MULTILEVEL CONSTITUTIONALISM AND OTHER "ISMS" IN SOUTH AMERICA TESTING THE THEORY OF MULTILEVEL CONSTITUTIONALISM ON THE EXAMPLE OF THE REGIME UNDER AMERICAN CONVENTION ON HUMAN RIGHTS

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Abstract: *Primary goal of the article is the comparison of several aspects of constitutionalism in South America with its european equivalents with particular attention on the existing parallel functional ties typical for the theory of multilevel constitutionalism. The secondary goal is to map constitutional developments in a region of South America that occur under the regime of American Convention on Human Rights in order to draw existing parallels between the judicial activism of the Court of Justice of the EU, European Court of Human Right and Inter-American Court of Human Rights. Subject to the analysis are also the thoughts of transformative constitutionalism, which heavily influenced the present state of inter-american constitutionalism. Regime of the American Convention on Human Rights oscillates between monism with primacy of international law and constitutional pluralism. This tension is best described by the theory of multilevel constitutionalism. The theory conceptualizes relations arising from the application of the EU law and its member states and is also capable of explaining the specifics of the application of the European Convention on Human Rights. This dimension is important, because American Convention on Human Rights and Inter-American Court of Human Rights are in many ways heavily influenced by the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights. In connection to this, compatibility of the observed spillover of the multilevel protection of human rights and fundamental freedoms with the regime of the European Convention on Human Rights are tested. The research reveals new elements for the conceptual analysis of vertical and horizontal relationships that shape the connections between complementary constitutions at different levels of positive law. These elements are identified both in the European 'Bermuda Triangle' and in the South American legal theatre. Article arrives at the conclusion, that the theory of the multilevel constitutionalism finds fertile soul in the environment where, using Dworkins terminology, (human) rights are taken seriously and represent the fundamental goal of international cooperation in the culturally pluralistic legal space.*

Keywords: *Transformative constitutionalism, American Convention on Human Rights, European Union, Multilevel constitutionalism, Conventionality control doctrine*

INTRODUCTION

The last thirty years of European constitutionalism were marked with discussions about the constitutional character of the EU and the relationship between the law of the EU and legal systems of its member states. These theories mainly focus their attention on the European legal space. We would like to challenge this approach by taking a small excursion into the fascinating world of constitutionalism in South America. Many of the authors in South America often reference the constitutional developments in Europe and even compare some of their theories and models to their European counterparts. Our goal is to propose a contrasting approach: to screen the multicultural environment of

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the American Convention on Human Rights (hereinafter as ACHR, or also just American Convention) for presence of connections and relationships identified by the (European) theory of multilevel constitutionalism.

Article is split into two parts. The first part focuses on the short analysis of both legal theatres and their main characteristics, followed by the synthesis of gained insights. For the sake of transparency and scientific accuracy, the theory of multilevel constitutionalism is briefly presented and expanded upon with a new conceptual context, which is subsequently applied to insights gained from the comparative analysis.

After establishing the viability of conceptualizing the relationships under the regime of the American Convention through the lens of the theory of multilevel constitutionalism, the authors shift their focus in the second part of the article to presenting various theories and models of constitutionalism in South America, as articulated by domestic scholars. Each theory is presented from the viewpoint of their respective authors and then confronted from the viewpoint of their staunchest critics. Individual theories and models are also compared with their european counterparts, if such a connection can be made. Finally, we compare descriptive and normative claims of each theory with the constitutional developments identified in the first part of the article. This in turn leads us to the theory that offers the best explanation and characterization of the constitutionalism in South America.

I. CONSTITUTIONALIZATION OF SOUTHAMERICAN LEGAL THEATRE AND ITS EUROPEAN EQUIVALENT

a) South America

This section does not aim to offer a comprehensive empirical account of judicial relations in South America. Rather, it seeks to outline the regional framework of human rights protection under the American Convention and to examine its constitutional developments, with particular emphasis on aspects that resonate with European developments discussed in subsequent parts of this paper. The focus here is doctrinal and the goal is to reconstruct and critically evaluate the normative claims made by the Inter-American Court of Human Rights (hereinafter as IACtHR, or also just Inter-American court), particularly those that assert a binding transnational authority over domestic constitutional orders, such as the doctrine of conventionality control. The broader question of whether judicial relations in South America are stable, fragmented, or marked by 'irritant' courts that challenge the transnational framework falls outside the immediate scope of this paper. Nonetheless, some preliminary observations are made to illustrate contested areas in regional human rights protection. These are not exhaustive but aim to flag points of friction that merit deeper empirical and theoretical exploration.

American convention on human rights makes up the core of international protection of human rights in South America. Convention was signed on 22nd November 1969 in San José, Costa Rica and put into force on 18th July 1978. It eventually found its way into the texts of national constitutions via the process of internationalization, which allowed the national courts to submit their constitutional control to both

national and international criteria.[1] This process found fertile soil in South America, where national courts often reference and cite the international regulation of the protection of human rights. Mechanism for human rights protection in South America underwent several severe changes over the years, and just like many other international legal regimes entered into the process of its constitutionalization.[2] The result is a rather unique system of human rights protection, which can be characterized by two distinct features: conventionality control doctrine and interpretational principle of pro homine/persona.

