

# THE IMPACT OF GLOBALIZATION ON THE REFORM OF THE STATE AND THE LAW IN LATIN AMERICA\*

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## TABLE OF CONTENTS

I. INTRODUCTION .....	786
II. FROM THE NATION-STATE TO THE WORLD SYSTEM.....	787
III. GLOBALIZATION AND THE LAW .....	788
IV. THE REFORM OF LEGAL INSTITUTIONS IN THE “GLOBALIZED” STATE: TWO PARADIGMATIC CASES .....	789
A. <i>The Economic Liberalization and the         “Opening” of the Legal System</i> .....	790
B. <i>The Justice System</i> .....	793
1. <i>The Institutions of Justice for the Strengthening             of Democracy and the Protection of             Human Rights</i> .....	795
2. <i>The Reform of Ordinary Justice</i> .....	796
V. CONCLUSIONS.....	798

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VI. REFERENCES .....	799
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## I. INTRODUCTION

Globalization is, without any doubt, one of the fashionable topics today. We can observe daily its most visible manifestations and consequences—for example, in the consumption of goods and services, including information. Globalization, however, is not truly a new phenomenon. Rather, today's globalization is the most recent and accelerated stage in the process of the world-wide diffusion of a particular model of civilization—a process that began more than five centuries ago. What is certain is that we have hardly begun to create the adequate conceptual and theoretical framework to explain and appraise this process.<sup>1</sup>

The development of such a framework faces considerable difficulties. Jurisprudence and other social sciences are relatively helpless in coming to terms with it because they were born or took their modern shape under the historical shadow of the nation-state. Hence, phenomena extending beyond this horizon and cutting across national borders do not find an easy accommodation in the conceptual categories developed by such sciences.

Continuing the effort begun in previous projects,<sup>2</sup> this article intends to explore some of the legal consequences of the vast economic and political transformations occurring in the last few years in Latin American countries. The analysis will focus on two important areas. Part IV will examine 1) the liberalization of the economy under a new economic development model, and 2) the justice system. The transformations in both of these areas have occurred as a response to changes in the international context and to the internal dynamics of the respective societies. In both cases, the law and the legal institutions have initiated a process of “opening”—of reception of and adaptation to external influences—as well as the establishment of new links with other countries and with the international order, as shown by free trade agreements.

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1. For recent analysis and commentary on globalization, see generally BARRIE AXFORD, *THE GLOBAL SYSTEM: ECONOMICS, POLITICS, AND CULTURE* (1995); JOSEPH A. CAMILLERI & JIM FALK, *THE END OF SOVEREIGNTY? THE POLITICS OF A SHRINKING AND FRAGMENTING WORLD* (1992); PETER DICKEN, *GLOBAL SHIFT: THE INTERNATIONALIZATION OF ECONOMIC ACTIVITY* (1992); GLOBAL CULTURE: NATIONALISM, GLOBALIZATION, AND MODERNITY (Mike Featherstone ed., 1990); DAVID HELD, *DEMOCRACY AND THE GLOBAL ORDER: FROM THE MODERN STATE TO COSMOPOLITAN GOVERNANCE* (1995); ROLAND ROBERTSON, *GLOBALIZATION: SOCIAL THEORY AND GLOBAL CULTURE* (1992); LESLIE SKLAIR, *SOCIOLOGY OF THE GLOBAL SYSTEM* (1991).

2. See Sergio López-Ayllón & Héctor Fix-Fierro, *Estado y Derecho en la Era de la Globalización*, in ESTUDIOS JURÍDICOS EN HOMENAJE A DON SANTIAGO BARAJAS MONTES DE OCA 191–238 (1995); Héctor Fix-Fierro & Sergio López-Ayllón, *El Tratado de Libre Comercio de América del Norte y la Globalización del Derecho: Una Visión Desde la Sociología y la Política del Derecho*, in 1 EL TRATADO DE LIBRE COMERCIO DE AMÉRICA DEL NORTE: ANÁLISIS, DIAGNÓSTICO Y PROPUESTAS JURÍDICOS 19–54 (Jorge Witker ed., 1993).

This exploration is preceded by two sections. Part II explains briefly the “crisis” of the nation-state and of the traditional concept of sovereignty. Part III attempts to establish a relationship between the concepts of “globalization” and “transnationalization” and the law. The conclusions in Part V briefly examine some consequences of our analysis for the concept and the role of international law.

