

**Inter-American constitutionalism:
The creation and internalization of human rights**

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I. Introduction

In this paper I would like to explore the links between two normative systems that are overlapping, complementary, and at times, in conflict with one another. I am referring to international human rights law—in particular, to the part of this legal doctrine that emerges from inter-American protection organs—and to the domestic constitutional law of individual Latin American States. By observing the new dynamics that are guiding the creation of this area of law as well as the processes of internalization led by both States and supra-regional bodies, this investigation seeks to determine the spaces of work and intervention where it is most feasible to present a robust agenda dedicated to the protection of fundamental rights and public liberties.

Since the bodies of the inter-American system for the protection of human rights first began to receive individual petitions and cases against OAS member states (and states that ratified the American Convention on Human Rights), a rich jurisprudence has been generated, creating a space for countless debates and analysis by specialists. While some discussions have revolved around the substantive development of jurisprudence, others have focused on a crucial theme in the validation of international law (or in this case, of human rights law), which concerns the mechanisms of compliance and implementation, both in the countries that are subjects of resolutions as well as other countries for whom these international decisions are relevant. Lastly, attention has also been paid to reflect on the procedural regulations that make possible the appearance of individuals, groups, and of course, States, in the realm of international rights protection.

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In the case of the inter-American human rights system, discussions during the early years of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights centered on whether or not these bodies could hold responsible those States that failed to uphold international obligations. Along those same lines, questions arose regarding how States should implement the decisions of supranational bodies. Although these are questions that continue to be relevant to the work of all regional rights protection and promotion mechanisms, the inter-American system today has taken on new demands that require novel approaches to and understandings of the law and the relationship between States and inter-American organs.

Arguments centered on the contention that States, virtually by definition, infringe on rights, are strengthened by situations in which the regional system of rights protection goes “to rescue,” so to speak, citizens from their States. According to this perspective, regional protection systems take action “in the absence of” adequate State response, as “*ultima ratio*” when States cannot—or do not want to—offer their citizens protection. This conception has incidentally served as a response to potential criticism of the regional system meddling in the domestic sphere: *because* a State does not comply, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights intervene. Thus States need not fear illegitimate intervention, but rather, should approach an eventual intervention as a complement to or correction of domestic legal systems that, once updated to reflect the appropriate human rights protections, would make future intervention of the sort neither feasible nor necessary. The supplementary nature of the inter-American system for the protection of human rights—just like other systems, such as the European equivalent or the United Nations—primarily results from admissibility requirements that insist that victims first exhaust internal judicial resources; hence, it is only possible to access these systems of protection when there is no way to seek redress at the domestic level, because all available administrative and judicial avenues have been exhausted or because such domestic options are inexistent or insufficient in offering citizens effective tutelage. In the words of the Inter-American Court of Human Rights, and as it has signaled since its first cases,

The rule of prior exhaustion of domestic remedies allows the State to resolve the problem under its internal law before being confronted with an international proceeding. This is particularly true in the international jurisdiction of human rights, because the latter reinforces or complements the domestic jurisdiction (American Convention, Preamble).¹

Yet, alongside this analytic framework—which focuses on the manner in which inter-American jurisprudence affects and impacts “target” States—I believe it possible, and moreover, advisable, to observe this phenomenon from a different perspective. Hence, I would like to propose an analysis that considers not only the “top-down” model just described, but also the way in which the States themselves exert influence on the supra-regional system. Thus, the question that I would like to explore considers the interactions and iterations of these two normative systems with an emphasis on recent and probable future developments, through which the states—or for that matter, their constitutional systems—influence and demand a certain attitude from human rights protection bodies. Put another way, the system of rights protection today is not simply a unique structural mechanism situated “above” States that fail to protect their citizens, but rather it is also obligated to adopt a more open stance toward legal developments than would domestic authorities and to highlight new expertise in the field of rights protection. For this reason, several agendas that years ago seemed impossible to integrate in the inter-American human rights system—for instance, the rights of people of different sexual orientations—are now permeating the system as a product of existing conceptions within some of the region’s States, accompanied by transnational activism that, notably, gives meaning to the “inter-American” right by drawing on a number of diverse sources.

