and despite the obstacles it faces, Latin American transformative constitutionalism has become part of a broader social and political development. Even self-styled realists must recognize the novel opportunities and possibilities it presents.

¹⁷ ROBERTO GARGARELLA, LATIN AMERICAN CONSTITUTIONALISM 1810-2010. THE ENGINE ROOM OF THE CONSTITUTION 170-171 (2013).