## II. FROM THE NATION-STATE TO THE WORLD SYSTEM<sup>3</sup>

The concept of “globalization” can only be understood in a perspective that reexamines the nation-state in the temporal-spatial dimension and that allows us to recognize it as a historically determined institution.

The modern state had its origin in Western Europe between the thirteenth and eighteenth centuries, essentially as an answer to the crisis of territorial organization at the end of the Middle Ages. Thereafter, this model of political and territorial organization extended itself to the entire world with claims to universality. Today, as a result of historical, social, and technological conditions created by new processes and new actors, the state is confronting a “crisis” that compels us to reconsider its place and role in modern society.

The modern state is constituted first of all as a “territorial corporation.” Its territory has been the space within which a state claims for itself the sovereign exercise of regulatory powers over a population. In its traditional formulation, sovereignty included the idea of final authority, both inside the state’s borders and in relation to other states. Thus, the states enjoyed equality in theory, regardless of the actual differences that prevailed between them. In this perspective, international law was the law of the states and for the states—that is to say, the law which established the conditions for their mutual recognition as subjects and which regulated their reciprocal relations.

Toward the middle of the twentieth century, the state became the only legitimate organization on the international stage, operating both as an axis of the world and of political discourse. At the same time, the emergence of various cumulative and differential phenomena exposed this organization, and the theoretical framework underlying it, to severe questioning.

New actors appeared on the international stage that escaped in large measure the territorial and political control of the state. In their most advanced forms, multinational corporations, as well as governmental and nongovernmental organizations, act as genuine supranational entities, claiming and exercising powers that had been historically reserved to the states.

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3. Many of the arguments in this and the following parts summarize ideas developed more fully in our previous works, such as López-Ayllón & Fix-Fierro, *supra* note 2; Fix-Fierro & López-Ayllón, *supra* note 2.

Thus, the dynamics of the international stage have changed. The emergence of new actors, the heterogeneity of the states, and the new modes of social interaction that result from scientific and technological innovations—especially those related to information—point to the need to redesign the analytical framework for understanding today's world. One possible way of developing such a framework depends on conceiving the world no longer as a fragmented space, but rather as a complex system, or better, as a "system of systems" in continuous interaction.

According to this view, globalization is nothing more than the multiplication of interaction spaces outside the coordinates of space and time that are characteristic of the modern state. Globalization does not mean that the state will tend to disappear; on the contrary, its organization remains meaningful for an important number of social processes. We find that the behavior of social agents (individuals, groups, organizations, and even states) develops differently in distinct temporal and spatial coordinates: sometimes it unfolds horizontally across traditional geographical divisions, while in other cases it remains contained within such ~~These~~ states are now inserted into new "global" fields, subject to decisions and regulations that escape their "sovereign" control. Clearly, the normative power of the state has been eroded by the growing role of international law, international organizations, and integration processes. The issue of the role of the law in a "global" world must be examined in this context.

### III. GLOBALIZATION AND THE LAW

There are already several concepts on what globalization may mean in connection with the law, such as the following:

- 1) the unification of the law at the world level;
- 2) the increasing relevance of law for the coordination of social behavior everywhere on the planet;
- 3) the process of transnationalization of the law—where mechanisms of creation and application of the law increasingly escape the control of nation-states;
- 4) the "americanization" of law—the worldwide spreading of the legal rules and practices of the United States.

All these visions reflect real phenomena and capture undoubtedly an important part of the relation between the law and the different aspects of globalization.

For the purposes of this article, however, "globalized" law or "transnational legal fields" indicate the existence of normative and institutional complexes that are not necessarily uniform worldwide, but which are constituted before the horizon of the world society—that is to say, they react to the possibility and the reality of social interaction across any political border. A consequence of their existence is the gradual trend to

recognize the primacy of globalized or transnational law, either explicitly or otherwise, over domestic law, as well as the increasing submission of conflicts arising from cross-border interactions in those fields to supranational dispute settlement institutions.

Specifically, we observe the existence of at least three globalized or transnational legal fields: economic and trade law, human rights law, and environmental law. These branches of the law began to emerge as globalized or transnational legal fields in the decades following World War II and since then they exert increasing influence on domestic law.