Here is the plan. After this introduction, I turn to the development over time of the inter-American human rights system, emphasizing the stages that, in light of its jurisprudence, can now be delineated. I argue that a transition occurs between the receipt and comprehension of cases alleging massive and systematic violations of civil and political

¹ Inter-American Court, *Case of Velásquez Rodríguez vs. Honduras*. Merits. Judgment of July 29, 1988, par. 61; *Case of Godínez Cruz vs. Honduras*. Merits. Judgment of January 20, 1989, par. 64; *Case of Fairén Garbi y Solís Corrales vs. Honduras*. Merits. Judgment of March 15, 1980, par. 85.

rights and the arrival of cases of recognition (as well as redistribution) that are often presented by vulnerable groups; this transition is explained in good measure by the replacement of authoritarian regimes by democratic governments (II). Thereafter, I review some examples of progressive cases and policies that have been supported by several Latin American nations' constitutional law and that, I believe, impact the inter-American system by demonstrating its greater flexibility and dynamic approach when facing demands for rights. It is this interaction of normative forces between constitutional practices and the inter-American system that gives shape to a type of constitutionalism—which I deem “inter-American”—that nurtures various sources and interpretations of the law from actors situated in different places and embracing causes that need not be related but, nonetheless, find themselves pursuing an agenda of rights protection for vulnerable people and groups (III). Then, I present a case that exemplifies the interaction between these two aforementioned normative orders and sheds light on the practices that inter-American constitutionalism generates. In this section, moreover, I briefly examine how the procedural mechanism of the amicable settlement, featured in a related example (and in many other cases), is part of an even more flexible—and perhaps more democratic—dynamic of creation of the law that emanates from regional protection bodies (IV). Lastly, I present some conclusions regarding the utility of observing these dynamics for the advancement of progressive rights agendas (V).

II. The Inter-American Human Rights System

Conceived as a collection of tools destined to promote, investigate, and repair violations of the rights elucidated by the American Convention for Human Rights by the member nations of the Organization of American States (OAS), the inter-American system for human rights protection has generated substantial jurisprudence concerning different fundamental rights. Both the Inter-American Commission and Court have granted special guardianship to the rights commonly labeled “first generation,” i.e., freedom of expression,² due process,³ the right to be free of inhuman treatment,⁴ and the protection

² As in, for example, *La Colegiatura obligatoria de periodistas (arts.13 and 29 of the American Convention on Human Rights)*, Advisory Opinion AO-5/85, from November 13, 1985; the Case of *The Last*

against arbitrary discrimination,⁵ among others. With respect to these rights, the system's bodies have issued announcements, in the form of reports, precautionary measures, or advisory opinions, whose principal objective is to protect persons whose rights have not been recognized by the State.

That said, with regard to the so-called "second generation rights" or social rights, the organs of the inter-American system have taken less-decisive steps to secure their protection, even though it appears to want to move in that direction. Thus, for example, in the case *Five Pensioners vs. Perú* (2003), in an excerpt from his vote in the concurring opinion, the Inter-American Court Judge Sergio García Ramírez signals that

the issue [of economic, social, and cultural rights] is not reduced to the mere existence of a State duty that should orient its tasks as established by this obligation, considering individuals as mere witnesses waiting for the State to comply with its obligation under the Convention. The Convention is a body of

Temptation of Christ (Olmedo Bustos and others) vs. Chile, judgment of February 5, 2001; the Case of *Ivcher Bronstein vs. Peru*, judgment of February 6, 2001; the Case of *Ricardo Canese vs. Paraguay*, judgment of August 31, 2004; the Case of *Herrera Ulloa vs. Costa Rica*, judgment of July 2, 2004; the Case of *Chaparro Álvarez y Lapo Iñiguez vs. Ecuador*, judgment of November 21, 2007, and the Case *Kimel vs. Argentina*, judgment of May 2, 2008.

³ Among which the following cases decided by the Inter-American Court can be named: the Case of *Genie Lacayo vs. Nicaragua*, judgment of January 29, 1997; the Case of *Loayza Tamayo vs. Peru*, judgment of September 17, 1997; the Case of *Blake vs. Guatemala*, judgment of January 24, 1998; the Case of *Castillo Petruzzi vs. Peru*, judgment of May 30, 1999; the Case of *Duran Ugarte vs. Peru*, judgment of August 16, 2000; the Case of *Bámaca Velásquez vs. Guatemala*, judgment of November 25, 2000; the Case of *The Constitutional Court (Aguirre Roca, Rey Ferry and Revoredo Marsano) vs. Peru*, judgment of January 31, 2001; the Case of *Juan Humberto Sánchez vs. Honduras*, judgment of June 7, 2003; the Case of *Myrna Mack Chang vs. Guatemala*, judgment November 25, 2003; the Case of *Maritza Urrutia vs. Guatemala*, judgment November 27, 2003, and the Case of *Acosta Calderón vs. Ecuador*, judgment of June 24, 2005.

