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# The Anglo-Latin Divide and the Future of the Inter-American System of Human Rights

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# The Anglo-Latin Divide and the Future of the Inter-American System of Human Rights

ESSAY

Paolo Carozza<sup>†</sup>

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## Abstract

A former President of the Inter-American Commission on Human Rights, Paolo Carozza draws on his personal experience to identify and propose solutions for a key flaw in the Inter-American Human Rights System: the division between English-language member states and states with Latin-based languages. Terming this division “The Anglo-Latin Divide,” Carozza traces the division not only to linguistic difference, but also to differences in legal traditions. He explains how the differences between Anglo tradition of common law and the Latin tradition of civil law manifest in both substantive and procedural divides within the Inter-American Human Rights system, including in sensitive areas of the law such as right-to-life cases. Carozza offers solutions for the future, ranging from changing the composition of the Inter-American Court and Commission to the radical solution of requiring universal ratification of the American Convention on Human Rights. Ultimately, Carozza concludes that, whatever the solution, the viability and strength of the Inter-American system requires a much stronger effort to integrate the English-speaking world into a Latin-dominated system.

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## I INTRODUCTION

Even the most casual and inexperienced observers of the Inter-American human rights system cannot fail to notice a peculiarly binary division running right down its center and distinguishing it from the other two major regional systems. The Inter-American system evinces in various ways a fundamental gap between the relative shallowness of its engagement of the English-speaking countries of the Western Hemisphere, on the one hand, and the depth and breadth of its integration of the region's countries having predominantly Latin-based (or Romance) languages, on the other. Moreover, those with a more sophisticated understanding of the system, its history, and its functioning—perhaps especially those who have experienced the practical operation of the Inter-American human rights institutions from within—know that this division is not merely superficial, but instead pervades many different aspects of the system.

This is not to deny, of course, that there are many important divergences to be observed and distinctions to be made within those groups of countries that share a common language: the English-speaking Caribbean is not simply assimilable to the United States, nor the United States to Canada;<sup>1</sup> the same is true of the Spanish-speaking countries of the region, not to mention the vital differences between Brazil or Haiti and the Spanish-language nations, for example. Indeed, the differences within the language groups are often sharper than across them. Nevertheless, none of that negates the existence of what I call the “Anglo-Latin Divide” on human rights in the Americas. Some of the more broadly generalizable differences stem from the common law roots of the English-speaking countries, setting them off from the predominantly civil law (or “Romano-Germanic”) origins of the Latin countries.<sup>2</sup> Other aspects of the divide have more to do with the distinctiveness of the Caribbean nations, their colonial history, and their relationship to the British Commonwealth, or to the sometimes *sui generis* constitutional identity of the United States. Accordingly, in this Essay I try to identify and discuss both some features that separate Latin from Anglophone countries *en bloc*, and also some that separate just a portion of the English-speaking world from the “Latinate” characteristics of the Inter-American system as a whole. One of the key arguments I assert here, in general, is that the Inter-American human rights system, for a variety of historical and institutional reasons, is, in its history, at present, and increasingly a system heavily influenced by the legal and political culture of the Latin countries of the region. At times, this leads to a generalized disengagement of English-speaking countries generally, and at other times to the alienation of a subset of Anglophone nations,

<sup>1</sup> For purposes of this Essay, I will treat Canada as an English-speaking country because it is the country's dominant language, despite its importantly bilingual character (which in turn is one of the distinguishing features of Canada from other predominantly English-speaking countries).

<sup>2</sup> This remains true even though many countries of the civil law tradition in Latin America, in contrast to their Continental European counterparts, are widely regarded as having public law systems deeply influenced by the United States. See JOHN HENRY MERRYMAN, DAVID SCOTT CLARK & JOHN OWEN HALEY, *THE CIVIL LAW TRADITION: EUROPE, LATIN AMERICA, AND EAST ASIA* 463 (1994); JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 3–4 (3d ed. 2007).

but the end result is the same: The progressive entrenchment of a “two-speed” Inter-American system, in which the authority and success of the norms and institutions are much greater in some countries (Spanish-speaking, especially) and weaker in others.

It is essential that we confront those questions clearly and directly, because both practical experience and scholarly study support a conclusion that such a divide is not compatible with the long-term effectiveness of the regional human rights regime. Successful international regimes invariably must come to terms with the important differences among their members, mediating and harmonizing in order to construct a strong common whole. Whether we look at the European Union, the International Criminal Court, or the World Trade Organization, we find an ongoing need to address and respect national divergences while still maintaining the coherence and effectiveness of the complex supranational entities. In some ways, this is especially true of human rights regimes, given the extent to which they invariably reach more deeply into domestic law and politics. Finally, regional human rights systems in some ways represent the most acute examples of the necessity of maintaining balance and harmony among the national differences of their constituent states. One of the basic purposes of regional human rights systems, after all, is to leverage the political, economic, and historical commonalities and convergences among certain groups of countries in order to construct human rights institutions and processes that are more capable of achieving legitimacy and effectiveness than their global, United Nations-based counterparts.

