



CONSTITUTIONAL JUSTICE IN IBERO-AMERICA: SOCIAL INFLUENCE AND HUMAN RIGHTS*

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ABSTRACT. *This note offers a general overview of the state of constitutional justice in Ibero-America. In particular, it explores the influence the decisions of constitutional courts have on society and the development of international jurisprudence on human rights from a Latin American perspective.*

KEY WORDS: *Constitutional courts, Ibero-America, society, human rights.*

RESUMEN. *Este ensayo ofrece un panorama general sobre el estado de la justicia constitucional en Iberoamérica. Específicamente, explora la influencia que las decisiones de los tribunales constitucionales tienen en la sociedad, así como el desarrollo de la jurisprudencia internacional con respecto a los derechos humanos desde una perspectiva latinoamericana.*

PALABRAS CLAVE: *tribunales constitucionales, Iberoamérica, sociedad, derechos humanos.*

* This text was presented on behalf of the Constitutional Courts of Ibero-American countries at the Worldwide Conference on Constitutional Justice held in Cape City, South Africa, on January 22-24, 2009. It was discussed and enriched by all participants of the region, as well as those of Angola, Equatorial Guinea, Guinea-Bissau, Mozambique and Sao Tomé and Príncipe. The representative of the Moroccan Constitutional Court participated as an observer. I would also like to thank Alfonso Oñate Laborde, Francisca Pou Giménez, Gabino González Santos, David García Sarubbi and Karlos Castilla Juárez for their comments on and support with this article.

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I. INTRODUCTION

Constitutional justice is the result of three great political-legal syntheses: the democratic state, the liberal state and the social state. The democratic state has transformed the criteria that regulate access to power and legitimate governments while defining citizens' status. It has given new foundations to the relationship between society and those who govern in its name. The liberal state has in turn introduced an important distinction between public power and society, thereby providing the possibility of creating a space for individuals that is shielded from certain kinds of state action. The recognition of fundamental rights for the protection of personal freedom emerges from that act, which can also be said of the modern understanding of the division of powers and the principle of legality. Lastly, under the formula of a social state, a set of guarantees was introduced in order to bestow a basic amount of material benefits to the least fortunate. The rationale behind the constitutionalization of social rights was an institutional effort to guarantee a set of minimum entitlements to broader sectors of the population.

An understanding of this general constitutional structure, however, is simply a first step, since very serious problems immediately arise. The complexity arises out of the need to figure out how the components of these three elements (with their different origins and purposes) can be synchronized at a time of growing political pluralism.

The social and democratic states of law are broad structures whose full effectiveness requires solutions at more concrete levels. Where could the construction of these solutions start? In my view, constitutional courts must follow basic principles of constitutional democracy while also taking into due account the constraints posed by their singular and particular historical and political realities. It should be recalled, for instance, that in Latin America the introduction of the model of constitutional justice has been particularly challenging due to the need to adapt the region's consolidated historical reality to the new structure. In contrast, in Europe constitutional courts emerged as a result of a general re-founding process after the Second World War. As a result, their consolidation ran parallel to the consolidation of a new common political reality.

In consideration of this, the Ibero-American Conference of Constitutional Justice¹ —which gathers constitutional courts and chambers in Spanish- and Portuguese-speaking countries— has from time to time held meetings in which constitutional judges can share experiences and jurisdictional efforts by exchanging ideas, striving at all times to reaffirm the basic principles and values of the Rule of Law, the correct institutional functioning of the branches of government and a more effective guarantee of individual rights and freedoms.

In order to form a database of cases and experiences in Ibero-America that will be analyzed at various roundtables during this conference, the issues to be addressed have been grouped in two sections: “The Influence of Constitutional Justice on Society” and “The Development of Global Jurisprudence on Human Rights.” It is also important to always keep in mind the difference between the domestic and the international aspects of our analysis. The domestic approach covers cases that were resolved nationally, while the international contains a reference to the arguments and criteria contained in the opinions of international bodies engaged in the protection of human rights.