⁴ Among which the following cases can be cited: *Castillo Páez vs. Peru*, judgment of November 3, 1997; *Loayza Tamayo vs. Peru*, judgment of September 17, 1997; *Cantoral Benavides vs. Peru*, judgment of August 18, 2000; *Bámaca Velásquez vs. Guatemala*, judgment of November 25, 2000; *Juan Humberto Sánchez vs. Honduras*, judgment of February 28, 2003; *Bulacio vs. Argentina*, judgment of September 18, 2003, and *The Gómez-Paquiyaui Brothers vs. Peru*, judgment of July 8, 2004, all decided by the Inter-American Court.

⁵ Here we can highlight the Inter-American Court cases *Yatama vs. Nicaragua*, judgment of June 13, 2005, the *Case of the Girls Yean and Bosico vs. Dominican Republic*, judgment of September 8, 2005, and the Case *González et al. ("Cotton Field") vs. Mexico*, judgment of November 16, 2009.

rules on human rights precisely, and not just on general State obligations. The existence of an individual dimension to the rights supports the so-called “justiciable nature” of the latter, which has advanced at the national level and has a broad horizon at the international level.⁶

In circumstances of scarce and poorly distributed fiscal resources, the supranational organs of human rights protection will be hard-pressed to avoid addressing the critical necessities of social and economic rights. In this paper, however, I will not address this class of normative advances.

In keeping with the existence of non-democratic regimes that embrace political and legal persecution and that lack judicial guarantees as part of State policy, the work of these “subsidiary” organs of fundamental rights protection was, for quite some time, concentrated on denouncing the existing precarious legal conditions in the region’s nations. Faced with the impossibility of seeking justice in local contexts, citizens directed themselves, with varied levels of success, toward the international sphere. This process of interaction generated (and continues to generate) its own dynamics, giving civil society actors of private interests and authority a way to expand their knowledge of international human rights law as part of promoting their agendas for rights protection (Abregú 2008). For this same reason, when civil governments replaced non-democratic regimes, primarily during the middle and end of the 1980s, these same groups developed high expectations in areas that up until that point the system had not explored (González 2001).

Reviewing the chronology of the inter-American system for human rights with a special interest in the system of individual cases—and, in particular, through the actions of the Inter-American Commission—, Felipe González, (selected as president of the Commission in March 2010), recognizes three distinct periods. The first period began

⁶ Judge Sergio García Ramírez’s concurring opinion (March 5, 2003) in the judgment of the *Case of the “Five Pensioners” vs. Peru*, judgment of February 28, 2003. Also in the case *Girls Yean and Bosico vs. Dominican Republic*, judgment of September 8, 2005, the Inter-American Court had the opportunity to argue about the right to education and the right to nationality as prerequisite for the recognition of other rights. More than a decade ago, Inter-American Court Judge Antonio Cançado Trindade noted with purpose that in the future of the inter-American system, “[O]ne must ... move on to address economic, social, and cultural rights as the true rights that they are.” Cançado Trindade (1998: 578).

when the American Convention (or “Pact of San José, Costa Rica”) came into effect in 1978 and lasted until approximately 1990, encompassing years during which a number of regimes were practicing massive and systematic violations of human rights as State policy, against which the organs of the inter-American system naturally channeled its efforts to fight. The second period, spanning the years between 1990 and 1995, bore witness to “a breakthrough in which the OAS as an institution [took on] the political crises on the continent” (González 2001: 169). This period also saw the adoption of Resolution 1080 concerning “representative democracy,” which sought to prevent abrupt interruptions in the democratic processes that were beginning from that time forward. The consideration of topics tied to the efficacy of democratic systems grew, and the Commission adopted a new, more conciliatory attitude with respect to decisions and judgments. This conciliatory attitude is particularly evident in the increasing use of the amicable settlement as a means of resolving disputes, which I will address more thoroughly at the end of this paper. In this second stage, moreover, discussions began surrounding the adoption of new human rights instruments directed at particular groups such as women and indigenous people (setting a precedent indicative of the third and most recent stage).

Lastly, González outlines a third period between 1996 and 2001 that corresponds to the beginning of reiterated debates surrounding the possibility of reforming the inter-American system. According to González, the primary reason for this, though not the only one, was the disappearance of dictatorial regimes in the region, which made the work of *protection* by inter-American organs irrelevant for some countries, requiring the supranational organs to shift their focus and concentrate instead on the goal of *promotion*.⁷ Over a decade ago, in fact, lawyers specializing in international human rights law convened experts to debate the future of the inter-American system, which, according to them, was experiencing “an identity crisis” due to “the fundamental lack of agreement

⁷ It is understood that education through seminars, lectures, and other activities to spread the word correspond to the scope of promotion, while monitoring State compliance with international human rights standards belongs to the field of protection.

among the key players about the legal and political character of the system and its future direction” (Méndez and Cox 1998: 9).

