

SYMPOSIUM:
THE CONSTITUTIONALIZATION OF INTERNATIONAL LAW IN LATIN AMERICA
DEMOCRACY AND RIGHTS IN *GELMAN V. URUGUAY*

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On 24 February 2011, the Inter-American Court of Human Rights (IACtHR) issued its decision in *Gelman v. Uruguay*, condemning Uruguay for the forced disappearance of María Claudia García Iruretagoyena de Gelman and the kidnapping of her daughter Macarena Gelman during the military dictatorship.¹ In the decision, the Court ordered Uruguay to remove all obstacles that enabled those responsible for the crimes to go unpunished. Accordingly, it declared that Law 15848 on the Expiry of Punitive Claims of the State (“Expiry Law”), a 1986 amnesty law that prevented the prosecution of people who had committed serious human rights violations during the military dictatorship, was incompatible with the American Convention on Human Rights and the Inter-American Convention on Forced Disappearance of Persons, and therefore lacked legal effect. That the law had been passed democratically and subsequently reaffirmed two times by popular referendums did not change the Court’s evaluation or impede the Court from annulling it.

The political and legal implications of this decision are enormous, touching on fundamental issues in contemporary constitutional and criminal law theory. My analysis of the IACtHR is not motivated by any intention to defend or criticize the decision but rather by the importance of the theoretical questions that it forces us to explore. I will focus on a series of basic questions that the decision takes up: How should the relationship between democracy and rights be conceived? More specifically, how should this relationship be conceived when it imbricates, as this case does, fundamental human rights and free, open plebiscites? How can the potential tension between the decisions of a democratic community and those adopted by international bodies be resolved? When the most serious violations of human rights are involved, to what extent should the state be allowed to determine the level or terms of its reproach, and what should be the limits on its discretionary power?

Democracy And The Problem Of Democratic Pedigree

One of the first questions that the Court’s decision raises refers to the *locus* of the tension between democratic decision-making and international human rights law: which aspect of international human rights law was being violated by the democratic decisions taken in Uruguay? The Court addresses this question in the section of its decision labeled “Amnesty Laws and the Jurisprudence of this Court.” Here the Court insists that “amnesty laws are, in cases of serious violations of human rights, expressly incompatible with the letter and spirit”

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¹ *Gelman v. Uruguay*, Merits and Reparations, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 221 (Feb. 24, 2011).

of the American Convention. This idea had already been expressed by the Court, albeit slightly differently, in cases such as *Barrios Altos v. Peru*, *La Cantuta v. Peru*, *Almonacid Arellano v. Chile*, and *Gomes Lund v. Brazil*.² The Court adds that amnesty laws:

impede the investigation and punishment of those responsible for serious human rights violations and, consequently, impede access to victims and their families to the truth of what happened and to the corresponding reparation, thereby hindering the full, timely, and effective rule of justice in the relevant cases. This, in turn, favors impunity and arbitrariness and also seriously affects the rule of law, reason for which, in light of International Law, they have been declared to have no legal effect.³

The position of the Court on this matter is ultimately difficult to accept because it misunderstands the proper attitude of judicial review toward democratic decision-making. Latin America has a long history of amnesty and pardon laws.⁴ The amnesty laws that began to appear in the region starting in the 1960s, during the authoritarian era, were driven by different motives and acquired forms and substance that varied by context. This is why the decision of the Court to consider all amnesty laws involving serious human rights violations equally lacking in legal effect, despite the obvious and relevant differences among them, can seem, on the surface, to lack nuance, and upon reflection, to create injustice.

The potential injustice of the approach becomes apparent when we take into account an important element that varies among amnesty laws: their *democratic legitimacy*. I will call this the *problem of democratic pedigree*. To illustrate the problem, I would like to differentiate between four amnesty laws that were passed over the last 30 years in the region: (i) the self-amnesty proclaimed by the National Reorganization Process in Argentina before surrendering power; (ii) the self-amnesty proclaimed by the regime of Alberto Fujimori in Peru following the massacre at Barrios Altos; (iii) the pardon laws passed by the democratic government under President Raúl Alfonsín in Argentina putting an end to the trials of persons responsible for the serious human rights violations that took place in Argentina starting in 1976; and (iv) the Expiry Law passed in Uruguay and reaffirmed in two instances by popular vote.