Conventionality control doctrine was formulated by IACtHR in the year 2001 in the Barrios Altos v. Peru decision.[3] It represents an international obligation of all member states of the ACHR to interpret all national law in the light of the convention and the jurisprudence of the IACtHR. If national judge finds the norm of national law to be in conflict with American convention or jurisprudence of the Inter-American court, he is *ex officio* obliged to disregard it.[4] Conventionality control doctrine considers all national judges to be *de facto* "Inter-American" judges, the term coined by a judge of Inter-American court Eduardo Ferrer Mac-Gregor.[5] Jorge Contesse, among other scholars, has voiced concern over the doctrine, specifically in that it does not specify, which judge is supposed to possess such a power. This is further complicated by a fact, that across the member states there are several different models of constitutionality control.[6]

In Argentina for example, constitutionality control is diffuse with all judges in possession of a power to proclaim legal act to be void. Chile on the other hand has a concentrated model of constitutionality control and the power to proclaim legal act to be void is in possession of a single specialized court. Columbia has a mixed model, in which constitutional court has the power to proclaim legal act to be void, but there is also mechanism in place to allow district judges to attack constitutionality of legal acts.[7] Conventionality control doctrine gives all these judges powers not conferred unto them by their respective legal systems. It disregards the division of judicial power and thus each ordinary judge becomes a quasi-constitutional judge, even in countries which do not have a diffuse model of constitutionality control.

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[1] CONTESSE, J. Conventionality Control and the Limits of *Pro Persona* Jurisprudence. *The Italian Review of International and Comparative Law.* 2023, Vol. 3, No. 1, pp. 123–124.

[2] BOGDANDY, VON A., URUEÑA, R. International Transformative Constitutionalism in Latin America. *American Journal of International Law.* 2020, Vol. 114, No. 3, p. 403.

[3] Barrios Altos Case, Judgment of May 14, 2001, Inter-Am Ct. H.R. (Ser. C) No. 75 (2001). In: *Inter-American Court of Human Rights* [online]. 14. 3. 2001 [2025-06-19]. Available at: <https://www.corteidh.or.cr/docs/casos/articulos/seriec_75_ing.pdf>.

[4] MAC-GREGOR, F. E. Conventionality Control the New Doctrine of the Inter-American Court of Human Rights. *AJIL Unbound.* 2015, Vol. 109, p. 93.

[5] Almonacid Arellano v. Chile, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 154. In: *Inter-American Court of Human Rights* [online]. 26. 9. 2006 [2025-06-19]. Available at: <https://www.corteidh.or.cr/docs/casos/articulos/seriec_154_ing.pdf>.

[6] CONTESSE, J. The final word? Constitutional dialogue and the Inter-American Court of Human Rights. *International Journal of Constitutional Law.* 2017, Vol. 15, No. 2, p. 415.

[7] Ibid., p. 420.

IACtHR modified the conventionality control doctrine in a case Dismissed Congressional Employees v. Peru,[8] in which he specified, that national judges are supposed to execute the doctrine in accordance with their respective powers and corresponding procedural regulation. Judge Eduardo Ferrer MacGregor continues this train of thoughts in the decision Cabrera García and Montiel Flores v. Mexico,[9] in which he specifies, that the clause exists to "calibrate" the intensity, in which the national authorities must execute the conventionality control. Therefore, in the system of diffuse constitutionality control, the doctrine will have bigger intensity and this will dissipate in countries that do not allow diffuse constitutionality control.[10] In the decision Liakat Ali Alibux v. Surinam,[11] Inter-American court claims that it does in no way endorse any specific kind of constitutionality control and the duty to monitor compliance of the national legislature with the convention rests with all state bodies across all levels.

There is one more objection put forth by Jorge Contesse against the conventionality control doctrine. Doctrine is formulated to be drawn from the text of ACHR, yet the Convention is completely silent on the matter. In his opinion, the doctrine should instead be based on other sources, mainly on international traditions and national courts that often reference the Convention in their decisions. This way, conventionality control doctrine could mirror the developments inside the member states and grow with them.[12] International law does not always offer the best answer, and national law could often provide a more flexible and better solution. It is therefore not necessary to view international law as inherently morally and legally superior.[13]

The second distinct characteristic of the human rights protection in South America is the interpretational principle pro homine, today better known as "pro persona". The pro persona principle serves mostly as a hermeneutic tool in the process of legal interpretation. Judge is obliged to accommodate the most extensive interpretation of a human right in a case of its protection and the most restrictive interpretation of it in a case of its violation.[14] The goal here is to strengthen the human rights protection and for this reason it makes sense to reach for it as an interpretational tool when resolving conflicts

[8] Dismissed Congressional Employees (Aguado Alfaro et. al.) v. Peru, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C.) No. 158, 89(2). In: *Inter-American Court of Human Rights* [online]. 24. 11. 2006 [2025-06-19]. Available at: <https://www.corteidh.or.cr/docs/casos/articulos/seriec_158_ing.pdf>.