In 2001, new rules of procedure were issued to reshape the operations of both the Commission as well as the Court, favoring the arrival of cases to the system and enhancing the work of promotion and protection by its organs. In parallel, this same year for the first time in the history of the OAS non-governmental organizations were permitted to formally participate in the discussions about the positions of States opposite the international protection of human rights. Thus a spirit of openness is clear, for example, in the adoption of the Inter-American Democratic Charter, an instrument that—among other topics—deals with, though far from exhaustively, the relationship between democracy and poverty, the strengthening of democratic institutions, the importance of citizen participation, and the “promotion of a democratic culture.”

In González’s analysis, however, one must note that the period he recognizes as the third stage is not related to substantial features of the system, which is to say, it doesn’t look at the *type* of cases that organs of protection should hear—as happens in the first two periods—but rather it deals with *procedural* reforms whose results, at the time this paper was published, were still unknown. Today we can speak to this matter because we know precisely what has been the *substantive* development of inter-American jurisprudence.

The system has been developing and expanding itself according to—and alongside—the different cases and problems that it confronts. First, it took on massive and systematic violations; later, the necessity of preserving the validity of those (new) democratic regimes, in order to later provide greater space for the participation of non-governmental organizations. Similarly, and in connection with the broadening of agendas to inter-American civil society, the spectrum of fundamental rights to be guarded has also evolved; from political and civil rights to economic and social; and in the same way, the protection of individual victims has been expanding toward guardianship of specific

groups, as has been the case in what are now recognized as collective property rights of indigenous peoples.⁸

III. Inter-American Constitutionalism and New Regional Demands

The phenomenon I want to examine, which I have termed “inter-American constitutionalism,” is bound, as I have previously explained, to the considerable development of jurisprudence by the OAS’s organs of human rights protection as well as to the advancements that have been made at the local level. Similar to González (2001), I would like to argue that it is possible to identify three stages in the development of this jurisprudence. The first is marked by the legitimization of the inter-American system and by the system’s treatment of cases of gross, systematic violations committed by authoritarian regimes, setting a strong precedent with its famous ruling against Honduras in *Velásquez-Rodríguez*. The second stage is distinguished by the system’s desire to strengthen the newly returned democracies in the region and, along those same lines, its collaborative attitude toward these States to complement the traditional duties of monitoring and sanctioning serious crimes against human rights. Lastly, in the third stage new interactive spaces are opened between the inter-American system and the States—especially, I will argue, through greater use of the amicable settlement—in conjunction with decisive action on the part of civil society organizations, which are capable of reconstructing and grouping together normative developments in different States to “demonstrate” to the system possible avenues for reform.⁹ The prior contrasts drastically with the model that gave birth to interventions of the organs of the inter-American system, as I will explain later on.

In the first stage identified, the “top-down” model is clearly evident. In the absence of proper responses at the national level, the inter-American system condemns countries—

⁸ I am referring to the Inter-American Court case, *Mayagna (Sumo) Awas Tingni Community. vs. Nicaragua*, judgment of August 31, 2001.

⁹ Ariel Dulitzky correctly pointed out to me the necessity of conducting an empirical review of the use of the amicable agreement in order to draw normative conclusions about the dynamics and processes of the Inter-American System vis-a-vis the domestic law of States. As this paper seeks to offer avenues of future research surrounding relevant themes of inter-American constitutionalism, but does not expect to resolve them, I can do no more than receive the empirical approach proposed by Dulitzky.

as in the case *Velásquez-Rodríguez vs. Honduras*—for allowing grave and massive human rights violations, as in, for example, the forced disappearance of people at the hands of State agents, acting on behalf of the authoritarian regimes that at the time governed a large part of Latin America. Similar to *Velásquez*, there are a number of cases in which the Court’s agenda lies in the condemnation of States that do not provide adequate opportunities to proceed forward with investigations of grave and systematic rights violations.

Second, the OAS’s organs of rights protection began to broaden their horizons, at the same time that the States began deserting their authoritarian regimes and were forced to adopt other legal and political necessities. This stage is marked by resolutions to help maintain and secure these democracies. With the arrival of democratic governments, many States that had years earlier denied the existence of grave and systemic violations in their territories, quickly began to recognize these violations, which signaled the start of a new and clearly distinct relationship between the States and the organs of protection. From hereon, it became important for the OAS, to act not only as an observer and enforcer but also as a collaborator; to work not only *against*, but rather, *alongside* the States. In any case, this second stage deals with a period of time in which demands begin to appear that later on, in the third stage—which, I want to show, is where we live now—the supra-regional system should address.