Thus, the longer that this Anglo-Latin Divide remains operative in the hemispheric human rights system, and the longer the system continues to develop principally according to the parameters of only one side of that divide, the more likely it is that the disengagement of the English-speaking world will become entrenched and permanent. It is like two trains on not-quite parallel tracks that appear quite close early on, but the further they travel, the more the distance between them becomes difficult, and eventually impossible, to bridge.

What follows, therefore, is merely a first attempt (to my knowledge no published work has ever tried to catalogue and analyze the Anglo-Latin Divide comprehensively) to identify some of the key sources of that division, and to consider what its implications are for the future health and strength of the protection and promotion of human rights in the Western Hemisphere. In the spirit of the seminar for which the paper is being produced, I will not hesitate sometimes to be more speculative on these points in the interest of provoking debate and deeper reflection in the group. I also will not rely on prior published work of a scholarly nature. Direct practical experience brings out many relevant examples that will not always have been recognized in the publicly available debates and literature.

## II SYSTEMIC AND STRUCTURAL QUESTIONS

The most obvious difference between the Anglo and Latin worlds has to do with the ratification of the American Convention and the acceptance of the jurisdic-

tion of the Inter-American Court. The Inter-American Commission has perennially and rightly identified the lack of universalization of the basic treaty among the Organization of American States (OAS) Member States as one of the most important problems affecting the long-term strength and health of the system.<sup>3</sup> The split between the ACHR-party and ACHR-non-party states is, of course, structurally facilitated by the unique, complicated, and suboptimal dualism in the Inter-American system generally. We are all very familiar with the weaknesses and incoherence of a system in which the American Declaration and American Convention apply asymmetrically to different countries, and in which the Inter-American Commission has different jurisdictional mandates and authority with respect to different states in the same system. Yet, in the annual ritual of pleading for ratification and acceptance, the Commission has never (as far as I have been able to tell) explicitly recognized the extremely strong correlation between non-ratification and the English-speaking OAS member states, one that becomes even stronger when focusing more narrowly on acceptance of the jurisdiction of the Inter-American Court. That correlation begs the question: *Why?* It seems improbable that the answer lies only in the absence of political will, as the implicit default assumption of the Commission's annual pleas for ratification would have it. Nor can the explanation lie only in the peculiarly idiosyncratic dynamics of U.S. exceptionalism and isolationism, given the similarity in position of the other English-speaking countries on this score.<sup>4</sup> There are several factors that could play a role in helping to account for this convergence among Anglo countries and their collective divergence from the Latin ones.

One part of the explanation might lie in the strong common law tradition of dualism with respect to international law generally, a feature that the constitutional systems of all of the former British colonies of North America have in some degree inherited from England.<sup>5</sup> The Inter-American Court, in particular, has over the years consistently pressed toward a strongly monist understanding of the treaty, of international law and international human rights law generally, and of the applicability of its own jurisprudence. This was especially evident in the years in which Judge Cançado Trindade was a member of (and undeniably one of the dominant intellectual influences on) the Court, but, even if in somewhat less extreme form, it is still true today, for instance in the developing doctrine of conventionality control. Conventionality control is an idea still in the process of being defined in the Court's jurisprudence, and in its softer forms it is not incompatible with a wide variety of different constitutional traditions. In some of the Court's case law, however, conventionality control has been asserted in ways that are very aggressively monist and hierarchical. These latter

<sup>3</sup> See, e.g., Annual Rep. of the Inter-Am. Comm'n of Human Rights, O.A.S. Doc. OEA/Ser.L./V/II, doc. 50, corr. 1, ch. 4, at 359, 379–85 (2013), <http://www.oas.org/en/iachr/docs/annual/2013/docs-en/AnnualReport-Chap4-Intro-A.pdf>.

<sup>4</sup> It is worth highlighting that even in Europe it is self-evident that the United Kingdom has always had a somewhat more fraught relationship with the regional human rights system than many of its Continental counterparts.

<sup>5</sup> Fiona de Londras, *Dualism, Domestic Courts, and the Rule of International Law*, in *THE RULE OF LAW IN COMPARATIVE PERSPECTIVE* 217, 220 (Mortimer Sellers & Tadeusz Tomaszewski eds., Springer, Ius Gentium: Comparative Perspectives on Law & Justice Ser. No. 3, 2010).

interpretations of the doctrine would, I believe, deeply exacerbate and entrench the Anglophone countries' reluctance to ratify the American Convention or to accept the jurisdiction of the Court.

A second possible reason for the Anglo-Latin divide has to do with the particular institutional relationships between the judiciary and the legislative power that most common law systems loosely share. Without being able to develop the idea at length in this short space, we could express this point in a compressed manner by saying that—at least in the United States—one can find throughout the history of the Republic a sort of Madisonian view of judges as being politically accountable and integrated into the political community.<sup>6</sup> To *not* have a professional class of judges (*cum* civil servants), as is typical of civil law systems, but rather judges who come from the practicing bar and are understood to be reflective of and responsive to their political community, is a hallmark of U.S. constitutional structure and tradition, in particular, but I believe there are at least echoes of this understanding in the English tradition of common law adjudication more generally, and thus in much of the English-speaking world today as well.