It is important to emphasize that these globalized or transnational legal fields have their political-cultural foundation in the western legal tradition<sup>4</sup> and in the model of the sovereign nation-state. In other words, the diffusion of western law and of the model of the nation-state from the sixteenth to the twentieth century can be seen as a first process of globalization of the law. Between the sixteenth and the twentieth centuries, the fundamental elements of the western legal tradition spread over the world through conquest and colonization by the European powers. The transplant of these elements of law had the initial purpose of regulating the relations between the members of the conquering or colonizing group among themselves and with the native populations. Although the legal culture of these conquered populations was frequently recognized and respected in general terms, western law exercised a powerful influence over it, sometimes deforming and making it almost disappear.

When such societies became independent, they organized themselves into states in the modern sense, since this was the only means to obtain recognition and legitimacy—and hence, to participate in international society. Thus, the official law of such states could not be other than that of western root, even if this had little to do with the legal and cultural practices of most of the population.

In conclusion, this first process of legal diffusion builds the indispensable foundation for the current globalization process of the law.

#### IV. THE REFORM OF LEGAL INSTITUTIONS IN THE “GLOBALIZED” STATE: TWO PARADIGMATIC CASES

In the following sections, we attempt to outline two areas, among other possible examples, that allow us to better visualize the growing interplay of the domestic and the international legal spheres.

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4. For a discussion of the formation and aspects of the western legal tradition, see HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* (1983).

A. *The Economic Liberalization and the “Opening” of the Legal System*

In the decades following World War II, most of the Latin America countries adopted the model of “import-substitution.”<sup>5</sup> This model was based on a “closed” economy. Under this “closed” system, the state restricted economic and trade exchanges with the exterior, playing at the same time a central role as an economic agent in the industrial, financial, and commercial sectors.<sup>6</sup> To a closed economy corresponded a “closed” legal system. Since economic exchanges were limited, the room for interaction between the domestic and the international legal systems was also limited.

Changes in the world economic environment compelled a change of direction in the development model of the Latin American countries, beginning in the early 1980s.<sup>7</sup> The accumulation of unresolved internal problems<sup>8</sup> made it necessary to apply severe adjustment programs—designed, promoted, and monitored by international financial organizations, such as the International Monetary Fund (IMF) and the World Bank.<sup>9</sup>

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5. See Enrique R. Carrasco, *Law, Hierarchy, and Vulnerable Groups in Latin America: Towards a Communal Model of Development in a Neoliberal World*, 30 STAN. J. INT'L L. 221, 223 (1994). Import-substitution involves turning economies “inward” via state driven policies to replace imported manufactures with domestically produced goods. See *id.* at 229. For a detailed discussion of the history and policies of the import-substitution model in Latin America, see *id.* at 228–38.

6. See *id.* at 229–30 (describing the state’s role in using its financial regulatory regime to protect the economies of Latin America, including, i.e., the use of high tariffs, import quotas, exchange controls, and subsidized financing measures). The state also controlled a network of state-owned enterprises that included national private companies and multinational corporations. See *id.* at 233–34.

7. See *id.* at 238 (noting that the heavy borrowing by Latin American countries in the name of development “ultimately halted the region’s economic growth in the 1980s”).

8. Latin American debtor countries faced a number of significant economic crises at the onset of the 1980s debt crisis, including:

- (i) a staggering level of external debt, a large proportion of which was contracted from foreign commercial banks at floating interest rates;
- (ii) high international interest rates, which made debt service costly and difficult;
- (iii) a marked deterioration of terms of trade due to the worldwide recession and protectionist barriers in industrialized countries;
- (iv) a dramatic reversal from net inward transfers of resources to net outward transfers, resulting from the steep drop in lending to the region and the flight of private capital out of debtor countries;
- (v) high fiscal deficits;
- (vi) high inflation rates; and
- (vii) overvalued currencies.

*Id.* at 245.

9. See *id.* (discussing the cooperation between the debtor countries, foreign creditors, the IMF, the World Bank, and other entities “to avert a collapse of the international financial system”).

As a consequence, practically all the countries of the region initiated a process of change that was accompanied, more or less contemporaneously, by significant institutional modifications. In some cases, the changes were translated into new constitutions or into substantial amendments to the existing constitutions. In the economic area, this change is manifested in a multitude of policies—liberalization of the economy and of international trade, privatization of public enterprises, deregulation—that converged in the strengthening of the market and the redefinition of the role of the state in the economy.<sup>10</sup>

Regardless of the economic success or failure of such changes, our concern is to show how and to what extent domestic policies are interrelated with the world economic environment, as well as the correspondence between states that are becoming less strong in relative terms and the market forces that increasingly escape national control.