These days, many of the cases that are heard by the organs of protection broach topics that, from the point of view of rights violations, are less “obvious” than the forced disappearances or extrajudicial executions that conformed to the system’s agenda several decades ago (although unfortunately these cases are not just a part of history, as protection organs continue to tackle cases dealing with these violations). Today, the system hears cases about redistribution and recognition, to use Nancy Fraser’s terminology (1997: 17-37), while it tries to expand the important advances in protections that some States have already made, such as rights safeguarding sexual diversity. This new context requires reflection on the types of interventions and the conceivable strategies and alliances necessary to consolidate plenary constitutionalism in the region’s

nations.¹⁰ Along the same lines, this new scenario changes the system from one in which supra-regional organs prescribed resolutions from above downwards, to one in which States and diverse non-governmental actors are decisively shaping the jurisprudence emanating from the inter-American system.

Legal developments at the local level and the expansion of regional demands

It is in this context, alongside the expansion of the system's agenda—or perhaps described more accurately, “the cases that the system receives,”—that the constitutional practices of some countries have also experienced advances in so far as opening of spaces to exercise fundamental rights that years earlier were difficult to imagine. Whether it is the result of actions taken by progressive constitutional courts or rather due to the work of civil society groups with well-defined intervention strategies, or both, a clear tendency can be seen—despite a few exceptions and the occasional step backwards—to demand the recognition of rights from public authorities, entailing a new way to link States to the supranational system.

At the beginning of the nineties, as Carlos Nino has explained, the return of democracy to various Latin American nations generated legitimate expectations among those people and groups who had previously set aside their individual rights demands in favor of fighting authoritarian regimes (Nino 1992: 8). For them, the recovery of democracy—even with its limitations—or the transition toward a greater democratic space, involved rearrangements in various areas. We have already seen that at the regional level, the way that supranational organs approached cases and situations adopted not just a legal but also a clear political outlook, and sought, among other things, to accompany the emerging processes of (re)democratization. Moreover, it should be added, at the State level these processes implied the opening of previously inexistent spaces so that the demands

¹⁰ Carlos Nino distinguished between two types of constitutionalism: one in the minimal sense, in whose virtue it is possible to appreciate the existence of constitutions that contemplate catalogs of rights and normally institute protection mechanisms for those rights, together with stipulating the way in which public powers are organized, and the other one in the “plenary” sense, in which the understanding of constitutionalism as political practice implies that the laws respond to determined procedures and have a specific content. The latter, it should be said, has not had much momentum in our countries. Nino (1992: 1 ss)

silenced by the immediate urgency of earlier years—to put an end to regimes and authoritarian practices—could begin to be articulated in the public sphere, employing the language of rights. Though the process has been neither fast nor easy, if one compares the former state of weak or even nonexistent constitutional courts with the substantial jurisprudence that exists today, they can appreciate a real advance in terms of both the subject matter and the way it is addressed.

Here it is worth noting a few examples to illustrate the substantive developments at the State level that, as I suggest below, can influence the adoption of new standards or the expansion of the existing ones guiding the Inter-American Commission and Court. Think, for example, about the cases and legislative developments surrounding reproductive rights; the advances in the recognition of sexual diversity as an area for the exercise and enjoyment of fundamental rights, and similarly, the recognition of the rights of indigenous people. Let's see.

In 2007, the Legislative Assembly of Mexico's Federal District approved a legal reform to authorize the practice of abortion during the first twelve weeks of gestation; though contested by some sectors (among them, the National Human Rights Commission), the Supreme Court ruled in favor of the reform's constitutionality. Also in the sphere of sexual and reproductive rights of women, and despite some setbacks, Peru's Constitutional Court decided in 2006 that the so-called "day-after pill" had the same effect as contraceptives, and ordered the Ministry of Health to distribute it free of charge. This case thus contrasts with the 2008 ruling by Chile's Constitutional Court—which was charged with nothing less than determining the start of human life—issued at a time when the then-government and some members of Congress were actively promoting a policy of public access to the pill. In Argentina the outcome was distinct: faced with the decision of the federal Supreme Court against the medicine's distribution, Congress passed legislation to legalize the distribution of the pill, welcoming the government's claim and, of relevance to this paper, asserting the ample reproductive rights of women. The 2006 judgment from Colombia's Constitutional Court likewise deserves to be added to this list,

as it decriminalized abortion in certain determined circumstances and signified a profound change in the terms of the debate on reproduction and sexuality in the country.