The connection with ratification of treaties, especially human rights treaties, is this: They almost inevitably strengthen judicial power in ways that remove judges further from the vicissitudes of ordinary domestic politics, from democratic responsiveness and accountability. Indeed, this is in part exactly why, under some circumstances, we like and need international human rights mechanisms: in order to help guarantee fundamental rights, and the institutional integrity of the judges called to protect those rights, even against the potential abuses of democratic majorities. I am not therefore suggesting that this is necessarily a bad thing, but rather pointing out that it is a potential source of tension with a more typically U.S. (and possibly more broadly common law) view of the proper relationship between the judiciary and democracy, and helps explain some of the greater background resistance to ratification and acceptance of international jurisdiction. A somewhat different way of putting this point, captured nicely by Larry Helfer, is that international human rights mechanisms can sometimes tend to “overlegalize” human rights.<sup>7</sup> According to Helfer, that dynamic has contributed significantly to the English-speaking Caribbean's resistance to the Inter-American system. It is a little more speculative, but not unreasonable, to see it also as one element in the U.S. and Canadian skepticism toward international control of domestic human rights norms.

In much of the Latin world, as in much of Continental Europe, any possible reluctance to allow international human rights law to enhance the roles of judges and insulate them more from democratic politics and legislation was largely swept aside by the experience of dictatorship. As various studies have

<sup>6</sup> Lisa Hilbink, *Law and Politics in a Madisonian Republic: Opportunities and Challenges for Judges and Citizens in the New Europe*, in AFTER NATIONAL DEMOCRACY: RIGHTS, LAW AND POWER IN AMERICA AND THE NEW EUROPE 121, 125 (Lars Trägårdh ed., 2004).

<sup>7</sup> Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes*, in INTERNATIONAL LAW AND SOCIETY 125 (Laura Dickinson ed., 2007).

shown in recent decades, a country's direct history of the collapse of democracy and of the rise of criminal, abusive, and authoritarian regimes has a direct and empirically verifiable relationship to its later willingness to accept international authority and to cede some of its traditionally sovereign independence to supervisory human rights mechanisms.<sup>8</sup> Not having had that experience (with the very small exception of Grenada), the English-speaking countries of the Americas are less likely to accept unproblematically the idea that international norms, processes, and institutions are necessary safeguards of constitutional democracy and freedom.

One final structural issue that works against the full acceptance of the Inter-American system, in the United States at least, is the strength and centrality of federalism in that country. Although this is less of an "English-speaking" phenomenon (and in fact unites countries as otherwise distinct as Brazil, Argentina, Mexico, and Canada with the United States), it is fair to say that federalism has a different and stronger valence in the constitutional identity of the United States than anywhere else in the hemisphere. Because international treaties generally, and international human rights treaties even more so, have a very high potential to alter what is otherwise the always-contentious balance of power between the central government and the several states. We have seen federalism concerns surface strongly in every single treaty ratification debate in the United States, and the few human rights treaties that have been ratified by that country have all contained strongly-worded reservations seeking to minimize their impact on the federal-state political settlement.<sup>9</sup>

Before going on, I would like to emphasize that this descriptive identification of various possible structural and systemic barriers to fuller integration of the English-speaking nations of the hemisphere into the Inter-American system is not in any way intended to be a defense of or apology for one or another of the points. Rather, the aim is political realism and cultural accuracy. To the extent that these are, in fact, contributing elements in maintaining the Anglo-Latin Divide, no amount of exhortations to universalization of the system will be sufficient unless either the system adapts to them or the English-speaking countries experience a historic evolution in their constitutional systems and identities (ei-

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<sup>8</sup> See, e.g., Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217 (2000).

<sup>9</sup> E.g., International Covenant on Civil and Political Rights, art. 2(1), Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976)

[T]he United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant.

138 CONG. REC. 8068 (1992) (Senate Resolution of Advice and Consent); see also Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987); 136 CONG. REC. 36,192 (1990) (Senate Resolution of Advice and Consent).



ther incrementally over time as has, to a degree, been true of the United Kingdom and the European system, or as would presumably be more immediately the case if, for instance, any of them underwent a period of the collapse of democracy and the rise of dictatorial rule and systematic, gross violations of human rights).

### III DIFFERENCES STEMMING FROM DIVERGENT LEGAL TRADITIONS

A second important dimension of the Anglo-Latin Divide is more strictly related to the gaps between the common law and civil law traditions. Even though in the twenty-first century, so many aspects of the legal system of any country have been shaped by globalization and by the dominance of modern bureaucratic-administrative states, still it is widely recognized that legal traditions are in a way “sticky”—that is, they continue to exert lasting influences on the way that law is conceived and practiced even long after the origins of their particularities have become historical artifacts.<sup>10</sup> In a variety of ways, the Inter-American human rights system incorporates details of the civil law tradition more than it reflects any heritage of the common law tradition. That alone is unremarkable, for international law in general is more strongly influenced by the civil law tradition. In some specific ways, however, this link to the civil law tradition within the Inter-American human rights system leads to a number of practices that make it somewhat more difficult for common law systems and the lawyers formed within them to find a comfortable home. These characteristics can be further divided loosely into those of a more procedural nature and those relating to more substantive questions, in particular regarding sources of law.