[9] Cabrera García and Montiel Flores v. Mexico, Preliminary Objections, Merits, Reparations and Costs, Judgment Inter-Am. Ct. H.R. (ser. C.) No. 2020 (Nov. 26, 2010). In: *Inter-American Court of Human Rights* [online]. 26. 11. 2006 [2025-06-19]. Available at: <https://www.corteidh.or.cr/docs/casos/articulos/seriec_220_ing.pdf>.

[10] CAROZZA, P. G., GONZÁLES, P. D. The final word? Constitutional dialogue and the Inter-American Court of Human Rights: A reply to Jorge Contesse. *International Journal of Cosntitutional Law.* 2017, Vol. 15, No. 2, pp. 439–440.

[11] Liakat Ali Alibux v. Suriname, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H. R. (ser. C) No. 276 (Jan. 30, 2014). In: *Inter-American Court of Human Rights* [online]. 30. 1. 2014 [2025-06-19]. Available at: <https://www.corteidh.or.cr/docs/casos/articulos/seriec_276_eng.pdf>.

[12] CONTESSE, J. *The final word? Constitutional dialogue and the Inter-American Court of Human Rights: A rejoinder to Paolo Carozza and Pablo Gonzáles Domínguez.* p. 446.

[13] CONTESSE, J. *The final word? Constitutional dialogue and the Inter-American Court of Human Rights.* p. 416.

[14] PINTO, M. El principio pro homine. Criterios de hermeneutica y pautas para la regulación de los derechos humanos. In: Víctor Abramovich – Christian Courtis (eds.). *La aplicación de los tratados sobre derechos humanos por los tribunales locales*. Buenos Aires: Editores del Puerto, 2004, p. 163.

between two different legal interpretations. When it comes to the relationship between national and international law, Yota Negishi identifies two functions of the pro persona principle.[15] The first is to offensively attack and the second to defensively protect the line between national and international law. Jorge Contesse considers such a line of reasoning to be dangerous. In his opinion, the pro persona principle, which is usually applied in the process of interpreting national law, cannot be a source of new powers for national judges in terms of international regulation. Such powers may only be based on the binding norms of international law.[16]

Regardless of the justification or merit of these critical reservations, it is clear that the boundaries between domestic and international human rights protection are not firmly established under the regime of the ACHR. Although all national courts are part of the international mechanism for the protection of human rights through the doctrine of conventionality control, not all necessarily agree with the jurisprudence of the Inter-American Court.

IACtHR court often finds himself relying on national practice of one state to transform the conditions for human rights protection in another state.[17] An example of this can be seen in the case Atala Riffo,[18] in which Inter-American court argued with constitutional developments in Mexico and Columbia to assert sexual orientation and gender identification as protected categories within the prohibition of discrimination set forth in Article 1 of the ACHR.[19] Specifically, it was the following part of the decision of the Mexican Constitutional Court in a similar matter: *"Heterosexuality does not guarantee that an adopted minor will live in prime conditions for development: this has nothing to do with heterosexuality or homosexuality. All types of families have advantages and disadvantages, and each family must be analyzed individually, not from a statistical point of view."*[20] For Chile and other countries subject to the jurisdiction of the IACtHR, this meant the expansion of the prohibition of discrimination, which was based on the interpretation of these rights in another member state of the American Convention.[21]

These relations between national and international law are rather unique and do not fit into the classic molds of monism and dualism. They lead to the increase in the minimal standard of the human rights protection under the regime of the ACHR, as the result of the specific relationship between the system of regional international organization and the national systems of its member states. We believe that in order to understand and theoretically grasp these atypical ongoing processes, a thorough analysis of the ap-

[15] NEGISHI, Y. The *Pro Homine* Principle's Role in Regulating the Relationship between Conventionality Control and Constitutionality Control. *European Journal of International Law.* 2017, Vol. 28, No. 2, pp. 471–472.
[16] CONTESSE, J. *Conventionality Control and the Limits of Pro Persona Jurisprudence. p.*127.
[17] CONTESSE, J. *The final word? Constitutional dialogue and the Inter-American Court of Human Rights.* pp. 415–417.
[18] Atala Riffo and Daughters v. Chile, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter.Am. Ct. H.R. (ser.C) No. 239. In: *Inter-American Court of Human Rights* [online]. 24. 2. 2012 [2025-06-19]. Available at: <https://corteidh.or.cr/docs/casos/articulos/seriec_239_ing.pdf>.
[19] CONTESSE, J. *The final word? Constitutional dialogue and the Inter-American Court of Human Rights.* p. 427.
[20] Corte Constitucional [C.C.] [Constitutional Court], septiembre 9, 1998, Sentencia C-481, para. 25, Gaceta de la Corte Constitucional [G.C.C.]. In: *Corte Constitucional de República de Colombia* [online]. [2025-06-19]. Available at: <http://www.corteconstitucional.gov.co/relatoria/1998/c-481-98.htm>.
[21] CONTESSE, J. *The final word? Constitutional dialogue and the Inter-American Court of Human Rights.* p. 428.