Something similar happened with another class of rights of recognition, in this case concerning the rights of people of different sexual orientations. At the time this paper was written—the first semester of 2010—the Legislative Assembly of Mexico's Federal District had already transformed their city into the first in Latin America to legalize marriage between members of the same sex, and in Argentina the National Congress was approving a historic reform to the nation's Civil Code to permit this legal union. As a precursor to these advances in the protection of rights to sexual diversity, it should be noted that the jurisprudence emanating from the Colombian Constitutional Court, which began in 2007 to bring into line the rights of heterosexual and homosexual partners based on the principle of constitutional equality (as Uruguay's parliament did in 2007) was debating, in 2010, whether the uniquely limited marriage of heterosexual partners violated the Constitution and international human rights treaties.

In the same way, one could think about the initiative taken by the Colombian Court in advancing the material of collective rights to giving strength to the rights of indigenous people, like in the previous opinion, with a legal basis not only in the Constitution but also in international instruments, in particular, Convention 169 of the International Labor Organization on indigenous peoples and tribes in independent nations.

These advances should impact the way that organs of the inter-American system create and interpret the law. And as those who examine what happens in our countries, we should expand our outlook to include the way that regional organs react (or don't react) to these local developments, with the goal of locating places where the manifestation of agendas in favor of broad public rights and liberties is more feasible.

IV. Inter-American Constitutionalism as a Facilitator of Dialogue

In the previous sections I have tried to demonstrate, on the one hand, how the inter-American system has evolved, basing this on the analysis begun by Felipe González regarding the different stages that are exhibited, and emphasizing the substantive development of jurisprudence from the organs of the OAS. On the other hand, I have suggested that the processes of constitutional creation and adjudication in various countries have opened individual normative and collective spaces for the enjoyment and exercise of fundamental rights. The goal of this paper is to show that these phenomena are tied to each other, that is, that it is not only important to look at the way the Inter-American System impacts the rights and legal practices of States—a question that, certainly, is of great importance and has received attention from doctrine (Abramovich, Bovino and Curtis, 2007)—but rather, moreover, the way that countries’ constitutional law influences the organs of human rights protection.

A brief example can help demonstrate this argument. In 2006, the Inter-American Commission on Human Rights held a hearing in the case of Karen Atala and her daughters. Atala is a female judge who lost custody of her daughters in Chile’s Supreme Court as a result of her sexual orientation (overturning decisions in the first and second instance that affirmed the inability of legal doctrine to deny a lesbian woman and her partner custody to care for their own daughters). The case was presented to the IACHR by various Chilean organizations¹¹ and, once there, awoke the interest of regional groups and institutions of various backgrounds. Interested parties included non-governmental organizations promoting the rights of people of diverse sexual orientations, groups that exclusively address children’s rights, NGOs dealing with civil rights and even groups specializing in the interests of judges. They were joined by reports elaborated by legal clinics at law schools and law firms doing pro bono work in the United States. After two years of fruitless attempts to find an amicable settlement, the petitioners asked the

¹¹ I should clarify that one of the organizations that sponsors the petition is the Centro de Derechos Humanos at the Universidad Diego Portales, with which I am affiliated. Together with the Center, the case is represented by two Chilean civil society institutions: Libertades Públicas, A.G. and Corporación Humanas.

IACHR to rule on the case's admissibility to then investigate the background, since it was clear that the Chilean state had lost the will to continue with the case.

In 2008 the IACHR ruled that the case was admissible, finding that all internal resources had been exhausted, that the complaint had been presented within the appropriate period of time, that the material was not under review by other international mechanisms, and that it fulfilled the formal legal requirements. Despite the fact that it only declared the petition admissible, the decision cast light on a case whose central violations of human rights in the realm of the family and of the rights of people of different sexual orientations just ten years earlier may have placed it well beyond the Commission's more limited agenda. And thus, ten years later, the inter-American system resolved that Chile had violated "Karen Atala's right to live free of discrimination," henceforth elevating the distinctions based on a person's sexual orientation to the level of other suspect categories, like race or gender.

A single-paragraph explanation does little to elucidate the many complexities of Karen Atala's case that came to light once it was within the Commission's reach. At the time the first complaint was lodged, cases dealing with the rights of persons of different sexual orientations did not play an important role in the inter-American system's agenda. We have already seen that the system traditionally focuses on cases of violations of the rights to life, physical integrity, due process, and other civil liberties, like freedom of expression. But with respect to rights of recognition, and more importantly, to cases brought "against" States that were no longer behaving like neighborhood bullies but actually making a real effort to obey and comply with human rights standards and cooperate with the System, it became considerably more difficult for the Commission to intervene. On the other hand, Latin America is generally recognized as an essentially conservative region, where the Catholic Church exerts strong influence, which would suggest a need to act with prudence in order to avoid destabilizing the region's political order until the types of cases brought to the Commission no longer dealt with concerning kidnapped journalists and illegitimate treatment of detained citizens by police officers, as

these cases are not complicated by special interest groups or conceptions of how individuals should live their lives.

