

## DOSSIER'S PRESENTATION. THE CONSTITUTIONAL REASONING CULTURE IN LATIN AMERICA

Presentación del dossier. La cultura del razonamiento  
 constitucional en América Latina

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The relevance of studies on constitutional reasoning has grown parallel with the interest in engaging with the global constitutional discourse. Initially, the interest to know other countries' answers to certain common problems emerged together with the evolution of comparative constitutional law into a separate discipline. Over time, it has become clear that there are numerous different solutions for our common concerns and that these depend on the social, political, historical context and the concrete needs of the country in question. Even though the answers can be different, the way we approach, discuss and debate these problems seem to be very similar.

Therefore, the question put forth by comparative constitutional reasoning is not *what* the answers are, but *how* we understand and find them. In Latin America today, we encounter several divisions like race, religion, social welfare, education, gender etc. that are reflected in the different theories and doctrines of the region's constitutional laws. The question that concerns us is if one can still look for and find a common ground in the midst of these divisions, which could serve as a basis for engaging, understanding and discussing constitutional issues.

It is the attempt of this Dossier to start such a dialogue within the Latin American region, by including scholars also from outside and inside the Latin American region. Among the articles presented in this Issue, we can find several topics that focus on the dialogue both on a global and on a regional, Latin American level, like the one on the cross-fertilization of the Inter-American Court of Human Rights and the European Court of Human Rights or the one on conventionality control. Others discuss key concepts of the region's constitutional reasoning, such as the principle of equality and constitutional identity. Furthermore, the first article serves as a proposal to discuss the universal question of what makes a good lawyer. The key condition to engage in a debate about these problems require an open and honest debate.

The problem of understanding and the method we use to argue and debate different issues holds an important role in public debate. Language and reasoning are not mere means of communication, but they also represent the fundamental questions of existence, as it was pointed out by Heidegger in *Being and Time* (1927). Understanding the world begins with understanding ourselves: the beings we are, the time and context in which we exist, the reality that surrounds us, and our immediate problems. Thus, and following Hans-Georg Gadamer in *Truth and Method* (1960), the means through which we understand the world is "ourselves". Hence, we have more than only the capacity to know ourselves: we are also able to understand others and challenge ourselves in order for a better understanding. We have, therefore, the ability to reflect honestly, openly and responsibly on our views in order to recognize what motivates us and what are the justifications of our decisions. This reflection can only happen through providing and accepting reasons, i.e. debating openly and truly listening to the arguments of others, just as occurs in human life in general.

A healthy and functional public discourse, therefore, assumes a common ground, since all the opinions demand to be recognized in the light of a common goal: to discuss how



to live together in our society, so that all members of the community have a flourishing life. This common ground of public debate is founded on a culture of reasoning that has at least relatively settled rules for determining a reason to be persuasive or weak, good or bad. The reason behind the value of our opinions is that each one of us are unique, unrepeatable, valuable and dignified, meaning that each of us is seeking to understand our existence in a unique and unrepeatable way. However, in several aspects of law, agreement is desirable, at the same time, disagreement expressed in an honest and constructive environment carries a crucial value too. The disagreement that is expressed and valued on the basis of human dignity is not just a way of symbolically consoling those of a minority opinion. It is to build a culture of legal reasoning where the person is not defined or determined by her or his opinions or circumstances. In an ideal culture of legal reasoning, opinions formed on the basis of good faith can have their fair share even in case of forming a minority by strengthening peace and stability through the plain fact that everyone was heard and discussed equally. Even if in the end we end up choosing different solutions, through the appreciation of both those who agree and disagree in an open debate, we build the culture of a healthy and prospering dialogue.

The *method* for a meaningful public debate about constitutional issues is based on constitutional reasoning. Constitutional reasoning is articulated when an agent provides reasons about the constitution. Applying justificatory reasons allows us to go beyond our personal opinions and to translate our unique understanding into the common language of reasons. A very clear and realistic method of lawyerly argumentation was put forward by the article of András Jakab, which asks the question of “what makes a good lawyer?”. Analyzing the common features of lawyers in general, Jakab claims that legal thinking has at least three peculiar features. The category of the two-tier thinking seems to carry a crucial importance, as this is the one that guarantees that legal reasoning satisfies both the textual, dogmatic and system-building functions of a lawyerly decision, and it is also able to bring about a morally good decision. Jakab’s article is a good reminder about the unity of substance and form, i.e. the way how we reach a decision determines its content and quality.

