The Globalization of Latin American Constitutional Law

By *Javier A. Couso*, Santiago de Chile*

I. Introduction

One of the most remarkable developments in the legal domain over the last few decades has been the increasing globalization of constitutional law, the legal subject most intimately linked to national identity. This trend is apparent not only in constitution-making, or in the use of foreign jurisprudence by constitutional and supreme courts but, I submit, in the emergence of what amounts to a kind of constitutional *ius cogens.* This body of global legal rules – which is intimately linked to international human rights law – has led to the increasing homogeneity of constitutional law around the world, because it is deemed mandatory by a similarly global network of constitutional scholars and rights activists.

As international law scholars know well, *ius cogens* is a peremptory, unwritten norm thought to be so fundamental that it invalidates other rules.[1] A typical example of *ius cogens* is the rule that slavery is unacceptable. This concept, which has evident links to natural law thinking (Janis argues that it is a '*modern form of natural law*'),[2] gained legitimacy after World War II, as a reaction of the abuses of Nazism, and I think it represents the best way to conceptualize the type of human rights-based constitutional law that dominates current constitutional thought worldwide.

As it happens in the domain of international law, the new constitutional *ius cogens* is regarded as peremptory by its supporters. Indeed, given the high moral status it is deemed to posses, those who adhere to it believe that national sovereignty should not be an obstacle to the domestic implementation of the basic human rights recognized in the rich body of instruments that have configurated the contours of international human rights law since the mid twentieth century.[3]

In what follows, I analyze the way in which this human rights-based constitutional *ius cogens* – which I take to be the most important vehicle for the globalization of constitutional law in our time – has penetrated Latin America's constitutional law.

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1 See *Mark Janis*, An Introduction to International Law, 1993, page 62.

2 Ibid, page 63.

3 See *Thomas Risse* and *Kathryn Sikkink*, "The socialization of international human rights norms into domestic practices: introduction," in *Thomas Risse / Stephen Ropp / Kathryn Sikkink*, The Power of Human Rights. International Norms and Domestic Change, 1999, pages 1-38.

II. Law and constitutionalism in Latin American history

Right after their independence – in the early nineteenth century – Latin American countries were fairly open to foreign legal influence, including in the domain of constitutional law. In fact, most of the new nation-states of the region look to a very different country (socially and culturally), the United States, for inspiration when designing their constitutional architectures. This explains why all Latin American states adopted presidencialist regimes.

The initial openness to foreign influence in constitutional law exhibited by Latin American states would decline later, when constitutions came to play a crucial symbolic role in building the nation. This, in a region of the world in which (as opposed to Europe) the state preceded the nation.

While constitutional law was becoming nationalized, the opposite happened in the domain of civil and criminal law, subjects which became open to foreign influence. An example of the receptiveness exhibited by Latin American countries to foreign legal ideas in civil law is the Civil Code that Andrés Bello drafted for Chile (1855), which borrowed from an array of codes from overseas, such as the Code Napoleon, the Prussian Code, the Sardinia Code and many others. The remarkable range of foreign legal sources from which Bello got inspiration was openly acknowledged in the preamble of his code.[4]

Another example of the denationalized status of civil law in Latin America was the wholesale adoption of Bello's code by a number of countries in the region, such as Colombia, Ecuador, El Salvador, Venezuela, Honduras and Nicaragua, after it had been adopted in Chile.[5]

As indicated above, Latin America's openness to foreign law was not confined to the domain of civil law but it also reached criminal law. In this case, however, the foreign influence did not occur at the moment of codification but later on, through the hegemony achieved by German legal doctrine within Latin American legal academics and judges, which gradually led to the jurisprudential transformation of the region's criminal law.

How do we account for the fact that Latin American constitutional law became nationalized while that civil and criminal law were so receptive to foreign influences?