Thus, as it has in other cases, the Commission urged both parties to join together and begin the process of reaching an amicable settlement. This approach became commonplace in the Commission in the 1990s, a period that, as I explained above, coincides with the articulation of new demands from groups starting to seek recognition in the public arena. The fact that during these years the Commission had begun to use this tool—conceived as a negotiation between petitioners and the government of the denounced State, mediated by the Commission—is not unrelated, in my opinion, to the broader articulation of rights and the constitutional development that in the States was perceived as an articulation of “transnational” agendas by part of civil society actors. Considering this, it is necessary to speak to the mechanism that makes disputes in the inter-American system very distinct.

The friendly settlement as parity of participation

The friendly settlement procedure, as articulated by article 40 of the Rules of Procedure of the Inter-American Commission on Human Rights, consists of a declaration made by the supranational organ, to the involved parties that will negotiate the possibility of reaching an agreement to put an end to the process begun in the system “found[ed] on the basis of respect for the human rights recognized in the American Convention on Human Rights, the American Declaration and other applicable instruments” (art. 40.1). As per these arrangements, a denounced State recognizes that they violated one or several of these rights and the State is required to institute reparations and measures to avoid future repetition of the events that motivated the complaint made in conjunction with the petitioning party. The mechanism has equivalency in domestic procedural systems through similar instruments like transactions or reconciliation.

Yet the IACHR’s friendly settlement procedure is also characterized by several distinct features all its own. First, in the Commission’s proceedings the relevant parties find

themselves involved because one of them—the State—could not or did not want to deal with the petitioner at the national level, whether through decisions of the courts, the Congress, or an agency of the Administration. It is precisely that lack of attention to the alleged victim within the nation’s borders that motivates them to partake in such a mediation process through a regional body. In the Inter-American Commission’s friendly settlement proceedings, two distinct parties that at the onset had a very unequal power relationship are able to face each other under conditions of parity. The procedure gives a victim, who typically is subject to structural discrimination or other systematic rights violations, the opportunity to speak loud and clear to the State seated in front of them *because* they were initially disregarded.

Second, in terms of the negotiation proceedings –which, it is worth noting, the Commission can end at any time, with the petitioner’s consent, if and when it becomes clear that an agreement will never be reached—the likelihood of State compliance with the recommendations of the friendly settlement is much greater than compliance facing a sentence from the Inter-American Court or a final report from the Commission. The State that accepts the terms of a friendly solution, one would think, does so because it has been persuaded that it is important to accept international responsibility and act consequently—for example, through the adoption of guarantees of non-repetition. In this respect, it doesn’t matter greatly whether the State’s participation is the result of a broad conception of individual rights or whether it is simply a response to a cost-benefit calculation that sides with the advantages of avoiding international condemnation. What *is* important is that the State is more likely to internalize human rights standards because without their internalization, the agreement between parties simply ceases to exist. As Harold Koh explains, the means by which the rules and clauses of international human rights law are most efficient resemble a “transnational legal process,” that is, a “complex process of institutional *interaction* whereby global norms are not just debated and *interpreted*, but ultimately *internalized* by domestic legal systems” (Koh 1997: 2602). In this process of State-based appropriation, fueled by the interpretations that come from human rights organs and civil society organizations, exists a greater likelihood that the State that originally disregarded a disadvantaged person or group accepts responsibility

for the damages caused and does something to repair them. In the event that the State does not comply, it knows that the case will likely follow its course and that the State may be reprimanded with the same or greater force later on, through the same proceedings in front of the Inter-American Commission or with a subsequent sentence from the Inter-American Court.

Yet the role of the State is not the only feature that makes the inter-American system's friendly settlement procedure distinct. The Commission, which acts as an intermediary in this respect, is also affected by the development of the talks and the transnational dialogue that is therein produced. Insofar as this mechanism is less rigid, procedurally speaking, than a strictly contentious procedure—which is, in itself, fairly flexible in comparison to domestic legal processes—the conversation that is generated can and should impact not only the involved parties, the State, and the petitioners, but also the Commission itself. The Commission can observe how certain arguments acquire legal strength while others are weakened in the interaction between the involved parties and the remaining actors who are interested in the results of any given case. In a similar manner, in seeking an friendly settlement for cases that deal with new or changing issues, the Commission gains valuable insight for future disputes by observing each party's arguments as well as the dialogues and dynamics generated during the process.