These four laws carry varying degrees of democratic legitimacy.⁵ We can qualify the first amnesty—which was imposed by a blood-soaked military regime in its own favor when it was at the ebb of its popularity—as entirely *lacking legitimacy*. The second amnesty was advanced by the Peruvian President Fujimori after he dissolved the Congress in a self-coup d'état, and was approved by its replacement, the (so-called) new Democratic Constituent Congress. The law was imposed against a backdrop of severe restrictions on civil and political rights. The Peruvian amnesty thus warrants a very low presumption of *democratic legitimacy*.

² *Barrios Altos v. Peru*, Merits, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 75 (Mar. 14, 2001); *La Cantuta v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 162 (Nov. 29, 2006); *Almonacid et al. v. Chile*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 154 (Sep. 26, 2006); *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 219 (Nov. 24, 2010).

³ *Gelman v. Uruguay*, Merits and Reparations, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 221, para. 226 (Feb. 24, 2011).

⁴ The growth in the use of Amnesty in recent decades was due to the serious wave of breakdowns in democracy and the massive human rights violations that resulted from them, especially during the 1970s and 80s. It also reflects the political and economic inequality that has affected the region throughout modern history, and which results in the presence of a small number of actors who possess enormous influence over democratically-chosen political authorities.

⁵ Here I associate the (democratic) legitimacy of a norm simply with the degree of inclusivity and public debate that has characterized it up to the moment of its implementation. In accordance with this criterion, a norm that is promulgated under a dictatorship is typically assigned the lowest degree of legitimacy. See CARLOS NINO, *LA VALIDEZ DEL DERECHO* (1987). See also BRUCE ACKERMAN, *1 WE THE PEOPLE* (1993).

The third involves the pardon laws proposed by the democratic government of Raúl Alfonsín, approved by the national Congress, and supported by the Supreme Court. While it is always difficult to measure the legitimacy of a norm, Alfonsín's pardon laws were produced in a context of broad civil and political liberties with a mobilized citizenry marching freely in the streets. At the same time, these norms were proposed in response to unjustifiable pressure from military groups, and in particular the intimidating Easter rebellion, during which a military unit declared mutiny to protest ongoing trials against military leaders. This amnesty law is a case of *norms that are democratically legitimate in principle, yet tarnished by illegitimate pressure* from military forces.

Lastly we have the case of Uruguay. Here, the amnesty norm was dictated within the context of full civil and political liberty, albeit affected by reasonable fears generated by events in neighboring Argentina and by the pressure (in many cases unacceptable) exerted by the Uruguayan military (although not in the form of attempted coups, as was the case of Argentina). The legitimacy of the norm in question is notably reinforced, however, by having been twice approved by popular votes, which are understood to be the highest expression of popular sovereignty. In this case, then, we can speak of a norm that is *democratically legitimate to a significant degree*.

The differences that separate the self-amnesty of the Argentine military dictatorship and the Uruguayan Expiry Law are enormous, and warrant at the very least careful and disciplined study. The IACtHR should have made a special argumentative effort in its decision to draw distinctions between amnesty laws. It should have done so not merely for the sake of academic or theoretical pretensions, but rather out of respect for the significance of what it means for the citizenry to reach that level of democratic agreement.