plication of law in the european legal theater characterized by the imaginary "Bermuda Triangle" (formed by the ECtHR, the CJEU and the constitutional courts of the member states) is necessary. The reason for this is, first, the presence of similar processes and hermeneutic specifics that occur when applying the law of regional international, transnational or national legal systems. Secondly, the ACHR was largely inspired by the European Convention on Human Rights (ECHR from here on out) and the Inter-American Court borrowed a lot from the way the European Court of Human Rights (ECtHR from here on out) operates. Our analysis therefore continues by looking at the specifics of the application of the ECHR, followed by clarification of the application of law under the specific conditions of the European Union.

b) Human rights protection in Europe

b1) Council of Europe

The jurisprudence of the ECHR has demonstrated to have a positive impact on the development of the protection of human rights and fundamental freedoms in the member states of the Council of Europe. National courts tend to follow the jurispurdence of the ECHR and respect the Convention, even in cases where the Convention provides a higher standard of protection of fundamental rights and freedoms than the national constitutional order.

In this context, from the perspective of the theory of multilevel constitutionalism, the judicial dialogue that took place between the Federal Constitutional Court of Germany (hereinafter as FCC) and the ECtHR on the backdrop of the decisions Sicherungsverwahrung I and II is especially interesting. The essence of the dispute was the fact that the German FCC originally considered the length of detention imposed under the current criminal code beyond the statutory maximum sentence to be consistent with the german constitution (known as "Basic Law" in english, "Grundgesetz" in german),[22] but from the perspective of the ECtHR, this approach was in conflict with the Convention.[23] The German FCC revised its approach after the jurisprudence of the ECtHR revealed new aspects of the interpretation of the Basic Law that it had not initially noticed in its earlier decision. We see that the German FCC revised its original decision precisely in connection to the jurisprudence of the ECtHR, the acceptance of which caused an increase in the standard of protection guaranteed by the Basic Law.[24] "This indirectly makes the Convention part of the Basic Law, when decision-making is capable (albeit indirectly) of changing the content of constitutional norms, thereby de facto changing the meaning of the Constitution by the ECHR." [25, 26]

[22] 2 BvR 2029/01.

[23] Complaint *M. c. Germany*, complaint nr. 19359/04, decision from 17th december 2009; Similarly, complaint *Kallweit c. Germany*, complaint nr. 17792/07, decision from 13. 1.2011.

[24] For more details, see: ĽALÍK, T. Záväznosť rozhodnutí ESĽP a dekonštrukcia ústavného práva. [Binding Effect of the Case-Law of the ECtHR and Deconstruction of Constitutional Law.] *Právník*. 2013, Vol. 152, No. 1, pp. 58–59.

[25] Ibid., p. 59.

[26] For more details, see also: VOßKUHLE, A. Multilevel Cooperation of the European Constitional Courts, Der Europäische Verfassungsgerichtsverbund. *European Constitutional Law Review.* 2010, Vol. 6, No. 2, p. 188.

In this way, the normative content of the fundamental rights and freedoms protected by the constitution in the Member States increases. The increase in normative content occurs even without a direct amendment of the constitutional text, through its transformation in the process of interpreting the national constitution. This transformation takes into account the higher standard of protection under the Convention, in conjunction with the evolving case law of the ECHR. The ECHR is therefore being constitutionalized at the interpretation level, something we can also observe in the Slovak Republic,[27, 28] and which leads to the creation of the european minimum standard for protection of fundamental rights. "Although the ECHR lacks national oddities that form part of all national constitutional catalogues of human rights, on the other hand, it contains common features of european constitutional development in general, which are not always expressed in individual national constitutions. The ECHR is therefore able to create guarantees for a pan-european minimum standard of human rights."[29] The Convention thus becomes a common inspiration for member states in regulating human rights at the national level.[30] The ECtHR has rightly characterized the Convention as the "constitutional instrument of european public order" and the ECtHR is rightly referred to as the european constitutional court.[31]

However, in accordance with Article 53, member states refuse to grant the Convention interpretative and application priority when it sets lower standard of protection for fundamental rights and freedoms compared to the protection offered by the national constitution.[32] In this context, the opinion of the German FCC in the Görgülü case is par-

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[27] MASÁROVÁ, Ľ. *Aplikovateľnosť čl. 6 Dohovoru o ochrane ľudských práv a základných slobôd v daňovej oblasti (Právo na spravodlivý proces). [Applicability of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms in Tax Matters (Right to a fair trial).]* Prague: Leges, 2015, pp. 18–19; ĽALÍK, T. Vplyv judikatúry Európskeho súdu pre ľudské práva na rozvoj ľudských práv v Slovenskej republike. [The impact of the case law of the European Court of Human Rights on the development of human rights in the Slovak Republic.] *Justičná revue*. 2009, Vol. 61, No. 12, pp. 1305–1324.

[28] Compare: BREICHOVÁ LAPČÁKOVÁ, M. Europäisches recht in der Judikatur des Verfassungsgerichts der Slowakischen Republik. In: Susanne Baer – Oliver Lepsius – Christoph Schönberger – Christian Waldhoff – Christian Walter (eds.). *Jahrbuch des Öffentlichen Rechts*. Tübingen: Mohr Siebeck, Band 66, 2018, p. 674.