In a global economy, the role of law as an element of rationality, calculability, and coordination becomes fundamental. It is not surprising, therefore, that a permanent tension exists between the market forces and the attempts to introduce normative and institutional elements that allow us to stabilize exchanges and to make them foreseeable. It is quite evident that traditional domestic regulation will be largely ineffective and that global, or more frequently, regional arrangements, are needed to cope with the legal challenges posed by the new world economic order.

Perhaps nowhere is this phenomenon more evident than in international trade law. The successive rounds of GATT negotiations that led finally to the agreement creating the World Trade Organization (WTO)<sup>11</sup> have widened both the matters subject to regulation—which now include trade in services<sup>12</sup> and intellectual property rights<sup>13</sup>—and the number of countries belonging to the system. Currently, all the countries of the continent are part of the WTO.<sup>14</sup> The agreements of the Uruguay Round have been incorporated, with specific variations for each country, into the domestic legal systems of the member states.

Legal integration in economic matters has resulted equally, maybe even with greater force, in the establishment of regional organizations and agreements. In effect, over the last few years Latin America has witnessed

10. For a discussion of the reforms in Latin America, see MERILEE SERRILL GRINDLE, *CHALLENGING THE STATE: CRISIS AND INNOVATION IN LATIN AMERICA AND AFRICA* (1996); LA REFORMA DEL ESTADO: ESTUDIOS COMPARADOS (José Luis Soberanes et al. eds., 1996); Werner Baer & Melissa Birch, *Privatization and the Changing Role of the State in Latin America*, 25 N.Y.U. J. INT'L L. & P. 1 (1992).

11. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1144 (1994).

12. See *id.* Annex 1B, at 1168 (General Agreement on Trade in Services).

13. See *id.* Annex 1C, at 1197 (Agreement on Trade-Related Aspects of Intellectual Property Rights).

14. See *id.* at 1132 (listing the signatories to the WTO Agreement).

a true explosion in the conclusion of regional agreements. This explosion largely exceeds the original framework for regional integration as contemplated by the Latin American Integration Association (LAIA) and its Partial Scope Agreements.<sup>15</sup> The new agreements represent a more advanced stage of integration and, regardless of their economic success, they build a new reality whose operation and influence on domestic legal rules and institutions deserves a careful analysis.

Maybe the boldest attempt at regional integration thusfar is the North American Free Trade Agreement (NAFTA).<sup>16</sup> Due to its economic importance, institutional design, and the scope of its provisions and the characteristics of its member countries, the NAFTA may constitute a watershed in the interaction of legal systems belonging to different legal and economic traditions, in the context of increased commercial and investment exchanges.

However, this instrument is only one among the many that form a new regional economic framework. We may recall here the mosaic of regional instruments that exists in addition to the NAFTA—the Common Market of the South or MERCOSUR,<sup>17</sup> formed by Brazil, Argentina, Uruguay, Paraguay, and which will probably incorporate Chile in the near future; the Andean Agreement,<sup>18</sup> with Bolivia, Colombia, Venezuela, Peru, and Ecuador; the Group of Three,<sup>19</sup> an agreement between Mexico, Venezuela, and Colombia; the Central American Common Market;<sup>20</sup> the Economic Community of the Caribbean (CARICOM);<sup>21</sup> and the numerous bilateral agreements between the nations of the region. Furthermore, these nations, together with the United States and Canada, have ambitiously

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15. Treaty of Montevideo Establishing the Latin American Integration Association, Aug. 12, 1980, 20 I.L.M. 672 (1981). The LAIA was “designed to foster regional development and creation of a Latin American customs union, but LAIA does not itself seek to become [a Free Trade Agreement] or [a Customs Union]. Rather, LAIA establishes a basic framework of regional concessions and the infrastructure for negotiation of FTAs among its members.” Frank J. Garcia, “Americas Agreements”—*An Interim Stage in Building the Free Trade Area of the Americas*, 35 COLUM. J. TRANSNAT’L L. 63, 81 (1997). The LAIA replaced the LAFTA as the “‘umbrella’ association for Latin American integration.” *Id.*

16. North American Free Trade Agreement, Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 289, 605 [hereinafter NAFTA].