But the approach adopted by the IACtHR in *Gelman* exhibited a schematic structure lacking any such nuance. For the Court, amnesty laws were simply prohibited in all cases. The judges made it clear that the incompatibility with the Convention on Human Rights was not limited to “self-amnesty laws” but instead applied to every type of amnesty law because the relevant factor was not “adoption process” of the norm or “the authority that issued the amnesty law,” but rather “its *ratio legis*,” that is, “leaving unpunished serious violations of international law.”⁶ Graver yet, the Court then adds that the “fact that the Expiry Law of the State has been approved in a democratic regime and yet ratified or supported by the public, on two occasions . . . does not automatically or by itself grant legitimacy under International Law.”⁷ For the Court, the incompatibility of amnesty laws with the American Convention “does not derive from formal considerations, such as their origin,” but rather from their substantive aspect.⁸ In other words, both the expression of a sovereign Congress and the organization by the citizenry of, first, a referendum and, secondly, a plebiscite, represent merely *formal* matters that have little to do with the substantive validity of a law.⁹

In fewer than ten lines, and basically without offering any argument, the IACtHR in *Gelman* overruled a decision of the Uruguayan Congress that had been ratified by the popular opinion of more than 50% of the population expressed through clean and direct means. What we would call the *problem of democratic pedigree* was thus clearly laid out in its most serious form.

⁶ *Gelman v. Uruguay*, Merits and Reparations, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 221, para. 229 (Feb. 24, 2011).

⁷ *Id.* at para. 238.

⁸ *Id.* at para. 229.

⁹ Herein arises an objection that my colleague Victor Abramovich, who served as Vice-President of the Inter-American Commission of Human Rights, has often brought up. The Abramovich objection starts with the idea that the countries of the region also “democratically” affirmed their participation in the human rights treaties that the courts—whose authority has thus been “democratically” recognized—are now obliging those countries to respect. In other words, the objection draws attention to the *democratic pedigree* of the decisions to which I object using arguments of the same caliber. The objection, however, does not strike me at all as convincing. The act of setting up and putting into operation a high court does not preclude debate over what that court can decide or the modalities and authority of those decisions, but rather inaugurates it.

Rights: The Problem Of Disagreement And Distrust Of Majorities

One could try to defend the *Gelman* judgment by stating that it was simply impossible for the tribunal to do something different, given the legal requirements established by the American Convention of Human Rights. The problem with this claim is that we have (and will always have) radical yet reasonable disagreements about the rights we wish to protect. It would be reassuring to be able to agree upon one definitive selection among all possible combinations of rights that could be consecrated through inclusion in a legal instrument in a way that would render them unconditional and inviolable by majority decision. In reality we disagree over what those rights should be, and what their content and contours are. Our life in society is decisively marked by reasonable and persistent differences of opinion with regards to justice and rights.¹⁰

This “fact of disagreement,” as Jeremy Waldron calls it, does not mean that we must renounce the idea of rights; nor does it imply that we must simply collapse rights under the idea of democracy. What it implies, rather, is that the opposite strategy is objectionable: we should not simply treat the idea of rights as isolated from or lacking any contact whatsoever with the notion of majority rule. Indeed, the pretension of completely separating the discussion of rights from the mechanism of majority rule is belied by judicial procedure itself: the Inter-American Court, like many high courts, frequently publishes dissents and concurrences alongside majority opinions, attesting to the existence of reasonable internal disagreement. Further, precisely due to this internal disagreement, these courts rely on majority rule as the means of settling their disagreements.

In refusing to consider the democratic legitimacy of the law, the IACtHR seems to make two problematic assumptions. First, it seems to associate majority rule with a tendency to make irrational or unreasoned decisions and, second, it seems to associate the judicial branch with rational and reasoned decisions. These assumptions regarding the inherent irrationality of majorities and the consequent necessity of judicial control appear to be what has made it possible for courts such as the IACtHR to affirm, with conviction, that the issue of rights must belong to the *exclusive* competency of the judiciary. The courts either consider irrelevant the fact that an amnesty law was approved in a democratic regime and further ratified by the citizenry on two occasions; or else they qualify the legislation of the Uruguayan Congress, the referendum, and the plebiscite, as merely “formal” expressions completely lacking importance when evaluating the validity of the law.

