

**INTER-AMERICAN JUDICIAL CONSTITUTIONALISM**  
On the Constitutional Rank of Human Rights Treaties in Latin America  
through National and Inter-American Adjudication

MANUEL EDUARDO GÓNGORA MERA

## CONTENTS

INTRODUCTION	1
CHAPTER I: TOP-DOWN INTER-AMERICAN JUDICIAL CONSTITUTIONALISM	15
A. AN INTRODUCTION TO THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS	16
1. Inter-American Commission on Human Rights	16
2. Inter-American Court of Human Rights	20
a) Functions of the Inter-American Court	21
b) The Contentious Jurisdiction	22
c) Evolution of the Case Law of the Inter-American Court	25
B. LEGISLATIVE OBLIGATIONS OF THE STATES PARTIES IN THE AMERICAN CONVENTION: CASE LAW ON ARTICLE 2	29
1. Anti-Terrorism Laws	30
a) Loayza-Tamayo	31
b) Castillo-Petruzzi	32
c) Cantoral-Benavides	32
d) Lori Berenson-Mejia	33
2. Amnesty Laws	34
a) Castillo-Páez	36
b) Barrios Altos	37
c) La Cantuta	39
3. Censorship Regulations	41
4. Contempt Laws (Desacato)	42
a) Herrera-Ulloa	44
b) Canese	45
c) Palamara	45
d) Kimel	47
C. THE INTER-AMERICAN CONVENTIONAL REVIEW	48
1. Implementation, Reform and Derogation of Domestic Laws as Guarantees of Non- Repetition	49
a) Declarative Judgments on Legislative Omission	50
b) Exhortative Judgments	52
c) Judgments of Nullity on the Grounds of Unconventionality	54
2. The Conventionality Control Doctrine	54
a) International Responsibility of the State for the Conduct of the Judges and the Prevalence of Inter-American Law	55
b) Characteristics of Domestic Conventionality Control	56
c) Horizontal Preference through the <i>pro homine</i> Principle	58
d) Towards a Regional Diffuse System of Conventional Review	59
D. CONCLUDING REMARKS	61

CHAPTER II:	INTER-AMERICAN JUDICIAL CONSTITUTIONALISM FROM BELOW	65
A.	POLITICAL CONSTITUTIONALIZATION OF HUMAN RIGHTS TREATIES	66
	<b>1. Argentina</b>	<b>69</b>
	a) Supra-legal Status of International Treaties: The Case <i>Ekmekdjian, Miguel Angel c/ Sofovich, Gerardo</i>	70
	b) Constitutionalization of Human Rights Treaties in the 1994 Constitutional Reform	71
	<b>2. Bolivarian Republic of Venezuela</b>	<b>75</b>
	a) Title III, Chapter 1 of the Constitution	76
	b) Constitutionalization of Human Rights Treaties: Article 23 of the Constitution	77
	c) The Block of Constitutionality and the Transitory Regime	81
	<b>3. Preliminary Conclusions</b>	<b>83</b>
B.	JUDICIAL CONSTITUTIONALIZATION OF HUMAN RIGHTS TREATIES	84
	<b>1. Constitutionalization supported on General References</b>	<b>85</b>
	a) Panama	85
	b) Dominican Republic	87
	<b>2. Common Constitutional Clauses Invoked for Constitutionalizing Human Rights Treaties</b>	<b>90</b>
	a) Open Clause	90
	b) Primacy Clause	91
	c) Interpretive Clause	92
	<b>3. Interpretation of other Constitutional Clauses Reinforced through Laws on Constitutional Justice</b>	<b>93</b>
	a) Costa Rica	93
	b) Honduras	96
	<b>4. Techniques of Constitutional Interpretation for Constitutionalizing Human Rights Treaties: The Case of Colombia</b>	<b>100</b>
	a) Activist Originalism: Identifying Internationally Protected Rights as Constitutional Rights and Defining their Essential Content	100
	b) Constructivism: Introducing the Block of Constitutionality Doctrine through the Primacy Clause	102
	c) Evolutionism: Defining the Content of the Block	104
	<b>5. El Salvador as Case Study on the Role of Citizens in Judicial Constitutionalization</b>	<b>107</b>
	a) Constitutional Provisions of El Salvador on the Normative Hierarchy of International Treaties	107
	b) First Attempts of Persuasion with the Thesis of Indirect Unconstitutionality	108
	c) A Double Strategy: Direct and Indirect Unconstitutionality	110
	d) Advocating Direct Unconstitutionality, Achieving Indirect Unconstitutionality	112
	<b>6. Constitutionalization of Human Rights Treaties as an Oscillating and Reversible Process: Deconstitutionalization and Reconstitutionalization in Perú</b>	<b>115</b>
	a) Deconstitutionalization of Human Rights Treaties after the Fujimori Self-Coup	115
	b) Judicial Independence and its Effects in the Conceptualization of the Block of Constitutionality	117
	c) Judicial "Reconstitutionalization" of Human Rights Treaties through the Block of Constitutionality Doctrine	119
C.	THE JUDICIAL ORIGINS OF POLITICAL CONSTITUTIONALIZATION: THE CASES OF BOLIVIA AND ECUADOR	121
	<b>1. Constitutionalizing Human Rights Treaties in Bolivia</b>	<b>121</b>