17. Treaty Establishing a Common Market, Mar. 26, 1991, 30 I.L.M. 1041.

18. Agreement on Andean Subregional Integration, May 26, 1969, 8 I.L.M. 910. For an updated version of the Andean Pact, incorporating four principal modifications of the original agreement, see Andean Pact: Official Codified Text of the Cartagena Agreement Incorporating the Quito Protocol, published July 26, 1988, 28 I.L.M. 1165.

19. See Mexican, Colombian & Venezuelan Presidents Sign “Group of Three” Trade Agreement, SOURCEMEX. ECON. NEWS & ANALYSIS ON MEX., June 22, 1994, available in 1994 WL 2237293. The agreement establishing free trade between these three countries was signed on June 13, 1994. See *id.*

20. General Treaty on Central American Economic Integration, Dec. 13, 1960, 455 U.N.T.S. 3.

21. Treaty Establishing the Caribbean Community, July 4, 1973, 12 I.L.M. 1033.

manifested their intent to create a free commerce zone which would encompass the entire hemisphere by the year 2005.<sup>22</sup>

It is difficult to identify, especially for the purposes of this short article, the whole range of changes in the domestic legal systems prompted by the new economic development model. The impact of these agreements on the domestic laws of the member-states is just now becoming the object of comprehensive study.<sup>23</sup> What is important to emphasize, however, is that all these integration efforts—as well as the legal instruments that formalize them—have served as a driving force and as a catalyst of internal legal change.

Mexico is a good case in point because the implementation of the new economic policies and the new trade agreements, especially the NAFTA, have required major modifications of both the law and the institutional framework. Between December 1982 and April 1996, out of a total of 198 existing federal laws, 99 were newly enacted, 57 were amended (in some cases extensively), and only 42, mostly obsolete laws, remained unchanged.<sup>24</sup> In other words, nearly eighty percent of the Mexican national legislation was newly enacted or modified during the last fifteen years. The change in the laws related to the economic, financial, trade, and services sectors was practically complete. In the same period, Congress or the Federal Executive established an important number of new agencies, whose main function is the enforcement of new legislation.<sup>25</sup>

#### B. *The Justice System*

One of the most relevant aspects related to the reform of institutions in Latin American countries in the last ten to fifteen years is the growing importance of the justice system and, in particular, of the courts, as a central element of the legal-political order. This growing importance is due to the complex interaction of a set of external and internal factors that meet in the processes that we label “economic reform” and “democratic reform.”<sup>26</sup> The relationship between both processes of reform is very complex, but it would not be risky to assume that they tend to complement and reinforce each other. It is also clear that both reform processes demand the strengthening of the justice system and the rule of law.

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22. See Summit of the Americas: Declaration of Principles and Plan of Action, Dec. 11, 1994, 34 I.L.M. 808, 811 (declaring as an outgrowth of a meeting in Miami the specific goal of creating a “Free Trade Area of the Americas” no later than 2005).

23. See, e.g., Kenneth W. Abbott & Gregory W. Bowman, *Economic Integration in the Americas: “A Work in Progress,”* 14 NW. J. INT’L L. & BUS. 493 (1994); Garcia, *supra* note 15.

24. See SERGIO LÓPEZ-AYLLÓN, *LAS TRANSFORMACIONES DEL SISTEMA JURÍDICO Y LOS SIGNIFICADOS SOCIALES DEL DERECHO EN MÉXICO* (forthcoming 1997).

25. See *id.*

26. Despite the differences in their recent historical development, all Latin American countries face the similar challenge of consolidating democratic institutions and of making them responsive to the social expectations and economic needs of their respective populations.

Economic reform requires this because there is a growing awareness of the intimate link between the climate of social certainty which the rule of law can provide and long-term economic growth.<sup>27</sup> This has been recognized by the international financial institutions, such as the World Bank and the Inter-American Development Bank (IDB), which in recent years have focused their attention on the concept of “good governance” in relation to economic development.

Aside from the traditional aspect represented by periodic and authentic elections—as demanded by the American Convention on Human Rights<sup>28</sup>—democracy requires a general climate of respect for human rights, particularly by the courts. An increasingly visible and militant civil society expects justice institutions to take on a more active and public role in this respect, and even to counteract and correct the deficiencies of weak, ineffective, or corrupt governments and parliaments.