I think this was because civil and criminal law were regarded in Latin America as more properly 'legal' subjects than constitutional law was, therefore as sites where a scientific legal discourse could be articulated, which in turn made them more liable to be penetrated by foreign scientific discourse (science has no nationality, as it were).

Contrasting with this understanding of civil and criminal law, until fairly recently constitutional law was rarely considered 'law' in Latin America by legal practitioners and academics. It was instead a way of constituting the nation, but not something expected to be

4 See "Mensaje del Ejecutivo al Congreso proponiendo la aprobación del Código Civil," in: Codigo Civil Edición Oficial, Editorial Jurídica de Chile, 1970, pages 5-19.

5 See *Rogelio Pérez-Perdomo*, Los abogados de América Latina. Una introducción histórica, Bogotá, 2004, page 120.

adjudicated by judges or theorized by legal academics. Given this context, it is not surprising that there was little space to create legal science around constitutional law, which in turn meant that it was less liable to be influenced by foreign legal ideas.

In spite of the fact that constitutional law was not considered a proper legal subject there was quite a lot of constitutional drafting during that time. The reason behind this paradox is that every time there was a change in the political regime –due to the recurrence of military coups succeeded by the reestablishment of civilian rule—the new authorities felt compelled to enact a new constitution. This is what Brian Loveman had in mind when he wrote that behind all the constitution-writing which has characterized Latin America over the last two centuries there was very little constitutionalism, in the sense of an actual limitation of political authority and a culture of respect for individual rights.[6]

III. The transformation of Latin American constitutionalism

Loveman's assessment of the role of constitutions in Latin America represents a fairly accurate account of the situation until the 1970s. Indeed, up until then constitutions were largely irrelevant to the daily life of the people of the region, rarely controlling governmental abuses. But then something extraordinary happened: the emergence of what amounts to a true constitutional revolution in the region, a revolution in both the content and the uses of constitutional law which has elevated it to the top of the legal field.

According to the new constitutional paradigm, constitutions involve not just rules but – more importantly – fundamental principles of public law drawn from international human rights law. Furthermore, the constitution is now understood to be an instrument that ought to be directly enforced by judges at both constitutional courts and the regular judiciary.[7]

In my view, the two most important factors contributing to the transformation of Latin American constitutional law into a real limit on political power and into a recognized legal subject (liable of being influenced by global academic discourse), were first, the way in which the wave of brutal military regimes that swept the region during the 1960s and 1970s was processed by Latin American society and, second, the understanding that international human rights law represents something like the constitutional *ius cogens* of our era, that is to say, a body of norms and principles above national sovereignty. These two factors opened the way to both the consolidation of constitutional law as the most important legal subject of out time as well as to the transformation of its content in order to satisfy its compliance with the demands of the standards of international human rights law.

Going to the first of the aforementioned factors –that is, the growing awareness of the importance to limit power as a result of the tragic experience of the military dictatorships –,

6 See *Brian Loveman*, The Constitution of Tyranny: Regimes of Exception in Spanish America, Pittsburgh Press, 1994.

7 See *Alan Angell*, *Rachel Sieder* and *Line Schjolden* (eds.), The Judicialization of Politics in Latin America, London, 2005.

of course Latin America had had many episodes of horror in its past (starting with the genocidal Spanish treatment of indigenous peoples in the sixteenth century), but this time it processed it in a more fruitful way, thanks to the global awareness created by human rights discourse –which was itself made possible by the international human rights movement. Due to this new context, for the first time in the region's history the horrors were processed in a way conducive to institutional change in the realm of constitutional law. In fact, we cannot understand current constitutional law thinking in Latin America without this background.

With regard to the second element mentioned above, that is, the impact in Latin American of what I have labeled constitutional *ius cogens*, it suffices to say that its penetration in the region has been so deep as to make it commonsensical in both the legal academy and in the judiciary. As Stone Sweet has argued in relation to the rise of constitutional justice in Europe,[8] the new constitutional *ius cogens* encourages judges in Latin America to engage in what amounts to a type of natural law adjudication, in stark contrast with the traditional deference to legislated law so common in the region up until the 1970s.