In the procedural area, the civil law tradition’s emphasis on written procedures and the relative unimportance of orality in legal process is one such detail. More often than not, the Inter-American Commission does not have any hearing at all associated with a contentious case. More significantly, even when it does have a hearing, the process tends to be quite pro forma and not substantive. Rarely are substantial arguments of law made; never are those argument tested and probed. If the hearing involves witness testimony, there is no practice of serious witness examination, either directly by the Commission or by the adverse party. In short, the oral hearings are almost always singularly unhelpful. Instead, nearly everything is done in writing.<sup>11</sup> Although these differences are also to some degree evident in the procedure and practice of the Inter-American Court as well, it is before the Commission that they are consistent and consistently problematic.

To the extent that the difference in the importance of orality affects the taking of witness testimony, it also connects to broader differences regarding the taking and evaluation of evidence more generally. As Alvaro Paúl-Díaz has convinc-

<sup>10</sup> See generally Pierre Legrand, *European Legal Systems are Not Converging*, 45 INT’L & COMP. L.Q. 52 (1996).

<sup>11</sup> The additional difficulty at that point is that the Commissioners almost never actually read the documents in the case files. See Dinah Shelton, *The Rules and the Reality of Petition Procedures the Inter-American Human Rights System*, 5 NOTRE DAME J. INT’L & COMP. L. 1 (2015). This, however, is not a problem of the Anglo-Latin divide. It is, distressingly, universal.

ingly shown in his recent and extremely comprehensive doctoral dissertation on the topic,<sup>12</sup> the Inter-American Court (and—although it is not within the scope of his study—the same is even more true of the Commission) employs a very limited set of rules and standards of evidence that are highly autonomous (from domestic tribunals, for instance), highly informal, and highly flexible in their application. In this respect, it somewhat resembles a typical civil law tribunal, but in an extreme form. It inevitably, in the same measure, diverges from the much more circumscribed and well-defined rules of evidence typical of common law procedures. At times, this comparative absence of evidentiary rules and standards results in practices that would be considered quite improper in a system that more tightly controls rules of evidence.<sup>13</sup> As Paúl-Díaz put it:

The Court defines a limited number of rules governing its evidentiary proceedings and applies them in a flexible way. The reality resembles strongly the procedural custom of civil law countries. Considering the high proportion of common law OAS members that still reject the Court's jurisdiction, the Court should ponder whether it should encourage these States to accept its jurisdiction by establishing rules of procedure more akin to their legal tradition. Of course, there are other complex reasons why these countries have distanced themselves from the Court's system, but their lack of acceptance of the Court's jurisdiction cannot be attributed only to a desire to be free from the application of the ACHR. They are also perceived to be aliens to the Inter-American system, which seems more focused towards Latin countries. This sentiment is probably increased by the Inter-American Court's procedural rules.<sup>14</sup>

Sometimes, the procedural differences between civil law and common law systems, and the Commission and Court's persistent orientation toward the former, are reflected less in the internal procedures of the Inter-American institutions themselves, and more in their difficulty in appreciating the significance of procedural differences among the member states. In the interest of space here, just one example will have to suffice. In common law systems, investigating police and prosecutors who direct the investigation of a crime are not part of the judiciary but instead part of the executive branch. This is unlike typical civil law systems in the Americas and elsewhere, where the investigation of a crime is conducted by a judicial officer and the judicial police. In that context, the Commission has had persistent problems exercising appropriate supervisory control

<sup>12</sup> Álvaro I. Paúl-Díaz, *In Search of the Principles and Rules of Evidence Applied by the Inter-American Court of Human Rights* (2013) (unpublished Ph.D. dissertation, University of Dublin Trinity College School of Law) (on file with author).

<sup>13</sup> Take, for instance, the fact that the principal expert witness in one of the most controversial and widely-criticized cases the Court has ever decided, *Artavia Murillo v. Costa Rica*, on whose testimony the main and most questionable finding of the Court was made, had a significant financial stake in the outcome of the Court's case—a clear conflict of interest that was allowed to pass without comment. See *Artavia Murillo* (“*In Vitro Fertilization*”) v. Costa Rica, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257 (Nov. 28, 2012).

<sup>14</sup> Paúl-Díaz, *supra* note 12, at 137.

over prosecutorial conduct in common law systems, frequently assimilating it to the civil law model by seeking to require, for instance, that any confession must be made before a “judicial officer”—a requirement that would seem curiously inappropriate to lawyers in most common law systems. In other words, the procedural model of the civil law is, by default, allowed to shape the substantive standard adopted.

A problem that similarly lies at the intersection of procedure and substance arises in the application of the principle of *iura novit curia*. This principle, that “the court knows the law,” allows the tribunal in question to adopt legal arguments and use norms that the parties did not raise in the proceedings. Although not completely unknown in common law countries—even if the Latin term is not generally used to identify the practice—it is a practice that is used sparingly, if at all, because the adverse parties are generally considered responsible for identifying the appropriate cause of action and marshaling the law and arguments in its favor. A common law court would not normally insert a new claim or cause of action based on the alleged facts in the event that the plaintiff fails to do so. Yet, this is exactly what happens in the Inter-American system, with great frequency and to extreme levels. Under the banner of *iura novit curia*, the Commission routinely inserts new claims into cases, finding violations never asserted by the petitioners. In my time at the Commission, it was one of the most consistent causes of internal disagreement among the members, with the two Commissioners from the English-speaking common law countries consistently in disagreement with our five Latin colleagues on the frequency and extent to which the doctrine was employed. It is a practice, especially in the extremely liberal form it is used in the Inter-American system, that is very difficult for common law lawyers to accept, both because a procedural rule can result in a hugely different substantive case, and also because it implicitly represents a judicial role that is deeply at odds with the traditionally common law vision of a judge as an impartial arbiter of an adversarial dispute between two other parties.