However, the strengthening of the justice system under the conditions defined by economic and democratic reform seems to be somewhat paradoxical. From the economic point of view, a consequence of globalization is precisely the attempt to escape the authority of national institutions, including the court system. Thus, we witness a proliferation of dispute settlement mechanisms and institutions whose goal is to bypass the national court systems. Consequently, domestic courts are kept from deciding increasingly important matters, and this means a relative loss of power for them as national institutions.<sup>29</sup>

Further, democratic reform often awakens expectations that justice institutions are unable to satisfy—expectations that extend to all kinds of social grievances and injuries. This can weaken and de-legitimize justice institutions in the long-term, even if their operation were already adequate.

Yet, generally speaking, the institutions of justice have been weak in Latin America. They have lacked independence and have been invaded by corruption—regrettably failing in critical historical moments such as

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27. See, e.g., Roberto G. MacLean, *Algunas Consideraciones Sobre los Efectos de la Administración de Justicia en la Propiedad y los Contratos*, in LA REFORMA DEL ESTADO: ESTUDIOS COMPARADOS, *supra* note 10, at 527–37; Waleed Haider Malik, *El Desarrollo Económico y la Reforma Judicial: Experiencias Internacionales e Ideas para América Latina*, in LA REFORMA DEL ESTADO: ESTUDIOS COMPARADOS, *supra* note 10, at 539–50.

28. See American Convention on Human Rights, Nov. 22, 1969, art. 23(1)(b), 1144 U.N.T.S. 123, 151.

29. A very recent empirical study on international civil matters before the courts of the cities of New York, Hamburg, Bremen, Bremerhaven, and Milan shows the relatively scarce number of such matters decided by domestic courts. See Hanno Von Freyhold et al., *The Role of Courts in Global Legal Interaction*, in FOREIGN COURTS: CIVIL LITIGATION IN FOREIGN LEGAL CULTURES 269–81 (Volkmar Gessner ed., 1996). It is inferred that a majority of such matters must be dealt with by alternative means. See *id.* Another example of the lesser role of domestic courts is the *sui generis* system established by Chapter 19 of the NAFTA for solving conflicts in dumping matters—essentially precluding the intervention of domestic courts. See NAFTA, *supra* note 16, art. 1904, at 683 (replacing “judicial” review of final antidumping and countervailing duty determinations with “binational panel” review).

military coups. Consequently, a deep internal reform, supplemented by the possibility of resorting to international institutions, is needed if Latin America is to moderately satisfy the indicated requirements of an effective judiciary.

In the last ten to fifteen years we can appraise, in most Latin American countries, important reforms basically pointing in two directions:

1. *The Institutions of Justice for the Strengthening of Democracy and the Protection of Human Rights*

We may mention here the almost universal acceptance in Latin America of constitutional courts and chambers, ombudsmen, and institutions of electoral justice. Such institutions are complemented by the ratification of international instruments on human rights, to which a special hierarchy is sometimes accorded, and by the recognition of the protecting institutions established by such instruments.

Constitutional courts or chambers have been established, mostly following the European model, in the following countries: Guatemala (1965-1985), Chile (1970s-1980-1989), Ecuador (1978-1983, 1993), Peru (1979-1993), Colombia (1991), Bolivia (1994), Mexico (1987-1994), El Salvador (1983-1991), Costa Rica (1989), Paraguay (1992).<sup>30</sup>

The countries that have created a domestic ombudsman for the defense and protection of human rights, largely through constitutional reform, are: Guatemala (1985), Mexico (1990-1992), El Salvador (1991), Colombia (1991), Costa Rica (1992), Honduras (1992-1995), Argentina (1993-1994), Bolivia (1994), Ecuador (1996).<sup>31</sup>

With respect to electoral justice, at least eighteen countries of the region have recently established specialized electoral organs in the context of processes of redemocratization or democratic consolidation.<sup>32</sup> These agencies, which are normally provided for at the constitutional level,<sup>33</sup> generally have jurisdictional and/or administrative powers for the resolution of electoral conflict.<sup>34</sup>

30. See Héctor Fix-Zamudio, *Los Tribunales y Salas Constitucionales en América Latina*, in ESTUDIOS JURÍDICOS EN HOMENAJE A DON SANTIAGO BARAJAS MONTES DE OCA 59, 60-61 (1995) [hereinafter Fix-Zamudio, *Tribunales*]; see also Héctor Fix-Zamudio, *Estudio Preliminar*, in PAOLO BISCARETTI DI RUFFIA, INTRODUCCIÓN AL DERECHO CONSTITUCIONAL COMPARADO 7, 30-40 (Héctor Fix-Zamudio trans., 1996) [hereinafter Fix-Zamudio, *Estudio Preliminar*]. For a description of each nation's constitutional court, see Fix-Zamudio, *Tribunales*, *supra*, at 61-74.