A fairly illustrative example of the way in which the constitutional *ius cogens* has penetrated the region is provided by a statement of a high official of the Ministry of Foreign Relations of Chile, who, in the midst of the debate over the constitutionality of the treaty ratifying the International Criminal Court (ICC) in Chile, declared that since it had been considered constitutional in most countries of the world it should be so considered in Chile, without mentioning that the text of the latter's constitution was different from that of the countries he was referring to! But textual elements were surely beside the point in the era of constitutional *ius cogens*.

I have so far dealt with what I take to be the 'macro factors' contributing to the impact of the new constitutional paradigm in Latin America. I will now briefly deal with some 'micro factors' which have also contributed to the penetration of human rights-based constitutionalism in Latin America.

The transformation of constitutional discourse in this region has been supported by a fairly active group of legal academics devoted to the cultivation of constitutional law and theory, a set of professionals who combine their intellectual interest in the area with the expectation of rising to the top of the state apparatus through their incorporation to membership in the courts in charge of constitutional adjudication.

8 Alec Stone-Sweet, commenting on the rise of what he labels 'higher law constitutionalism' in Europe had this to say: "In Germany, Italy, and Spain, constitutional texts proclaim human rights before they establish state institutions and before they distribute governmental functions. In consequence of this fact, rights are considered by legal scholars and many judges to possess a juridical existence that is prior to and independent of the state. Doctrine has it that rights are invested with a kind of 'supraconstitutional' normativity that makes (at least some of) them immune to change through constitutional revision (…) This is inherently a natural law position, although natural law is rarely explicitly invoked." See *Alec Stone-Sweet*, Governing with Judges. Constitutional Politics in Europe, Oxford, 2000, page 95.

Another element that has contributed to the hegemony of the new constitutional doctrine in Latin America has been the global network of constitutional scholars and judges who meet regularly to discuss about constitutional theory.[9] The constitutional *ius cogens* I have identified above is the common denominator of those meetings, since judges and constitutional law scholars are reciprocally ignorant of the minutiae of each other's constitutions, but share a basic understanding of the basic core of human rights-based constitutionalism.

To finish this brief list of the elements encouraging the spread of the new constitutional ius cogens in Latin America it is important to mention the crucial role played by the Inter-American human rights system (which includes the Inter-American Human Rights Commission and Court). This body has been a focal point of articulation and dissemination of the new constitutional *ius cogens* in Latin America through its jurisprudence, which is widely commented regionally by a growing number of constitutional scholars who devoted themselves to analyze its rulings.

IV. Conclusion

Over the last two decades or so, Latin American constitutional law has experienced a sea change, due to the adoption of a human rights-based constitutional *ius cogens* accompanied with a new conception of the role of high courts in a democracy. This new paradigm encourages courts to assertively adjudicate the constitution even against legislated law. This revolutionary change in constitutional theory has created quite a lot of excitement within those who work in the field in the region, as well as in many social groups who now see the courts as an important resource to advance their claims when they are disregarded by the political system.

The high expectations placed in this new understanding of constitutional law should not, however, make us overlook the risks associated to this new paradigm, which are apparent from the record of the last two decades in the region, where assertive adjudication of human rights-based constitutionalism against legislated law has often led to the destruction of the independence of very courts which have used their power of judicial review of the constitutionality of law.

At any rate, and in spite of the danger just noted, it is clear that as a result of the emergence of the new constitutional *ius cogens* I have described in this paper, constitutional law in Latin America has become more globalized than ever before.

9 The meetings of the International Association of Constitutional Law (IACL) represent the most important of such forums.

The mechanism of prescribing a set of binding principles to the authors of a new constitution has been employed successfully in a few cases. These principles of constitution-making essentially reflect what might be described as the essence of contemporary constitutionalism.