Moving more firmly toward substantive differences from procedural ones, some of the key difficulties for common law jurists in the Inter-American system have to do with the sources of law. Comparative law scholars will often identify the sources of law that are recognized, and the manner in which they are employed, as constituting the most fundamental and persistent differences between two different legal traditions, including between common law and civil law. It is perhaps not surprising, then, that some of the sources of law and the ways they are handled in the Inter-American Court and Commission can be difficult for common law jurists to understand and accept. The uses of prior case law and precedent, from a common law point of view, is extremely weak and inconsistent in the Inter-American institutions. That is, prior cases are frequently cited without any serious analysis of how they are the same or different or what the relevant prior case actually holds and whether it is applicable in the same way. The end result is that a line of cases on a particular question can be substantially inconsistent and lacking in coherence. Again, to cite only one prominent example, the operative standards, language, and criteria that the Court has used

in a long line of cases assessing the validity of amnesty laws is so inconsistent that it is almost impossible to state with any confidence exactly why they are incompatible under the Convention and what the criteria of judgment are.<sup>15</sup>

Another divergence in sources of law has to do with the Court's very aggressive use, especially in the particular historical period that coincided with Judge Cançado Trindade's tenure on the Court, of *jus cogens* as a source of applicable norms. To some extent, this can be seen as a symptom of the Commission and Court's extremely broad use of a wide range of norms that would be unrecognized as formal sources of international law in general—soft law, unratified treaties, expansive assertions of custom, and a putatively normative “corpus juris” in one area or another. This is probably less a reflection of any Anglo-Latin divide than it is a divide between the Inter-American practice and the classically accepted standards of public international law more generally. Nevertheless, there is something in the Inter-American liberality of the use of sources, and especially the institutions' appeal to a variety of non-consensual sources of law, that appears to overlap with the observations made earlier in this essay regarding the different conceptions regarding the roles of judges, their political accountability, and their relative disregard for what would be accepted practice internal to any domestic jurisdiction of any legal tradition of the region. It is hard, for example, to imagine a common law court asserting that a particular legislative statute was not only contrary to the Convention but actually void *ab initio*—that is, it was never a “law” at all—the way that the Inter-American Court did in *La Cantuta* and similar cases.<sup>16</sup>

Finally, and perhaps speculatively, it is worth asking whether, on some important occasions, the very conceptual language that the Court and Commission employ (especially the Court) has a tone and valence that makes it less easily accessible for common law jurists. One of the recognized paradigmatic differences between the civil law and common law traditions—rooted in very clearly-identifiable historic and structural origins—is their relative penchant for (in the case of civil law adjudication) and aversion to (in the case of common law adjudication) high degrees of abstraction and generality. Where common law adjudication begins with cases and controversies and facts, and tends to reason by analogy and induction to a rule of law, the civil law is said to begin from systematic principles and deduce its way to their specific application. One of the consequences in the Inter-American system, I suspect, is the frequency with which the Court and Commission propose broad and abstract principles that sometimes seem impossibly vague and unhelpful to someone with a more typical common law *mentalité*.<sup>17</sup> Concepts like *vida digna*, *plan de vida*, *cosmovisión*,<sup>18</sup> and others come to mind. It is not that any of these, and concepts like

<sup>15</sup> See Luigi Crema, *Are Amnesties still An Option? A Non-Policy Based Critique of the Inter-American Approach* (Notre Dame Ctr. for Civil & Human Rights, Working Paper Ser. No. 6, 2013), <http://law.nd.edu/assets/99931/cremaamnesties.pdf>.

<sup>16</sup> See, e.g., *La Cantuta v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 162 (Nov. 29, 2006).

<sup>17</sup> Legrand, *supra* note 10, at 52.

<sup>18</sup> That is, a comprehensive view of all reality.

them, do not make sense or are improper or illegitimate. What I am trying to put my finger on is more a reflection of judicial style and language. As even my students often point out, one senses very clearly, reading decisions like these, that it is not an English-speaking court, but a foreign court whose judgments require translation, not just linguistically but conceptually and culturally.

#### IV SUBSTANTIVE DIFFERENCES IN APPLICABLE HUMAN RIGHTS NORMS

A vast literature of comparative constitutional law, and to a lesser extent comparative approaches to international human rights law, confirms the relevance of important differences in approaches to rights across cultures and societies and constitutional systems. We can expect no less within the Inter-American system, with its thirty-five different nations extending nearly pole to pole. Some of the Anglo-Latin divide can be traced to these divergences in the substantive interpretation and application of the applicable human rights instruments of the Inter-American system. These differences can be more superficial or more profound, linked to legal culture or to political history, and more ephemeral or more persistent. More often than not, they only affect one or a small group of the English-speaking countries, rather than the Anglophone world as a whole. But they do exist, and in aggregate may help to perpetuate the gap between the two cultural spheres of the Americas. For purposes of this Essay, I will mention four selected areas where there are discernable divides between at least some part of the English-speaking world and the Latin countries of the region: the right to life, constitutional structures and political participation, the rights of indigenous people, and issues of criminal prosecution and punishment.