31. See Fix-Zamudio, *Estudio Preliminar*, *supra* note 30, at 44-49.

32. The 18 nations are Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, and Venezuela. See J. Jesús Orozco Henríquez, *Los Sistemas Contenciosos Electorales en América Latina*, JUSTICIA ELECTORAL, 1996 (Vol. V, No. 7), at 5, tbl. I, 34.

33. See *id.* at 9-12.

34. See *id.* at 13-17.

All Latin America countries have ratified the American Convention on Human Rights—most of them in the 1980s.<sup>35</sup> In recent years, fourteen Latin American countries (and in the continent a total of seventeen of twenty-six), have recognized the contentious jurisdiction of the Inter-American Court of Human Rights.<sup>36</sup> The Court has already decided several cases, which, together with the numerous advisory opinions it has rendered, form a growing body of international jurisprudence.

Several countries of the region have amended their constitutions to grant to the international agreements, in general,<sup>37</sup> and to the treaties on human rights matters, in particular,<sup>38</sup> a special and higher hierarchy with respect to ordinary laws—even equating them with their own constitutions. The current Constitution of Argentina (since the amendments of 1994) attributes constitutional hierarchy to international treaties on human rights that are ratified by those countries.<sup>39</sup> Paraguay (1992) does this implicitly when Article 142 of its constitution orders that the enunciated treaties can only be denounced through the process that governs constitutional reform.<sup>40</sup> Finally, there are countries whose constitutions refer to these treaties, either as express limitations to sovereignty (Chile 1980-1989),<sup>41</sup> as a foundation for the exercise of the means of protection of these rights (Costa Rica 1949-1989),<sup>42</sup> or as standards for the interpretation of the rights and freedoms guaranteed by domestic law (Colombia 1991, and Peru 1993).<sup>43</sup>

## 2. *The Reform of Ordinary Justice*

The reform of ordinary justice has been a preoccupation that has acquired greater intensity in recent times. The courts of the countries of the region have suffered some of the traditional endemic evils: lack of re-

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35. See *Informe Anual de la Corte Interamericana de Derechos Humanos*, Corte Interamericana de Derechos Humanos, at annex XXIV, OEA/ser. L/V/III.33 doc. 4 (1996) (containing the ratifications table of the Convention).

36. See *id.* (containing dates of recognition of the jurisdiction of the Court).

37. See, e.g., CONSTITUCIÓN DE LA REPÚBLICA DE EL SALVADOR art. 144; CONSTITUCIÓN DE LA REPÚBLICA DE HONDURAS 1982 art. 16; CONSTITUCIÓN DE LA REPÚBLICA DEL PARAGUAY art. 141; see also Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT'L & COMP. L. 287, 355-76 annex 1 (1995/1996) (reprinting provisions in Latin American constitutions that address the subject of international law and international treaties).

38. See, e.g., CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE GUATEMALA 1985 art. 46.

39. See CONSTITUCIÓN DE LA NACIÓN ARGENTINA art. 75, para. 22.

40. See CONSTITUCIÓN DE LA REPÚBLICA DEL PARAGUAY art. 142.

41. See CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE CHILE art. 5.

42. See CONSTITUCIÓN POLÍTICA DE LA REPÚBLICA DE COSTA RICA art. 48.

43. See CONSTITUCIÓN POLÍTICA DE COLOMBIA 1991 art. 93; CONSTITUCIÓN DE LA REPÚBLICA DE PERÚ art. 4 transitorio.

sources and massive delays in the face of ever-increasing work loads.<sup>44</sup> The attempts at reform had been limited for the most part to procedural revisions or to the creation, always insufficient, of new courts, ordinary or specialized. Rarely has a systematic and coherent policy of modernization been carried out. Where it had been, as in Chile or Columbia, it was predominantly technical and organizational.