The case of Judge Karen Atala vs. Chile is a clear example of this model. The Commission's participation in *Atala* implied a clear intervention in a delicate area in both the field of family rights and in the protection of social groups that were previously seen as invisible in the domestic and international sphere. It dealt with a lesbian women, robbed of custody of her three daughters by Chile's Supreme Court on the grounds that living with her partner meant a prioritization of the woman's personal interests over the interests of her children. The ruling moreover ignored numerous expert reports and testimony that signaled the girls' desire to live with their mother—and her partner—and that none of them displayed psychological damage due to the arrangement. The legal strategy was not just limited to the victim's representatives—two civil society organizations and one academic institution, all with ties to protection of fundamental

rights—but also involved the participation of foreign universities and law firms, and non-governmental organizations both within and beyond Latin America, whose agendas varied widely but converged in the desire to open normative spaces to a long unattended and oft-postponed social reality.

When faced with this plethora of actors and positions that all pushed the case in the same direction, the IACHR could not remain indifferent. If the inter-American system had any doubts about the case, they were pushed aside by the many actors motivated to join the cause on behalf of the petitioner. In this sense, the interaction and iteration of experts, representatives, and social organizations invigorated an individual victim's position.

Within the structure of inter-American constitutionalism, one can observe the maturation of domestic political systems give way to a flood of constitutional decisions (be they judicial or legislative) that provide an institutional channel for new rights demands. In this sense, one can point to a disappearing sensation of vanguard or greater legal development that accompanied the Inter-American System for years—at least, in its relation to the States it reprimanded—and, in this way, seems to remain closer to other regional systems, like in Europe, and, by the same token, to the doctrines that give States greater spaces to determine the contours of their juridical regulations, as in, for example, the doctrine of the “margin of appreciation,” or in the inter-American system, the use of the so-called “fourth instance” doctrine.

The first doctrine consists of the European system's preference to defer to the States so that they may seek their own means of fulfilling the obligations outlined by the European Convention for Human Rights (Greer 2000), leaving the Strasbourg organs a much more limited space for intervention than is granted to their inter-American counterparts. The “fourth instance” doctrine, on the other hand, consists of a reaffirmation of the subsidiary nature of the bodies of the regional system. According to the latter, organs within the regional system should not seek to review the merits of the rulings made by local courts; instead of acting as a reviewing court, the regional organs should measure the extent to

which local court rulings have violated fundamental rights protected by the American Convention.

Ultimately, one can observe a readjustment of the parts that constitute this complex game consisting of the creation, interpretation, and internalization of law that emanates from the organs of the system: the victims, the States, local and transnational civil society groups, and, of course, the actors of the OAS.

V. Conclusion

In this paper I have suggested that an examination of the relationship between international human rights law and the constitutional law of States should go beyond looking at the way that States do or do not implement international standards. I argued that the development of a type of jurisprudence that gives strength to protection of individuals and, above all, to groups, obliges one to emphasize the role of “bottom-up” developments, which originate in domestic systems and affect the regional system of protection. For the purpose of better understanding the reach and possible advances of a rights agenda, it is worthwhile to explore what influences one can detect and what lessons it is possible to extract from them. Ultimately, by determining in which areas there is greater reception of domestic jurisprudential developments and what areas offer greater resistance, and why, one can more easily and accurately identify mechanisms of action for those who seek to open normative spaces in defense of disadvantaged groups.

This is a complex undertaking, full of nuances, difficult to organize in one or two normative categories, and that makes it necessary to address not only the type of constitutional decisions that the region’s nations produce –be they in the judicial, administrative, or legislative sectors—and the inter-American system’s pronouncements, but rather also the networks and alliances of groups and organizations that promote agendas of rights protection, as they continue attempting to shape the law, some more successful than others (Abregú 2008).

If the groups interested in promoting rights agendas pay attention to these relationships, their strengths and weaknesses, to the convergence or lack thereof of organizational agendas spanning the regions and to the location of more open and receptive institutions, then the advancement that progressivism purports to embrace will not respond necessarily to the events that we celebrate but with respect to those which are not possible to reconstruct normatively, but rather that could form part of an agenda working for the establishment of greater freedoms in Latin America. And with respect to which the conversation between domestic systems and the regional system of rights protection is more valuable than the dialogue between a regional body prescribing changes to a domestic system, and more like a system of horizontal deliberation on which the construction of more egalitarian societies and regulatory systems should rest.

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