Regional Perspectives[36]

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The links between Common Law and Civil Law worlds in South American States

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The Civil Law legal system, in Latin American States, is increasingly defined by the effective presence of constitutionalism. Constitutionalism requires judges to consider not only the codified and written law, but also the general principles of law, in such a way as to guarantee full respect for rights and deciding cases that the positive norm does not embrace.

At the moment, the codified law continues to be highly relevant; however, there are important changes as the Civil Law gradually incorporates criteria to prioritize the constitutional Law over case-law and constitutional history.

Common law's essential feature is the protection of rights in specific cases. The current system, in opening up normative control of laws to the judiciary once a conflict is resolved, promotes a practice that brings together both systems – common law and civil law.

The constitutionalism model prioritizes rights in such a way that laws must submit to constitutional rulings. Constitutional control, like that of Common Law, grants magistrates the power to decide whether a law is in conformity with the Constitution and imposes the duty to interpret and apply it in keeping with its fundamental principles. In short, the case-law trend in Latin America seeks to link both worlds – those of Civil Law and of Common Law – by means of neo-constitutionalism, which, as a historical process, grants us a conception closer to the juridical reality and a doctrinarian and institutional stance regarding the function that judges are called upon to perform in a constitutional democracy. Neo-constitutionalism rests upon three main concepts.

a) The incorporation into the constitution of a catalogue of fundamental rights – New Latin American constitutions embrace the constitutionalisation of certain principles of material justice designed to inform the entire legal system. Examples include the constitution of Brazil (1988), Colombia (1991), Argentina (1994), and Ecuador (2008). Within this transformation, the constitution becomes important as law, and the constitutional courts as bodies guarantee the constitution's supremacy, especially through the protection and development of human rights by constitutional judges. This represents a major change in the legal order of the entire legal system of these countries. The constitution, formerly considered a political guideline directed at Parliament, becomes the supreme law to be applied directly, aimed primarily at courts, especially the Constitutional Court.

b) Judges as protagonists – judicial activism – by means of which the interpretive task takes on a central role, shaping the law. The judge bases his or her decision on principles derived from the Constitution. South American Courts have settled conflicts over transcendental institutional issues (such as the rights of indigenous peoples, minorities, problems of marginalization; democratic guarantees, environmental issues) based on such principles.

c) Constitutional theory contributes to the definition of the scope and meaning of clauses on fundamental rights, correcting systematic defects that may appear in texts through the resolution of any gaps or inconsistencies that may arise.

The thesis proposed by this neo-constitutionalism doctrine has been incorporated into Argentinean constitutional law, particularly through the 1994 Constitutional Reform and some of the Supreme Court of Argentina's most recent rulings.

As can be observed, this movement contributes to the effective validity of human rights by means of judges' active participation. Indeed, in linking both systems, the judge does not submit coldly to the text of the law, but seeks justice for the case. Just as Common Law judges may stray from precedent in pursuit of a solution for a specific case, Civil Law Judges must exercise constitutional and conventional control of norms as a guarantee of fundamental rights. Domestic courts and constitutional courts exercise constitutional control which represents a comparison between the constitution and the norms which are below it according to their rank, with priority given to the former. On the other hand, conventionality "control" is a mechanism that should be carried out first by the domestic judiciary, making a "comparison" between local and supranational law, to ensure the effectiveness of international instruments, arising from treaties, the *jus cogens* or the jurisprudence of the Inter-American Court of Human Rights. Thereafter, that task should be exercised by the Inter-American Human Rights Court if the case goes to this courtroom. Jurisprudence illustrates that when a State has ratified an international treaty such as the American Convention, its judges are also subject to it, obliging them to ensure that the effectiveness of the Convention is not reduced or annulled by the application of laws contrary to its provisions, objective and purpose. In other words, the bodies of the judiciary should exercise not only constitutional control, but also that of "conventionality" *ex officio* between internal norms and the American Convention.

There is clearly a move from the principle which laid down that human rights were valid insofar as they were recognized by the law, to laws and other juridical norms that are valid insofar as they respect the essential contents of human rights, which currently possess sufficient constitutional guarantees to make them effective. Thus a juridical culture inspired by rights rather than based on norms or juridical duties

[36] The Permanent Bureau welcomes comments and different viewpoints.

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is established and disseminated. This new reality leads to the growth of the function and importance of the Judiciary, which moves in to occupy a key institutional role.

Consequently, neo-constitutionalism implies an important alteration to the basic layout of the system of sources of the civil law, since on the one hand new international treaties are incorporated which contain numerous provisions designed to govern internal inter-subjective relations, and on the other, the judge may directly apply the Constitution without the indispensable need for legislative action. An activist model of the Judiciary that protects human rights in order to bring about their full practical validity is therefore encouraging.

As can be observed, neo-constitutionalism once more addresses the complex and difficult topic of the role of judges, particularly those in charge of controlling constitutionality since they must control and even represent the rest of the powers in order to guarantee rights and enforce the Constitution. They are, in short, those who will bring the law and the legal system up to date and energize it to bring it in line with new realities and requirements. This task brings two challenges face to face: overcoming the adhesion to an excessively relativistic conception of human rights and controlling judges' own practice so as not to incur a judicial overstepping of boundaries (*ultra vires*) which may affect the normal functioning of the institutional system.

Lastly, it is worth pointing out that the change of the judicial paradigm has altered the teaching of law at universities, as well as the construction of jurisprudence, which was previously dedicated to the study of codes and laws and which currently promotes the examination of the jurisprudential criteria of national and international courts, especially those addressing human rights issues. There is no doubt that globalization, in allowing for the communication of legal experiences and in promoting the universality of rights, has narrowed the gaps, dissolved differences, and brought together different ways of addressing and resolving conflicts.

The 15th Anniversary of the IHNJ at Cumberland Lodge in July 2013.