The new conditions, however, require precisely such a coherent policy. An indicator of a more institutional and integrated modernization strategy may be seen in the rapid proliferation of the so-called Councils of the Judicature or of the Magistracy, which originated in Europe, in nearly all of the Latin American countries.<sup>45</sup> This body performs some or all of the following functions:

- 1) the administration of judicial careers—which includes the training, selection, and, sometimes even the appointment and promotion of judges and judicial officials;<sup>46</sup>
- 2) the discipline of judges and public judicial officials;<sup>47</sup>
- 3) the administration of the courts, which includes their creation, suppression, and distribution, as well as the development and management of the budget.<sup>48</sup>

This institution has the main objective of guaranteeing and strengthening the autonomy and authority of the judiciary. Naturally, this cannot be accomplished without encountering opposition and resistance, in view of the sensitive political consequences of its functions. By necessity, the strengthening of the judiciary brings with it the loss of power of other agencies—such as congresses, the executives, ministries of justice, and even supreme courts. For these and other reasons, such as the distrust toward the judges and courts,<sup>49</sup> the Council has been subject to specific adaptations in each country, which sometimes has limited its possible effectiveness. Nonetheless, a look at the list of the countries that have introduced or reformed this institution in recent times demonstrates its widespread acceptance in Latin America: Colombia (1955, 1971, 1991), Venezuela (1961, 1969, 1988), Peru (1969, 1979, 1993), El Salvador (1983-1991), Panama (1987), Ecuador (1992), Paraguay (1992), Costa Rica (1993), Bolivia (1994), Argentina (1994), and Mexico (1994).<sup>50</sup>

44. See Maria Dakolias, *A Strategy for Judicial Reform: The Experience in Latin America*, 36 VA. J. INT'L L. 167, 168–71 (1995). In the criminal area this is dramatically reflected in the phenomenon of prisoners without prison sentences.

45. See *id.* at 177 & n.30. Argentina and Ecuador have yet to establish these councils, and it appears that in Ecuador the legislature does not want to give up the power to appoint members of the supreme court. See *id.* n.32.

46. See *id.* at 176–83.

47. See *id.* at 184–87.

48. See *id.* at 187–97.

49. See *id.* at 168.

50. For a recent discussion of the nations who have introduced or reformed the Council, see HÉCTOR FIX-FIERRO & HÉCTOR FIX-ZAMUDIO, *EL CONSEJO DE LA JUDICATURA* (1996). For a

## V. CONCLUSIONS

We can draw three short conclusions which point in the same direction:

First, with respect to the role of international law, the globalized or transnational legal fields to which we made reference exert a growing influence on domestic law and domestic legal institutions. In many cases, this influence goes beyond the supplementing or complementing of domestic law. Rather, it seems to point toward overcoming the traditional dualism between international law and domestic law by ultimately recognizing some kind of explicit or non-explicit primacy of the former over the latter. This is more evident with respect to international trade and human rights, but proves to be less clear with respect to environmental law. In all these cases, however, the consequence is similar: to a larger or lesser degree, states do not have the final legal say they used to have, be it over economic policies, the use of natural resources, or the treatment of their citizens.

Examples of the explicit recognition of the primacy of international law are found in the European Union, in which community law is recognized as superior to domestic law, and in those Latin American constitutions which declare that treaties on human rights prevail over internal ordinary laws. An example of the non-explicit recognition would be found in the NAFTA and in other trade agreements, which, in order to be implemented in the domestic sphere, have required an avalanche of changes in the domestic laws. By regulating the insertion of national economies into the world economy, such agreements can be seen as a kind of "economic constitution" that may even prevail over the formal constitution, should a contradiction arise.

Second, all of the above leads us to question the internal/external distinction in the relations between international law and domestic law. We must admit the existence of multiple integrated and articulated legal fields above and across national borders, which sometimes provoke disruptions and dislocations in the allegedly homogenous and unified domestic sphere.

Finally, there exists a continuous feedback and exchange relationship between domestic and international law, similar to the one which exists in other areas of culture. Thus, if it is true that a global or world culture is emerging, such a culture exists also as a part of local cultures around the globe, in a process of permanent exchange. It seems to us that something similar occurs with the law.

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detailed analysis of the experience with this institution in several Latin American countries (Argentina, Colombia, Peru, and Venezuela), see the national reports in CONSEJO DE LA JUDICATURA FEDERAL, COLOGUIO INTERNACIONAL SOBRE EL CONSEJO DE LA JUDICATURA (1995).

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