II. THE INFLUENCE OF CONSTITUTIONAL JUSTICE ON SOCIETY

Strict constitutional jurisdiction has been defined as a privileged conflict-solving tool, as well as the forum in which the most profound political issues that cause social groups to confront one another in contemporary democracies are ultimately debated. It is little wonder, then, that exploring its influence on society constitutes an extraordinarily interesting topic.

I propose three main questions to guide the exploration of this topic:

1. We must first explore the collective perception of several aspects: the existence and magnitude of the social impact of constitutional justice; the existence and magnitude of the social reaction (in the mass media, politics and civil society) it causes, as well as the role of constitutional justice in the social fabric.
2. We must then explore how that perception leads to the instrumentation of internal elements in the system oriented at channeling this social impact, namely: the manner in which constitutional courts take into account the consequences of their resolutions upon pronouncing them; the way in which they might modify their decisions in the face of possible harm they may cause, and the obstacles courts may face in this regard.

¹ See <http://www.cijc.org>.

3. And lastly, we should consider the ways in which these realities are translated into concrete constitutional options, verifying in particular whether social and economic rights enjoy constitutional status and whether they are backed by some form of judicial supervision.

1. As far as the first question is concerned —the collective perception of the social impact of constitutional justice and reactions to it— constitutional justice in Ibero-America is centrally perceived as a necessary influence in consolidating institutional life in the countries of the region. It is true, as will be seen in the following section, that some of its constitutional courts have developed human rights jurisprudence that is very rich in content. But the fundamental source of their social impact must be associated, I believe, with the maintenance and preservation of the normal functioning of democratic and republican institutions. In other words, constitutional courts are perceived more as guarantors of correct institutional interaction and the division of powers than as champions of individual rights against eventual abuses by law-making bodies.

Many constitutional courts have received recognition for their achievements in this regard. In Chile, for example, the Court is associated to the transition process that took place from 1985 to 1987;² in Venezuela, the importance of court resolutions confirming the autonomy and independence of the judicial branch *vis-à-vis* other branches is widely acknowledged; in Guatemala, as well, we find paradigmatic cases such as the one in which the Court had to declare the unconstitutionality of the dissolution of the Court attempted by the President, as well as the unconstitutionality of the concentration of legislative powers in the hands of the President, a decision that was not challenged by the army and ended up preserving the basic structure of the constitutional state;³ in Brazil, the Court has declared highly sensitive pieces of legislation concerning the federal allocation of powers unconstitutional, decisions that have not gone without tensions and opposition from political parties.⁴ We can also mention many cases in Mexico where the Supreme Court has re-shaped or re-invigorated the workings of the federal system, and also reinstated the conditions under which it safeguards the division between the three branches of government.⁵

Society's reaction to constitutional justice runs along the same lines. Latin American societies bring social conflicts to constitutional courts for the basic purpose of keeping public authority within constitutional parameters. For example, in Panama⁶ and Argentina⁷ we find high-profile resolu-

² See: <http://www.tribunalconstitucional.cl>.

³ See: <http://www.cc.gob.gt>.

⁴ See: <http://www.stf.jus.br/portal/principal>.

⁵ See: <http://www.scjn.gob.mx/Paginas/PaginaPrincipal2008.aspx>.

⁶ See: <http://www.organojudicial.gob.pa>.

⁷ See: <http://www.csjn.gov.ar>.

tions that have declared the unconstitutionality of amnesty laws issued to unjustifiably establish immunity for certain groups. Freedom of speech cases must also be mentioned in this regard. The courts' function to guarantee this right central for the preservation and development of incipient processes of democratization has been remarkable in countries such as Colombia,⁸ Uruguay⁹ and Chile.¹⁰

With regard to the social reaction to what constitutional courts do, I would underline two points: the influence of the mass media on the still embryonic social debate on constitutional court decisions; and the need to find more specialized forums and means to allow for proper debate within civil society. An innovative strategy, for instance, has been developed in Mexico where a limited access public television channel has been launched for the principal purpose of disseminating judicial activity. In Brazil as well, the Court has produced a significant number of programs and transmissions on legal matters. On the other hand, we can still observe a degree of political hostility toward the expansion of constitutional jurisdiction into spaces that were previously the exclusive preserve of politics —something that has not developed, however, into generalized and systematic action that jeopardizes the ordinary progress of the courts' work.