[29] ĽALÍK, T. *Vplyv judikatúry Európskeho súdu pre ľudské práva na rozvoj ľudských práv v Slovenskej republike. [The impact of the case law of the European Court of Human Rights on the development of human rights in the Slovak Republic.]*. p. 54.

[30] BADINTER, R. La Convention européenne des droits de l'Homme et le Conseil constitutionnel. In: Paul Mahoney et al. (eds). *Protection des droits de l'Homme: la perspective européenne/Protecting Human Rights: the european perspective, Mélanges a' la mémoire de / Studies in memory of Rolv RYSSDAL*. Köln: Carl Heymanns Verlag, 2000, pp. 84–85. In: ĽALÍK, T. *Vplyv judikatúry Európskeho súdu pre ľudské práva na rozvoj ľudských práv v Slovenskej republike. [The impact of the case law of the European Court of Human Rights on the development of human rights in the Slovak Republic.]*. p. 55.

[31] GREER, S. *The European Convention on Human Rights: Achievements, Problems and Prospects*. Cambridge: Cambridge University Press, 2006, p. 7. In: ĽALÍK, T. *Vplyv judikatúry Európskeho súdu pre ľudské práva na rozvoj ľudských práv v Slovenskej republike. [The impact of the case law of the European Court of Human Rights on the development of human rights in the Slovak Republic.]*. p. 51.

[32] Compare: Argumentation of the Helsinki Committee for Human Rights before the Constitutional tribunal of the Polish republic, file number SK 30/05 from 16. 2. 2006, p. 19; Judgement of the Constitutional court of Slovak republic I. ÚS 5/02. For more details, see also: MACEJKOVÁ, I. Vybrané rozhodnutia medzinárodných súdnych orgánov v rozhodovacej činnosti Ústavného súdu Slovenskej republiky. [Select decisions of the international judicial bodies in the decision-making activity of the Constitutional court of Slovak republic.] In: Tomáš Majerčák (ed.). Ústavné dni – Implementácia rozhodnutí medzinárodných súdnych orgánov vnútroštátnymi súdmi a inými orgánmi verejnej moci [Implementation of judgements of the international judicial bodies by national courts and other bodies of public authority.] – V. ústavné dni, Košice, 2016, p. 8.

ticularly significant. The court consequently established the boundaries of the ECHR and the case law of the ECtHR within the German legal system.: "… it is not contrary to the obligation (of the Basic Law) to the international law if the legislator, as an exception, does not act in accordance with the law of an international treaty if this is the only way to avert a violation of the fundamental principles of the Constitution." [33]

At the same time, it indirectly placed the Convention at the level of federal law and obliged all German state authorities and courts to apply the Convention domestically, as pointed out by Andreas Voβkühle, the chairman of the German FCC at the time.[34] The German FCC itself "indirectly serves the enforcement of international law".[35] The Constitutional Court of the Slovak Republic approaches the binding character of international law in a similar way, perceiving international obligations under the Art. 1, para. 2 of the Constitution of the Slovak Republic as legally binding limits on the activities of all national public authorities, including the Constitutional Court of the Slovak Republic.[36] In this way, national courts become hermeneutic and application bodies of the Convention.

Following this line of thought, we can observe that the question of establishing boundaries of the ECHR and assessment of the normative scope of lower and higher standard of protection is not set in stone. Instead, it is a plastic, dynamic and constantly developing process. The question of the minimum standard of protection under the Convention, representing a higher level of protection from the perspective of the national constitution, can, in practice, also be determined by the national court. An example of this is the decision of the Supreme Court of Ireland in the case of McD. -v- L & amor, where protection under Article 8 of the ECHR was granted to a family, which in this case consisted of a lesbian couple of women,[37] despite the lack of jurisprudence of the ECHR on the issue. The decision of the national court thus simultaneously increased not only the national standard of protection, but also the minimum standard of protection under the Convention.

The aforementioned relationship highlights the necessity of transcending the narrow perception of the impact of ECtHR jurisprudence and acknowledging the de facto precedential effect of its case law. Simultaneously, it is essential to account for the dynamic evolution of the minimum standard of human rights protection, as guaranteed and upheld both under the Convention and within the constitutional frameworks of the Council of Europe's member states. This process is procedurally realized through mutual judicial dialogue.[38]

b2) European Union

The Court of Justice of the EU (hereinafter as CJEU) serves as a perfect example of judicial activism and many characteristic features of EU law, such as its direct effect, primacy or the principle of loyal cooperation can be traced back to the court's decision-making. In

[33] 2 BvR 1481/04 from 14.10.2004, § 35.
[34] VOßKUHLE, A. *Multilevel Cooperation of the European Constitional Courts, Der Europäische Verfassungsgerichtsverbund.* p. 188.
[35] BVerfGE 111, 328-329.
[36] PL. ÚS 7/2017, so called Mečiar's amnesties.
[37] Judgement No. 186/2008, [2009] IESC 81.
[38] ĽALÍK, T. *Záväznosť rozhodnutí ESĽP a dekonštrukcia ústavného práva. [Binding Effect of the Case-Law of the ECtHR and Deconstruction of Constitutional Law.].* pp. 62–63.

correlation with South America and the conventional control doctrine, we would like to point out its *Simmenthal* [39] decision, in which the ECJ established a direct relationship between itself and the national courts of the member states.[40] He turned the regular national judges into quasi-european judges who must follow the interpretation of the CJEU and disapply any national legal norms that are in direct conflict with the EU law. Moreover, if national courts encounter a case in which the question of the interpretation of the EU law remains open, they are obliged to submit a preliminary question and follow the interpretation of the CJEU.