This kind of reasoning is exemplified by the way in which the IACtHR justifies its conclusion that the Expiry Law violates the American Convention on Human Rights. The problem with the Expiry Law, the Court holds, is that the States are obligated to “penalize” persons responsible for serious crimes. According to the IACtHR, this obligation emanates from “the obligation of guarantee exalted in Article 1.1 of the American Convention.” The Court reads Article 1.1 as obliging States to “prevent, investigate, and punish all violations of the rights recognized by the Convention.”¹¹

Yet when one reads Article 1.1 of the American Convention, one does not find any iron-clad, detailed series of obligations. Article 1.1 of the Convention reads as follows:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

In sum, one of the principle reasons advanced by the IACtHR for condemning Uruguay for its failure to respect international human rights law is based on an Article of the Convention that nowhere makes explicit

¹⁰ See JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999).

¹¹ *Gelman v. Uruguay*, Merits and Reparations, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 221, para. 190 (Feb. 24, 2011).

reference to obligations to “prevent,” “investigate,” “punish,” and “repair the damage caused by the violation of human rights”—obligations that, according to the IACtHR, Uruguay did not meet.¹² These obligations derive from a judicial interpretation that is legally controversial, even as it contradicts the democratic will of the Uruguayan Congress and citizenry.

Conclusion: A Few Final Words About The Future

I want to conclude this essay with a few words about the future and where to go from where we are. And I want to do so by (very briefly) engaging with the views offered by my colleagues writing in this same AJIL Unbound Symposium.

In the previous paragraphs, I have offered reasons for skepticism concerning the work of the IACtHR, particularly taking into account the way in which the tribunal understands democracy. In this specific respect my view does not coincide with the more optimistic view offered by Judge Eduardo Ferrer Macgregor on the topic.¹³ Instead of praising the legitimacy and content of the IACtHR’s decisions, I think we need to assume a more critical approach to the tribunal’s work and position. Unfortunately, however, I do not think that we can “remedy” the problems we face by asking the IACtHR to work together or more in line with domestic courts, as my good friend and distinguished scholar Ariel Dulitzky believes.¹⁴ The main difficulty we face is not that the IACtHR is not sufficiently respectful or attentive to local judiciaries, but rather that it is not sufficiently respectful to democracy or, more precisely, to what local communities democratically decide.

Note, however, that in this work I have not wanted to defend a simplistic or shallow understanding of democracy, but rather a strong conception of it. For this reason, I believe that decisions like the amnesty decisions adopted in Uruguay, after a long and careful process of collective deliberation deserve special deference from courts. Of course, what I say about these kinds of cases does not apply to other local decisions that have not been the result of similarly strong democratic procedures.

Finally, I am also not totally persuaded by what Armin von Bogdandy, another distinguished scholar and good colleague, has said in this respect.¹⁵ Professor von Bogdandy praises the gradual emergence of a *ius constitutionale commune* in Latin America—a group of norms that are widely shared by member states in the region, mainly thanks to the activity of the regional (international and local) courts. As a description of the legal situation in Latin America, his claim seems at least partially right. The emerging dialogue between courts of different countries that is taking place in the region is creating a shared amalgam of fundamental rights law. Of course, we may like this result and we may even have some reasons to praise it. But how should we evaluate those developments from a democratic perspective? The answer, I believe, should not be positive or enthusiastic. The law, whether it be local, national, or international, should be the product of profound, deliberated, democratic agreements, rather than the result of judicial decisions. Of course, judges are an integral part of the democratic process, and should help us in the construction of democratic laws. But the content of democratic laws should be fundamentally the product of collective, “horizontal agreements,” and not the result of “vertical impositions” of the judicial or political type.

¹² *Id.*

¹³ See Eduardo Ferrer Mac-Gregor, *Conventionality Control: The New Doctrine of the Inter-American Court of Human Rights*, 109 AJIL UNBOUND 93 (2015).

¹⁴ See Ariel E. Dulitzky, *An Alternative Approach to the Conventionality Control Doctrine*, 109 AJIL UNBOUND 100 (2015).

¹⁵ See Armin von Bogdandy, *Ius Constitutionale Commune en América Latina: Observations on Transformative Constitutionalism*, 109 AJIL UNBOUND 109 (2015).