

FROM COMPLIANCE TO ENGAGEMENT:

Assessing the Impact of Inter-American Court of HR on Latin American Domestic Constitutional Law

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Structural Overview

- **Approach: restricted to Courts**
 - Heterarchical relations instead of hierarchical solutions:
 - Compliance “all-or-nothing”: Convergence, Resistance.
 - Engagement: normative, reflective
 - Not focused only in **compliance**, but also in **influence**.
- **Explanatory factors**
 - Constitutional Architecture – Int’l HR Law Status
 - Legal Cultures – Judge’s willingness to apply Int’l HR
- **Case Law**
 - Int’l Law used to review domestic legal provisions
 - Anti-Impunity IAHR Court ruling: Argentina, Brazil, Mexico, Uruguay.

Key-Arguments

- ▣ Int'l HR Law higher hierarchy in domestic constitutional architecture not necessarily reduce problems of compliance.
- ▣ Looking for full compliance isn't always the best way to improve HR enforcement.
- ▣ When heterarchical interactions happen, engagement strategies may generate broader impact than compliance and, at once, reduce legitimacy deficits.

The Factors

- **Constitutional Architecture:** *more or less normativity*

Int'l HR Status	Constitutional	Supra Legal	Ordinary	
Country	Mexico	Brazil	Chile	Uruguay

- **Legal Culture:** *Regardless legal rank, courts may use Int'l HR Law as an interpretative tool.*

Comparison #01. Dictatorship

Laws

Chile and Brazil

- **Chilean Harmonizing Engagement**
 - Int'l HR Law has ordinary rank.
 - But judges used it (even before *Almonacid*) as a subsidiary legal source to interpret the limits of the domestic amnesty law:
 - a) Blanket Amnesty
 - b) State of War and the Geneva Convention
 - After *Almonacid* a new legal category was imported: *Crimes Against Humanity*.
 - Engagement happens instead of full compliance.

Comparison #01. Dictatorship

Laws

Chile and Brazil

□ **Brazilian Resistance**

- Int'l HR Law has supra positive rank.
- But has never been used by courts until very recently.
- Courts resists to apply international law (arguing domestic law precedence).
- But federal prosecutors were able to move the agenda forward using *Gomes Lund* in an engaged way.

Comparison #02: Ordinary Laws Mexico and Uruguay

□ **Mexican Convergence**

- 2011 Constitutional Reform grants Int'l HR Law constitutional rank
- After *Radilla Pacheco*, Supreme Court state that it misses power to review or overrule IAHR Court decisions.
- The practical implication is the establishment of two independent and heterarchical legal sources in Mexico.
- By May 14, 2013, Mexican State haven't fully comply, but the Supreme Court have articulated a model of legal convergence.

Comparison #02: Ordinary Laws Mexico and Uruguay

□ **Uruguayan Dissonant Engagement**

- In 2009, court has converged with International Law under double positivity standards, but a national plebiscite reinforce the amnesty law.
- After *Gelman*, National Congress approved new legislation aiming to comply (a convergence approach), but the Supreme Court overrule the law arguing, again, under double positive standards.
- Differently from Mexico, the Uruguayan Court decline any possibility of Int'l HR Law hierarchical precedence over domestic norms.

Conclusions 1/4

- **Constitutional architecture matters, but its not enough.**
- Judges willingness to use Int'l Law is also a key-issue.

	Brazil	Chile	Mexico	Uruguay
Int'l HR Law Rank	Supra legal	Ordinary	Constitutional	Ordinary
Int'l HR Law Use by Courts	Resistance	Engagement	Convergence	Engagement

Conclusions 2/4

- **Engagement may be a better strategy (or, why Argentina is so exceptional)**
 - Where there's no hierarchical solution, convergence attempts may be blocked both by hierarchical and cultural means.
 - **Brazil:** resists the international
 - **Chile:** was successful without converging
 - **Uruguay:** attempts to full compliance lead to a backlash

Conclusions 3/4

- “Conventional Review” is yet to be defined.
- Two models:
 - **Uruguay:** domestic courts must have the final word regarding Convention’s interpretation
 - **Mexico:** the IAHR Court must have the final word regarding Convention’s interpretation.
- Legal issue: *fear of fragmentation*

Conclusions 4/4

- **Engagement may improve TLP.**
 - Institutions with second level legitimacy always face some democratic deficit.
 - While Int'l HR Law must play its role of external control, it also faces this deficit.
 - Engagement may better equate domestic legitimacy with international external control



Many Thanks!

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