##### A THE RIGHT TO LIFE

It is no secret or surprise to any observer that the Commonwealth Caribbean's difficult relationship to the Inter-American system stems, in important part, from the Court and Commission seeking consistently to interpret and apply the American Declaration and the American Convention in ways tending toward abolition of the death penalty. The denunciation of Trinidad and Tobago centered on this issue, and the Caribbean resistance has continued to be consistent in this area of law.<sup>19</sup> It is, of course, an acute issue for the United States as well. The normative instruments do not prohibit capital punishment as such, but it is clear that, by giving an assertively purposive reading to them, the Commission and Court have taken a position hostile to the practice,<sup>20</sup> and thus opposed generally to the English-speaking parts of the hemisphere (even if the death penalty is neither exclusive to nor universal to English-speaking countries).

Somewhat paradoxically, the assertion or absence of a Conventional right to life of human beings prior to birth has been a very different kind of obsta-

<sup>19</sup> See Helfer, *supra* note 7.

<sup>20</sup> Press Release, Inter-American Commission of Human Rights, IACHR Urges OAS Member States to Abolish the Death Penalty (Oct. 10, 2014), [http://www.oas.org/en/iachr/media\\_center/PReleases/2014/115.asp](http://www.oas.org/en/iachr/media_center/PReleases/2014/115.asp).

cle to the integration of English-speaking countries. For many years, it was said that the presence of strong language requiring the states party to the American Convention to protect the right to life, in law, “generally, from the moment of conception” (Art. 4) was one of the obstacles to Canada’s ratification of the treaty.<sup>21</sup> The American Convention is, on its face, the international human rights treaty that is most clearly protective of the right to life of the unborn—much more protective than the domestic law of Canada would allow given its very broad constitutional protection of a woman’s right to terminate her pregnancy. With its recent decision in *Artavia Murillo v. Costa Rica*, however, the Inter-American Court has given a strikingly narrow reading of the relevant language of Article 4 of the Convention—a reading not only quite contrary to the treaty’s intent and its manifest recognition of the right to life from conception, but also one which in fact impedes states from according legal protection to human embryos, and which signals that the legal protection of unborn human life in later stages will also have to give way always to the protection of other interests.<sup>22</sup> In short, where the treaty’s expansive right to life was previously seen as an obstacle to ratification by Canada, the Court’s opposite interpretation of that language will almost certainly provoke a strong backlash against ratification in the United States where for some time the clear trend in both popular opinion and in law has been to back away from the earlier and more extreme versions of the constitutional right to an abortion.

## B CONSTITUTIONAL STRUCTURES AND POLITICAL PARTICIPATION

On a few occasions, the Inter-American Commission (more so than the Court, but perhaps because the latter has not yet been given a clear opportunity) has issued merits reports showing a willingness to question and condemn constitutional arrangements having deep roots in a nation’s history and in its complex political compromises. The paradigmatic example is the case involving the statehood of Washington, D.C., where the Commission essentially ignored the distinctive historical place of the District of Columbia in the constitutional framework and concerns of the United States, and instead applied the American Declaration in a very abstract, acontextual, and formalistic way to find the United States in violation of its international obligations.<sup>23</sup> While this decision does not, by itself, have significant implications for other English-speaking countries, it is hard to overstate how much decisions like this serve to diffuse a concern that the Inter-American institutions have no regard for the historical and political distinctiveness of any of the member states. Although the attitude is not confined to the constitutional systems of English-language nations, in a system otherwise

<sup>21</sup> William A. Schabas, *Canadian Ratification of the American Convention on Human Rights*, 16 NETH. Q. HUM. RTS. 315, 322–23 (1998).

<sup>22</sup> *Artavia Murillo v. Costa Rica*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 257 (Nov. 28, 2012). For a comprehensive critique of the many problematic aspects of this decision, see the Ligia De Jesus trilogy of articles.

<sup>23</sup> See *Statehood Solidarity Comm’n v. United States*, Case 11.204, Inter-Am. Comm’n H.R., Report No. 98/03, OEA/Ser.L/V/II.118, doc. 5 rev. 2 (2003), <http://cidh.org/annualrep/2003eng/USA.11204.htm>.

structurally oriented toward the Latin world it may be more worrisome to the Anglophone half of the divide.