Despite the principle of EU law supremacy, national courts of member states often issue decisions prioritizing their own national law or accepting EU law with reservations. Notable examples include the landmark rulings of German FCC in *Solange I,*[41] *Solange II,*[42] and the *Lisbon* case.[43] These decisions illustrate the gradual evolution of the doctrine of limited supremacy of EU law,[44] culminating in the refusal to apply EU law when it conflicts with constitutional identity of the member states. This identity is grounded in the immutable constitutional principles forming the material core of the Basic Law, [45] which also includes the protection of human dignity.

In connection to this, the saga surrounding the interpretation of the european arrest warrant is of particular interest. As established by the CJEU in *Melloni,*[46] a higher standard of human rights protection within the EU can only be set provided it does not violate the principles of supremacy, unity, and effectiveness of EU law. A member state that suspects a provision of EU secondary law infringes on its constitutional identity[47] may challenge it under Article 4(2) of the Treaty on European Union.[48] However, in the *Melloni* case, the Spanish Constitutional Court chose not to invoke this option and proceeded to execute the european arrest warrant. In contrast, the German FCC took the opposite

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[39] C 106/77 Amministrazione delle Finanze v Simmenthal SpA (1978). In: *EUR-Lex* [online]. [2025-06-19]. Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A61977CJ0106>.

[40] DANI, M. National Constitutional Courts in supranational litigation: A contextual analysis. *European Law Journal*. 2017, Vol. 23, No. 3-4, p. 194.

[41] BVerfGE 37, 271.

[42] BVerfGE 73, 339.

[43] 2BEerfGE 2/08.

[44] BARANÍK, K. *Identita členských štátov EÚ – Súdny dialóg alebo diktát. [Identity of the EU member states – Judicial dialogue or dictation].* Bratislava: Univerzita Komenského v Bratislve – Bratislava legal Forum 2016 – Common European identity in the context of current legal challenges. 2016, pp. 16–17.

[45] The article represents a partial output of the following project: VEGA č. 1/0474/25 – The referendum and the material core of the Constitution in context of decision-making practice of the Constitutional court of the Slovak republic – evaluation, critical reflections and proposals de constitutione ferenda.

[46] C-399/11 from 26. 2. 2013.

[47] BOGDANDY, VON A., SCHILL, S. Overcoming absolute Primacy: Respect for National Identity under the Lisabon Treaty. *Common Market Law Review*. 2011, Vol. 48, No. 5, pp. 1417–1453; ZBÍRAL, R. Koncept národní identity jako nový prvek vo vztahu vnítrostátního a únijního práva: Poznatky z teorie a praxe. [The Concept of National Identity as a New Element of the Relationship Between National and European Union Law: Findings from Theory and Practice.] *Právník*. 2014, Vol. 153, No. 2, pp. 112–133.

[48] Article 4 (2) of the Treaty on the European Union: *"The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government...."*; For case *Melloni*, see also: BENKO, R. Vplyv Charty základných práv EÚ na formovanie ústavnoprávnej štruktúry EÚ na pozadí rozhodnutia Súdneho dvora vo veci Melloni. [The Impact of the Charter of Fundamental Rights of the European Union on the Constitutional Architecture of the European Union in the Light of Melloni case.] *Právník*. 2015, Vol. 154, No. 8, pp. 662–676.

approach. In a factually similar case, it invoked Article 4(2) to refuse the execution of the european arrest warrant, citing a violation of Germany's constitutional identity–specifically, the principle of human dignity enshrined in Article 1(1) of the Basic Law, which constitutes the material core of the german constitution.[49]

In this decision, commonly referred to as *Solange III*, the German FCC established boundaries of the EU law and identified the higher national standard of protecting human dignity as an insurmountable obstacle to the application of EU law.[50] In response, the CJEU extended the protection of human dignity in the context of the european arrest warrant. This was achieved by clarifying the interpretation of the Council Framework Decision of 13th June 2002 on the european arrest warrant and surrender procedures between member states, in line with Article 1 of the Charter of Fundamental Rights of the European Union, as established in *Aranyosi* and *Căldăraru*.[51] This saga exemplifies the interconnected dynamics of the evolution of fundamental constitutional principles at both national and supranational levels through open judicial dialogue.

At the same time, we can observe certain normative overlaps between national legal systems among the member states of the EU themselves. This occurs with the help of the same hermeneutic processes as under the regime of ACHR in *Atala Riffo*.