Although Latin America seems to be leading a vibrant discussion on constitutionalism in the recent years, its language and methods of reasoning have not yet been addressed in the academic space. The discovery and definition of the distinctive Latin American style of constitutional reasoning<sup>1</sup> exceeds the framework of the present work, but some of the articles of this Special Issue have still pointed out important features about the Latin American constitutional reasoning practice.

First of all, the ideas of universalism and particularity are reflected in the article of Tania Groppi and Anna Maria Lecis Cocco Ortu, which analyzes the dialogue between the Inter-American Court of Human Rights and the European Court of Human Rights from an empirical point of view. This study proves the existence and draws the most important features of a fertile dialogue between the two courts, through researching the use of extra-systemic precedents. In the light of some of the empirical and doctrinal results, the jurisprudence of the European Court seems to constitute a structural element in the case law of the Inter-American Court. On the other hand, The European Court of Human Rights is borrowing the Inter-American case law mainly in the fields of fair procedure and of cruel and inhumane treatment of the person.

Besides the analysis of the influence of extra-systemic jurisprudence and the interaction

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<sup>1</sup> This is the topic of an ongoing project in the Faculty of Jurisprudence of the University of San Francisco de Quito, called the Constitutional Reasoning Research Group (CORREG). See, <[http://www.usfq.edu.ec/programas\\_academicos/colegios/jur/institutos/correg/Paginas/default.aspx](http://www.usfq.edu.ec/programas_academicos/colegios/jur/institutos/correg/Paginas/default.aspx)>.

between the universal and the regional levels of constitutional principles and human rights, another interesting structural issue was touched upon about the tension between the regional and the national level by the article of Yota Negishi. In his paper about the doctrine of control of conventionality (*control de convencionalidad*) he examines the different modes of constitutional reasoning on how domestic courts exhibit a reasonable constitutional resistance in order to relativize the authoritative doctrines of the Inter-American Court. Examples, where domestic courts used a distinct constitutional reasoning opposing the decisions of the Inter-American Courts is amnesty, conflicting rights between private parties and invalidation of domestic decisions. As a conclusion of the analysis of several cases and doctrines concerning the models of authority on the regional and domestic levels, the author concludes that “constitutional reasonable resistance is permissible so long as it contributes to a more harmonious, democracy-oriented interaction on the basis of shared constitutional reasoning”.

In addition to the structural clashes on the different levels of legal authority, an emerging substantial concept of the region is constitutional identity. The article of Tímea Drinóczi invites the scholarly community to start a discourse on what we mean by identity of the constitution and how it is created and shaped in the different legal cultures. She has a global perspective as well, just as all the previous authors, which is completed by a specific viewpoint borrowed from another emerging concept based on the differentiation between the Global North and the Global South. After a thorough analysis of the divergent concepts of constitutional identity and its use in both the European legal order and in some Latin American countries, the author reminds us that borrowing concepts has their limitations depending on the legal, political and social environment. She warns that the identity of a constitution can be a double-edged sword. However, evidence shows that it could adequately reflect the actual identity of the constituent people, rooted in the past and overarching the future, but in the hands of autocratic and populist leaders with subservient constitutional courts, the use of this concept can be abused and it could lead to the dismantling of regional and national legal achievements.

Finally, perhaps one of the most important key concepts of the Latin American constitutional reasoning culture is equality. The article of José David Ortiz Custodio is the only article that analyses the jurisprudence of a Latin American domestic high court, namely the Constitutional Court of Ecuador. He focuses on the jurisprudence on the principle of equality with a special attention to those cases, where the Constitutional Court borrowed the jurisprudence of the Supreme Court of the United States. After an overview of the case law of Ecuador and the United States on equality, the author points out that the premises behind the two countries’ standards of justification and their different application of the equal protection clause result in a jurisprudence that lacks clarity and coherence.

It is the responsibility of the scholarly community to build a clear and consequent conceptual framework for highly debated social issues, as well as to arm public discourse with well-founded, professional reasons to make it more effective. While persuasion is important, in legal reasoning the goal cannot simply be to empower different ideologies. As in every social construction that involves personal freedom, law and legal reasoning come with great responsibility. The present Special Issue is an attempt to discuss and to reflect on some of the most interesting issues of comparative constitutional reasoning in Latin America.