A foundational *Leitmotiv* for constitution-making is to be found in the notion of global values, the most pre-eminent of which is human dignity. An exact definition of dignity is elusive, but it is gaining ascendency in the 21st Century thinking on the moral foundations of constitutionalism and therefore of written constitutions and their interpretation.

Global constitutionalism is not leading the world in the direction of the drafting of constitutions that are all the same. Comparative constitution-making has however become an essential characteristic of the process of drafting (and revision) of constitutions.

Comparative Constitutional Law in the Courts: Reflections on the Originalists' Objections

By *Jo Eric Khushal Murkens*, London

The controversy surrounding the judicial use of comparative constitutional law is not new. However, the debate has recently been reignited by a number of US Supreme Court justices who have spoken out on the use of non-US law in the Court. Scalia opposes, and Breyer favours, references to 'foreign law'. Their comments, made both within and outside of the Court, has led to a reaction by scholars. Arguably the debate is US-specific as it resembles the different views regarding constitutional interpretation, namely whether the Constitution's original, or rather its current, meaning is determinative. Yet the debate also raises broader issues of constitutional theory and politics: formal vs substantive legitimacy, globalisation of the courts, judicial sleight of hand, the cultural foundations of constitutional law, and the citation of non-primary sources of law in litigation. The present article explores these issues. It rejects radical approaches (either against or in favour of comparative constitutional law) and instead argues for a more modest process which both identifies the national specificity of law and grasps the mediating potential of law as a self-reflexive discourse.

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Over the last few decades, the world has experienced a remarkable process of globalization of law – in particular, constitutional law – due to the emergence of what amounts to a human rights-based constitutional *ius cogens.* This body of global legal rules has led to the increasing homogeneity of constitutional law around the world, because it is deemed as mandatory. The globalization of constitutional law has not been confined to consolidated

democracies, but it has also reach transitional ones, such as those of Latin America. In this region, the acceptance of the new constitutional *ius cogens* has involved a revolutionary transformation of the content and uses of constitutional law. According to the new paradigm, constitutions involve not just rules but – more importantly – fundamental principles of public law drawn from international human rights law. Furthermore, the new paradigm includes a new conception of the role of high courts, which encourages them to assertively adjudicate the constitution.

Globalization of Constitutional Law through Interaction of Judges

By *Jutta Limbach*, Berlin / Munich

During the last decades governments, lawmakers and judges have been faced with a multitude of challenges transcending national borders. These challenges call for effective ways of enforcing already existing structures of international co-operation and of creating novel approaches, such as the creation of networks between decision-makers on an international level. Thus recent years have seen the emergence of a proliferation of international gatherings of judges. Networks may connect international institutions and their national interlocutors in a vertical way with a view of enforcing international standards. In this respect the European Court of Human Rights dedicated the conference at the occasion of the opening of the judicial year 2005 to a dialogue between judges of different national and European courts and facilitated a vertical dialogue between an international court and its national counterparts in order to respond to the questions raised throughout Europe in terms of the application and interpretation of the European Convention of Human Rights. Moreover networks may connect national bodies and their foreign counterparts in a horizontal way, aiming at the exchange of information and mutual support, as it does for instance the Conference of European Constitutional Courts that enables constitutional judges to entertain personal contacts and to exchange know-how and experience. Although often lacking of coercive power, the impact of these networks using "soft powers" should not be underestimated. Based on mutual respect and appreciation, an intensive and open dialogue on fundamental issues of constitutional law as well as on methods of interpretation facilitates the exchange of information from a broad comparative perspective in order to meet the demands of a globalized world.

The Internationalization of Constitutional Law: A Note on the Colombian Case

By *Manuel José Cepeda*, Bogotà

This note describes the relevance of International Human Rights Law (IHRL) and International Humanitarian Law (IHL) for constitutional adjudication in Colombia by the Constitutional Court. As elements of the so-called "constitutionality block", IHRL and IHL have