### C INDIGENOUS PEOPLES AND LAND RIGHTS

Although in many ways the case law on the rights of indigenous people is among the most important and significant parts of the jurisprudence of the Inter-American system as a whole, it is well-known that the United States and Canada find the Inter-American decisions in this area to go far beyond the treaty provisions, to be inapplicable to their circumstances, and to reflect a model of relationships between indigenous populations and the state based on a variety of Latin realities that are radically different from those in English-speaking North America. As illustrated by the United States' response to the Commission's merits report and follow-up hearings in the *Dann* case, for example, the typical Inter-American remedy asking that vast portions of both private and public lands be returned to indigenous peoples is not a position that will be accepted any time in the foreseeable future.<sup>24</sup>

### D CRIMINAL PROSECUTIONS AND PUNISHMENT

Throughout the hemisphere, and not merely in the English-speaking parts of the region, the Inter-American jurisprudence has sometimes been criticized for being too oriented toward using criminal punishment as a tool of redress. Across a wide range of different human rights violations, the remedies prescribed by the Inter-American court include investigation and punishment of the perpetrators. In many cases this is certainly appropriate and necessary, and in general while there is some doubt or reasonable criticism about possible excesses in the mandate to investigate and punish, it is not a criticism that seems connected to the Anglo-Latin Divide. However, there are two circumstances in which Anglophone countries may have heightened concerns about the tendency toward punitivism of the Commission and Court. First, the Court has endorsed the need for criminal punishment even for violations arising out of relations between private parties that would not, in ordinary common law systems, fall within the boundaries of criminal law. For instance, in *Albán-Cornejo v. Ecuador*, the Court required criminal investigation, prosecution, and punishment of a medical doctor accused of negligent malpractice in a state hospital;<sup>25</sup> this is a circumstance in which the use of criminal sanctions would be unusual in common law systems (at least, those similar to that of the United States), and where civil remedies would be considered more appropriate. In Ecuador, as is the case in a number of more traditional civil law countries, criminal conviction is a necessary prerequisite for seeking civil damages, so the requirement makes some sense in context. In a

<sup>24</sup> See *Dann v. United States*, Case 11.140, Inter-Am. Comm'n H.R., Report No. 75/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 (2002), <http://cidh.org/annualrep/2002eng/USA.11140.htm>.

<sup>25</sup> *Albán-Cornejo v. Ecuador*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 171 (Nov. 22, 2007).

common law system, however, a blanket rule that such circumstances warrant the deployment of the criminal sanction power of the state is excessive.

Second, the Inter-American faith in the importance of criminal punishment is sometimes pursued even at the expense of due process rights of the accused. The Court has suggested that many protections against the potential abuse of prosecutorial power of the state ought to be set aside any time there is a serious violation of human rights at stake—for instance, statutes of limitation may not be applied to bar the action. I do not believe that most common law jurisdictions would be comfortable so easily setting aside rules that are regarded as essential due process protections of the rights of the accused, even in cases where the crime alleged to have been committed is quite grave.

## V ADMINISTRATIVE AND PRACTICAL ISSUES

The final set of problems in the Inter-American human rights system that reinforce the Anglo-Latin Divide are of a more narrow administrative and practical character. In some ways these are the most straightforward and least complex, and yet at the same time on a day-to-day basis they are among the most significant contributors to the gap between the Anglophone and Latin countries in the system.

The first problem is the difference of language in a very direct sense, not merely as a proxy for other and deeper divergences of legal and political culture. Spanish is unquestionably the dominant working language throughout the system. In some periods of the history of the system, the Court never even bothered to have its judgments and public documents translated into English. Today, fortunately, written translation and oral interpretation are the norm. However, translations are often done poorly, including in ways that affirmatively affect the substantive understanding of documents across languages. Various problems in the internal administration of the Secretariat of the Commission (I cannot speak from experience of the Court in this regard) ensure that translations are routinely done at the very last minute, often making it very difficult for English-speaking Commissioners to prepare for sessions and to contribute effectively to the evaluation of a draft report.

The second practical reality that has the effect of entrenching the Anglo-Latin Divide is the comparatively small number of English-speaking Commissioners and Judges. In the Court this is inevitable given the absence of state parties from the Anglophone countries. It is a circular problem, however, insofar as the absence of judges from the English-speaking countries reinforces the difficulty of getting English-speaking countries to accede to the jurisdiction. The presence of an Anglophone Caribbean judge on the Court has, in certain periods, been greatly beneficial in this regard, but still insufficient. In the Commission, Anglophone members are always present, but rarely in numbers that are close to being proportionate to the number of states or the total population of the hemisphere who are English-speaking. Within the Secretariat of the Commission, the number of U.S. lawyers is significant, but the perennial, near-total absence of



professionals from the Commonwealth Caribbean is striking.

Finally, it is a basic but persistent fact that the Caribbean nations are generally and consistently underrepresented in the working agenda of the Commission. The Commission's 2008 visit to Jamaica, for instance, was the first *in loco* visit to an English-speaking Caribbean nation in over a dozen years. The report of the visit took three years to draft, and today it constitutes the only country report on any Anglophone Caribbean nation available on the Commission's website, which otherwise includes ninety-three country reports on Latin-region countries dating back to the very first report of all, on Cuba in 1962. It is, of course, a historical reality that the Caribbean nations came late to the Inter-American human rights system, and that the Commission came of age and built its reputation and influence in the dark period of brutal Latin American dictatorships. Therefore, it would be unrealistic to expect the record to reflect equal attention to these two subregions. The continued neglect of the Caribbean today, however, is harder to justify and appears to reflect little more than an entrenched pattern inherited from another era.