2. Has this social response and interaction had an impact on the system of constitutional adjudication? In my view, the answer is yes: it has become inherent to the functioning of constitutional justice. The role of constitutional courts as true "social architects" is discussed in many Ibero-American countries and courts take into account this kind of social impact when deciding their cases, and even when technically designing the way to issue their decisions. In Colombia,¹¹ Costa Rica,¹² Portugal¹³ and Spain,¹⁴ for instance, there is a growing body of case-law dealing with the characteristics of opinions in terms of their various spheres of application, *erga omnes* opinions as the ones that receive greatest attention in this regard. However, the best example of this phenomenon is the proliferation of "interpretative" opinions, a technique explored and used by constitutional courts to avoid pronouncements of unconstitutionality.

This development demonstrates that it is quite common for courts to self-consciously perceive their role as social architects and their corresponding concern as that of conciliating practical results with constitutional content while managing the institutional impact of their decisions. It is frequent

⁸ See: <http://www.corteconstitucional.gov.co>.

⁹ See: <http://www.poderjudicial.gub.uy>.

¹⁰ See: <http://www.tribunalconstitucional.cl>.

¹¹ See: <http://www.corteconstitucional.gov.co>.

¹² See: <http://www.poder-judicial.go.cr>.

¹³ See: <http://www.tribunalconstitucional.pt>.

¹⁴ See: <http://www.tribunalconstitucional.es>.

to find some contrast and differences between cases in which a general statute has been challenged and those dealing simply with particular acts of authority. Courts assess the eventual impact of their decisions very differently when they touch upon the powers of the other branches of government. Equally interesting in this regard is the way courts engage in the analysis of legislative omissions, particularly when social rights are concerned. In many of these cases, courts enjoy considerable leeway in shaping normative hypotheses and solutions that will win the day—at least temporarily. This is, something that is met with suspicion by political branches ready to read these decisions as an encroachment on their powers.

In most cases, the pressure society has directly exerted on constitutional courts is inspired by a recognition of the historic singularities of the region and its pluralism. This is clearly observed in constitutional decisions dealing with indigenous communities in countries such as Bolivia, Chile and Mexico. The conciliation of the special demands of these communities has often taken place at a jurisdictional level in processes that have channeled the demands of broad social movements into the basic institutional network of the constitutional state.

3. Lastly, with regard to the issue of the way in which this social interaction has had a specific impact on “constitutional content,” we need to refer to the way Ibero-American constitutional courts have fulfilled their task of overseeing constitutionalized economic and social rights. This has allowed them to play a direct role in the design and attainment of social goals in their countries. A particularly important reference must be made to the doctrine of “progressiveness” that many courts have adopted when facing cases that have forced them to speak about the scope of these constitutional entitlements. With few exceptions, social rights have not been acknowledged in the region as a binding force equal to that enjoyed by traditional civil liberties.

III. THE DEVELOPMENT OF GLOBAL JURISPRUDENCE ON HUMAN RIGHTS

With regard to the second topic, constitutional justice in Ibero-America is undoubtedly pushing forward the development of global jurisprudence on human rights. As is almost unanimously acknowledged, the extent of overlapping in the interpretation and definition of the scope of fundamental rights among Ibero-American courts is rapidly increasing.

One of the elements that favors this process of increasing commonality is no doubt the extent to which international law is incorporated into opinions. This is so even though Ibero-American courts do not uniformly invoke international or regional human rights instruments. Among other rea-

sons, this is due to the fact that their binding quality according to domestic constitutional rules greatly varies and not all courts have developed a general interpretative theory that defines the specific role of these legal sources. However, it is clear that the constitutional courts of the region constantly and increasingly use and apply international human rights arguments, as a recourse to expressing provisions in their constitutions or to legally or jurisprudentially create the notion of a unified “block of constitutionality.”