This is because one of the sources of the general legal principles of the European Union, which form part of its primary law, is the constitutional law of its member states. In *Mangold*,[52] the CJEU derived a general legal principle prohibiting age-based discrimination against workers, even though only a few constitutions of the member states recognized this principle at the time.[53] This demonstrates how open communication between the European legal system and national legal systems occurs against the background of applying constitutional principles. As a result, the primary law of the European Union is enriched by principles derived from the constitutional laws of certain member states, particularly those concerning the position of the individual.[54] This enriched primary law of the EU then becomes binding on all member states under the principle of the supremacy of EU law.

Similar to the framework of the ACHR and the Council of Europe, the mutual relationships within the EU legal system leads to the application of those legal sources that enhance the overall effective protection of fundamental rights and freedoms. In South America, the *pro persona* principle serves as an important hermeneutic tool, while in Europe, the focus lies on the protection of fundamental constitutional principles, or constitutional identity, with human dignity playing a central role. In our view, both approaches are methodologically comparable in how they conceptualize judicial dialogue within multicultural international or supranational organizations.

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[49] 2 BvR2735/14 from 15. 12. 2015.

[50] RAUCHEGGER, C. The Bundesverfassungsgericht's human dignity review: Solange III and its application in subsequent case law. In: Lorenza Violini – Antonia Baraggia (eds.). *The fragmented landscape of fundamental rights protection in Europe: the role of judicial and non-judicial actors.* Cheltenham, Northampton: Edward Elgar, 2018, pp. 94–113.

[51] C-404/15 a C-659/15 PPU from 5. 4. 2016.

[52] C-144/04 from 22.11.2005.

[53] TOMÁŠEK, M., TÝČ, V. a col. *Právo Evropské unie. [Law of the European Union.]* Prague: Leges, 2017, pp. 102–103.

[54] Compare: BREICHOVÁ LAPČÁKOVÁ, M. *Nezrušiteľné ústavné princípy vo viacúrovňovom právnom systéme. [Irrevocable constitutional principles in a multilevel legal system.]* Košice: Šafárik Press, 2020, p. 454.

II. MULTILEVEL CONSTITUTIONALISM

a) Constitutional pluralism

Both under the ACHR regime and in the EU and the Council of Europe, we can observe the following three parallel processes:

1. The interdependence of the national and international levels of positive law, namely:
- the connection between the constitutional law of the member states and (in the material sense) the constitutional sources of law of international and supranational organizations.

2. The ongoing judicial dialogue that occurs:
a) in the direct national application of the sources of regional international, or supranational law,
b) in the application of the national standard of protection by regional international and supranational judicial bodies.

3. The emerging specific cumulative present normative overlaps between legal systems that are the result of the constitutional connection and the ongoing judicial dialogue:
a) international verticality (see below),
b) national verticality (see below),
c) normative horizontal overlaps (see below),

They result into mutually influenced increase in the protection of human dignity in a form:
a) gradual increase in *the common minimal standard of its protection* as a result of normative influence of the national legal systems of the member states,
b) gradual increase in *the national minimal standard of the protection of fundamental rights and freedoms*, not based on novelizations of the national constitution, but as a result of the normative influence of the systems of regional international and transnational law.

We can then observe *the common shared* increase in the protection of human dignity as the result of the process of mutual interaction between the individual legal systems.

Described processes and common shared increase in the protection of the human dignity occurring both in the european and southamerican region, are moving us away from the classic theories of monism and dualism, precisely because they represent the characteristic signs of constitutional pluralism. These processes and their result would not be possible without the absence of hierarchy between the national and international law present in many theories of monism. The clear sign of constitutional pluralism is the presence of heterarchy, rather than hierarchy.[55]

They would also not be possible without the absence of the systemic separation typical for theories of dualism. Described processes in the points 1, 2 and 3 and their

[55] JAKLIČ, K. *Constitutional Pluralism in the EU*. Oxford: Oxford University Press, 2014, p. 21.

resulting shared effect on the increase of the protection of human dignity is based precisely on the shared normative content of the individual legal systems and compatibility of their constitutional goals. It is therefore more fitting to talk about the concept of ties between the legal systems and subsequent complementary understanding of the content of the constitutional law in the individual legal systems, supplemented with the substantive compatibility od the shared protected constitutional values.

From our perspective, the presented and ongoing processes are best explained by the theory of multilevel constitutionalism, which aims to conceptualize them.

b) Multilevel constitutionalism of Ingolf Pernice

Developed by Ingolf Pernice,[56] the theory of multilevel constitutionalism provides a framework for understanding the ongoing processes within the European Union. The theory transcends traditional distinctions between national, European, and international law, offering a more integrated perspective. Originally termed *"Verfassungsverbund"* (constitutional association) in german, multilevel constitutionalism is rooted in the 1993 Maastricht decision of the German FCC. In this decision, the court affirmed that germany's Basic Law *(Grundgesetz)* was open to connections *"within the narrow legal association (Rechtsverbund) of the interstate community"*.[57] Drawing on this principle, the theory emphasizes *the "close connection and interdependence"*[58] between the levels of european and national law. The starting point for understanding the systemic relations within the European Union is thus the observed "connection" between the constitutional law of the member states and the primary law of the EU, together forming a single integrated system.[59]