## VI POSSIBLE STEPS FORWARD

Some of the steps that can be taken to try to bridge the Anglo-Latin Divide, or at least to mitigate its negative implications for the system, are relatively straightforward. For example, a deliberate policy of devoting more attention to the Caribbean in the Commission's work could be immediate and unproblematic. Hiring more professional staff from the region is more difficult but still does not require any significant structural changes. The problems of translation may require some additional resources, but a great deal of the problem can be addressed by altering the working methods and schedules of the Secretariat to permit sufficient time.

Changing the composition of the Commission or Court to have a broader representation of English-speaking countries would be a much greater challenge. In the case of the Court, it requires careful thought about whether the composition should bet on a hoped-for future in which the Anglophone countries are active participants, or remain merely reflective of a current reality. More general considerations regarding the reform of the composition of the Court and Commission are subjects to which Laurence Burgorgue-Larsen has devoted in-depth consideration.<sup>26</sup>

With respect to the collection of problems relative to procedure, evidence, and sources of law, at least part of the problem, in my experience, arises from the basic and historically conditioned orientation of the system (and of the Commission in particular) toward victims. To be sure, in many ways this is a laudable and necessary bias, especially in the historical context of the hemisphere's struggle with gross and systematic violations. However, it runs up against a counter-

<sup>26</sup> See Laurence Burgorgue-Larsen, *Between Idealism and Realism: A Few Comparative Reflections and Proposals on the Appointment Process of the Inter-American Commission and Court of Human Rights Members*, 5 NOTRE DAME J. INT'L & COMP. L. 29 (2015).

vailing concern as well: To the extent that the Commission remains a consistent advocate against states in its approach to its work, it will always struggle to some degree to gain full credibility as an institution of the impartial rule of law. To put it another way, for the Commission to build up the institutional legitimacy necessary to really universalize the system as a whole, it must, in the long run, come to terms with its schizophrenic nature as both advocate and adjudicator, both prosecutor and judge, promoter-educator and litigator. Functional differentiation and coherence of mandate is a key to the long-term sustainability of the Commission's relationship with *all* of the countries of the region, but in particular with those whose history and tradition of democratic rule has not put them in a position of indebtedness to the Commission for intervening against dictatorship and systematic abuses. A consistently and institutionally pro-victim and anti-state orientation is a hard sell where democracy and the rule of law have been the norm (even after acknowledging that no system is without need for external checks and controls).

A different but closely-related and necessary shift in the basic orientation of the Inter-American human rights system is toward one that takes much more seriously the diversity of constitutional, political, cultural, and legal cultures in the hemisphere. The practice and the jurisprudence of the Inter-American human rights system—especially when seen in contrast to its European regional counterpart—is almost completely lacking in doctrines and sensibilities that allow a pluralism of approaches to the protection of human rights to flourish within it. There is no explicit functional equivalent to a margin of appreciation doctrine, for instance. This fact is related to the immediately prior point because the principal historical explanations typically given for the absence of doctrines of constitutional pluralism are (a) that democracy and the domestic rule of law in the Americas are too weak to permit the necessary degree of trust in domestic institutions; and (b) the paradigmatic types of violations that have been at the core of the Inter-American system—that is, systematic abuses of non-derogable rights—do not reasonably allow for the tolerance of divergent understandings and applications. However, much these facts may have reasonably justified a past position strongly opposed to pluralism in the hemisphere, it is highly doubtful that they continue to justify the same degree of rigid uniformity today, when both the types of states and the types of violations that the system engages are much more complex and ambiguous. More directly to the point of the Anglo-Latin divide however, is this: Even in the past, the English-speaking portions of the hemisphere have arguably never fit neatly into a system whose basic operative assumptions are built around the confrontation of criminal regimes. If the Anglophone world is to be taken more seriously in the Inter-American system, a greater tolerance of constitutional pluralism akin to the European model needs to be cultivated in this hemisphere as well. This means, concretely, not only a much more robust use of comparative law in general, but the development of some formal doctrines of pluralism that are analogous to the margin of appreciation.

Of course, at the extreme end of reform, there is a different option available as well, that in a certain respect is more “pure.” One could coherently adopt a

position that the proper response to the Anglo-Latin divide is to force the issue by *requiring* universal ratification of the American Convention and universal acceptance of the jurisdiction of the Court in order to participate in the regional human rights system at all, or even as a condition of membership in the OAS. It is an approach similar to that which prevails in the European system. As tidy as that solution may seem, even if politically it were feasible to erect such a framework, it would not be a very satisfactory long-term outcome. The most likely consequence would be the total withdrawal of the English-speaking world from the Inter-American human rights system. As a *Latin* American human rights system, it might very well benefit from a greater degree of coherence and integration among its members and permit a fuller development of its normative content. Yet the price would be high—too high in my view: the complete disengagement of all of the English-speaking nations of the Americas from hemispheric mechanisms of human rights supervision and protection.

If we sincerely desire the long-term viability and strength of the Inter-American system, there seems to be no way forward that does not make a much more serious and sustained effort to integrate the English-speaking world into what is, at present and increasingly, a disproportionately Latin American human rights system. If it is not addressed, the Anglo-Latin Divide will be the fracture at the root of human rights protections in the Western Hemisphere that will ensure that the endemic structural weakness of the whole system lasts indefinitely into the future.





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# Protecting Freedom of Expression over the Internet: An International Approach

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