There is no uniformity among Ibero-American courts as to the form in which reference to decisions of international human rights bodies should be made. Nevertheless, there is clearly more uniformity in the way courts cite international opinions dealing with specific fundamental rights than in the way they directly apply and interpret international treaties. Nevertheless, disparity still exists between courts that constantly and consistently cite international jurisprudence and those that only do so only on an exceptional basis. There is also a more basic disparity in the ways they undertake the operation of spelling out the meaning and the purposes of international pieces of legislation. In some cases, courts apply themselves to the task of expounding and re-creating the meaning of those texts while in others, they systematically defer to what has been said in opinions issued by international courts (for instance, the Inter-American Court of Human Rights,¹⁵ the European Court of Human Rights¹⁶).

A few relevant examples of the use of international jurisprudence include: a decision on sex change in which the Supreme Court of Justice of Uruguay cited international case-law from both the Inter-American Court of Human Rights and the European Court of Human Rights; freedom of speech and due process cases, as well as in those dealing with vulnerable groups, decided by the courts of Guatemala and Colombia where they made ample reference to the decisions made by international bodies, though clearly giving priority to Inter-American Court jurisprudence. In Mexican cases dealing with the interaction between the right to health and the right to earn a living through medical practice, we have also cited the views of international courts, the United Nations Committee of Human Rights and its Committee on Economic, Social and Cultural Rights.

Because of the various ways in which supreme and constitutional courts introduce international law into national systems, it is difficult to speak of the existence of something like a “global or regional human rights jurisprudence rooted in international instruments.” However, some Latin-American countries accord direct authority to the opinions of the Inter-American Court of Human Rights, regardless of the fact that, strictly speaking, they are legally binding only for states who are parties to the litigation and not

¹⁵ See: <http://www.corteidh.or.cr>.

¹⁶ See: <http://www.echr.coe.int>.

all states in the region. This, in turn, poses new challenges: in the *Almonacid Arellano versus Chile* case, the Inter-American Court of Human Rights invited states to exert “conventionality control” through their judicial bodies, by contrasting their national law with the Inter-American convention. The possibility of recognizing the existence of more than one authorized interpreter of regional human rights treaties opens up completely new ways of building up protection for fundamental rights in the region.

In any case, the jurisprudence of international bodies is not the only possible source for creating global jurisdiction on human rights. The case-law of foreign tribunals can also play a role. Within the traditional legal culture in the region, this kind of evolution does not come as natural. But the fact is that, in most countries, one notices an ever-increasing willingness to engage, either explicitly or implicitly, in a dialogue with foreign courts. For example, the Constitutional Court of Guatemala¹⁷ recently has made reference to what had been established by the Supreme Court of Argentina, the Colombian Constitutional Court, the Constitutional Court of Bolivia and the Spanish Constitutional Court in a high-profile case dealing with freedom of conscience. In the recent abortion debate in the Mexican court, repeated references were made to the constitutional court decisions of Germany, Colombia, Argentina, Spain, Canada and the United States¹⁸ for similar cases. In many others, however, courts tend to refer to their equivalents in other countries implicitly. While there are no formal quotes, echoes and traces of what has been discussed elsewhere can be detected.

The extent of the references and the depth of comparative research it rests upon is still largely variable from case to case, but one can clearly observe a “jurisprudential dialogue” that is at present more fluid among supreme or constitutional courts than among national and international courts.

The development of global jurisdiction on human rights necessarily implies the need to create open “jurisprudential dialogue” along these two lines. And it is not only national tribunals that must examine what international bodies and foreign courts have said more carefully. International bodies must also keep a close and careful eye on what each country does when interpreting basic laws and international treaties. As stressed above and according to legal provisions in each country, the dialogue proceeds sometimes explicitly, sometimes implicitly. Regardless, it is necessary to take steps that would make this conversation more open.

We are inevitably involved in the process of constructing global jurisdiction on human rights on a highly de-centralized institutional platform, and not only for the overall purpose of finding common technical tools, but also and mainly for the purpose of building a common foundation of constitu-

¹⁷ See: <http://www.cc.gob.gt>.

¹⁸ See: <http://www.supremecourtus.gov>.

tional values. The challenges are considerable, but the first steps have already been taken. We are on the road to building, perhaps not a uniform jurisprudence, but certainly an unquestionably global jurisprudence through which those of us who have the responsibility of speaking in the name of constitutional justice must find ways to assure better and greater protection of human rights, and more extensive institutionalization of peaceful social interaction.