a)	Attempts of Constitutionalizing Human Rights Treaties through Constitutional Amendment	122
b)	Constitutional Rank of Human Rights Treaties through the Block of Constitutionality Doctrine	123
c)	Constitutional Rank of Human Rights Treaties in the 2009 Constitution	125
<b>2.</b>	<b>Constitutionalizing Human Rights Treaties in Ecuador</b>	<b>128</b>
a)	The Rank of Human Rights Treaties prior to the 2008 Constitution	129
b)	Judicial Constitutionalization of Human Rights Treaties	131
c)	Dealing with the Rank of Human Rights Treaties in the Constituent Assembly	133
D.	JUDICIAL REVIEW AS A BRAKE ON CONSTITUTIONALIZATION TRENDS	137
<b>1.</b>	<b>Resistances and Impediments: Attempts to Constitutionalize Human Rights Treaties in Chile and México</b>	<b>138</b>
<b>2.</b>	<b>Restricting Interpretation: The Case of Guatemala</b>	<b>144</b>
<b>3.</b>	<b>Path Dependence: The Case of Brazil</b>	<b>147</b>
a)	The Block of Constitutionality in the Brazilian Doctrine and Jurisprudence	149
b)	Creating the Path: Prevalence of Domestic Law over International Law	151
c)	Path Continuation in Conflicts between Human Rights Treaties and the Constitution	153
d)	The Constitutional Amendment 45/2004: A Path-Breaking Reform?	154
E.	CONCLUDING REMARKS	157
CHAPTER III:	THE BLOCK OF CONSTITUTIONALITY	161
A.	THE BLOCK: A MIGRANT CONCEPT	163
<b>1.</b>	<b>The European Origins of the Notion</b>	<b>164</b>
<b>2.</b>	<b>Horizontal Expansión of the Concept</b>	<b>167</b>
a)	The First Migration Wave	169
b)	The Second Migration Wave	171
<b>3.</b>	<b>Adaptation and Synthesis</b>	<b>175</b>
a)	Normative Reasons for Adaptation: The Debate on the Supra-Constitutionality of International Norms in Colombia and Costa Rica	175
b)	Block of Constitutionality <i>lato sensu</i> and <i>stricto sensu</i>	178
B.	CLASSIFICATION	182
<b>1.</b>	<b><i>Numerus clausus</i> and <i>numerus apertus</i></b>	<b>182</b>
a)	Argentina - Characteristics of a Block <i>numerus clausus</i>	182
b)	Bolivia - Characteristics of a Block <i>numerus apertus</i>	183
<b>2.</b>	<b>General and Exceptional</b>	<b>184</b>
<b>3.</b>	<b>Semantic, Nominal and Normative</b>	<b>186</b>
<b>4.</b>	<b>Cluster Analysis</b>	<b>189</b>
C.	TECHNIQUES OF BLOCK-BUILDING	190
<b>1.</b>	<b>Block-Building in Argentina</b>	<b>191</b>
a)	Inclusión through Legislative Action	191
b)	International and National Regimes of Exclusión	192
<b>2.</b>	<b>Block-Building in Judge-Made Blocks</b>	<b>193</b>

a)	Constitutional References	193
b)	Decisions of Connection and Exclusion	195
D.	CONCLUDING REMARKS	196
CHAPTER IV: INTERSECTIONS AND INTERACTIONS		199
A.	CONVERGENCE OF RULES	200
1.	<b>Model-Based Convergence: Major Treaties and Declarations with Constitutional Rank in Countries with Constitutional Block</b>	<b>200</b>
a)	A Model of Intersections of National Blocks	201
b)	The Core Human Rights Instruments with Constitutional Rank	201
c)	The Expandable Area	202
d)	Functions of the Constitutional Blocks in a Comparative View - An Example: The Right to Social Security	203
2.	<b>Top-Down Convergence: Region-wide Constitutionalization of the American Convention</b>	<b>205</b>
a)	The Constitutional Dimension of the American Convention in Countries without the Block	205
b)	Coexistence of the Conventionality Control with the Control of Constitutionality in Countries with the Block	206
c)	Some Considerations on the Convention of Belém do Pará	208
B.	CONVERGENCE OF INTERPRETATIONS	210
1.	<b>Harmonizing Regional Judicial Standards on Human Rights: Three Alternatives</b>	<b>211</b>
a)	The Doctrine of the Margin of Appreciation	212
b)	National Adherence to Inter-American Standards	214
c)	Parallel Convergence	221
2.	<b>Convergence as a Three-Way Interaction: A Co-Evolutive View</b>	<b>225</b>
a)	One-Way Views: Constitutional Borrowing and National Deliberative Engagement	226
b)	Co-Evolution: Terms of Reciprocal Engagement	228
3.	<b>Co-Evolution on Victim's Rights between the Inter-American Court and the Constitutional Court of Colombia</b>	<b>232</b>
a)	Ruling on Relevance of Inter-American Judicial Standards	234
b)	<i>19 Tradesmen</i> Case as a Ruling of Persuasion	234
c)	Transnational Deliberations on the "Justice and Peace Law" and Top-Down Convergence	235
d)	Bottom-up Convergence Regarding the Rights of Internally Displaced Persons	237
e)	Parallel Convergence on the Right to Reparation	239
CONCLUSION: THE RISE OF INTER-AMERICAN CONSTITUTIONALISM		243
BIBLIOGRAPHY		251
ANNEX		283