Multilevel constitutionalism observes the existence of a single, interconnected legal system, where the *concept of hierarchy is replaced by the concept of connection.*[60] In this multilevel system, the relations between the system of the european law and the national legal systems of the member states are horizontal, despite the term *"multilevel"* potentially suggesting a hierarchical structure. Within each Member State, a form of *"dual constitutional law"*[61] emerges, where national constitutional law and EU primary law oper-

[56] This term first appears in: PERNICE, I. Constitutional Law Implications for a State Participating in a Process of Regional Integration. German Constitution and "Multilevel Constitutionalism". In: Eibe Riedel (ed.). *German Reports on Public Law Presented to the XV International Congress on Comparative Law.* Bristol: 26th July to 1st August,1998, pp. 40–65.

[57] BVerfGE 89, 155 (183).

[58] PERNICE, I. Theorie und Praxis des Europäischen Verfassungsverbund. In: Christian Calliess (ed.). *Verfassungswandel im europäischen Staaten – und Verfassungsverbund. Göttinger Gespräche zum deutschen und europäischen Verfassungsrecht.* Berlin: Humboldt-Universität zu Berlin, 2007, pp. 61–92, page 2 in the linked document. In: *rewi.hu-berlin.de* [online]. [2025-01-06]. Available at: <https://www.rewi.hu-berlin.de/de/lf/oe/whi/publikationen/whi-papers/2008/whi-paper0808.pdf>.

[59] Ibidem, pp. 2–3.

[60] For more details, see also: BOGDANDY, VON A. Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law. *International Journal of Constitutional Law.* 2008, Vol. 6, No. 3 4, pp. 97–413.

[61] For more details, see also: BOGDANDY, VON A. Zweierlei Verfassungsrecht, Europäisierung als Gefährdung des gesellschaftlichen Grundkonsens? *Der Staat.* 2000, Vol. 39, No. 2, p. 167.

ate as complementary and interdependent components of the single integrated system. This approach reflects a post-national understanding of the term "constitution".[62]

Other key elements of the concept of multilevel constitutionalism are the perspective of citizens as the fundamental source of legitimacy, and the material unity of the assembled legal system in the post-national reality of constitutional pluralism.[63] As long as the basis and ultimate purpose of the system is the protection of individual rights, the entire result of the mutual cooperation becomes the basic hermeneutic tool of the entire system.

Even though the theory of multilevel constitutionalism is built inside the legal theatre of European Union and with the needs of the EU in mind, its complex nature and ability to explain the ongoing processes in the observed reality of constitutional pluralism becomes the reason for its viability as the explanation of the relationships inside the european bermuda triangle as well, or for the relationship between the european law and general international law.[64]

The theory of multilevel constitutionalism emerges as universally adaptable, offering theoretical and constitutional insights into the positive impact of systemic connections among the analyzed organizations. This is particularly evident in the cumulative concurrence of the three distinct overlaps (3a, 3b, 3c), which primarily manifest in the context of human rights application.

What is important is that these three normative overlaps have normative dimension:

First (3.a), multilevel constitutionalism recognizes the obligatory nature of the system of general international law from the viewpoint of the regional and national level,[65] as well as the obligatory nature of the european law from the level of national law. They do therefore recognize the vertical normative relationship typical for monism with the primacy of international law, which we will call *"international verticality."*

Second (3.b), multilevel constitutionalism also accounts for the increase in the protection of human rights and fundamental freedoms, which occurs alongside an opposing verticality–a "countermovement" characterized by international bodies' respect for national regulations. We refer to this phenomenon as *"national verticality."* This opposing national verticality is evident in the application practices of international organizations, distinguishing it from classical monism with primacy of national law, which prioritizes national law and is tied to the decision-making practice of national bodies.

Third (3.c), multilevel constitutionalism describes processes that lead to *"normative horizontal overlaps"* between the national legal systems of member states. These over-

[62] PERNICE, I. Europäisches und nationales Verfassungsrecht. *VVDStRL.* 2001, Vol. 60, pp. 175-176; PERNICE, I. Die Europäische Verfassunsg. WHI – Paper, 12/01. Berlin: Humboldt-Universität zu Berlin –- Walter Hallstein-Institut Für Europäisches Verfassungsrecht, 2021, p. 6. In: *rewi.hu-berlin.de* [online]. [2025-01-06]. Available at: <https://www.rewi.hu-berlin.de/de/lf/oe/whi/publikationen/whi-papers/2001/whi-paper1201ger.pdf>.

[63] PERNICE, I. *Theorie und Praxis des Europäischen Verfassungsverbund.* p. 3.

[64] KLEINLEIN, T. *Konstitutionalisierung im Völkerrecht.* Heidelberg: Springer, 2012, pp. 78–79; BOGDANDY, VON A. *Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law.* p. 413.

[65] BOGDANDY, VON A. Europäische Union und das Völkerrecht kultereller Vielfalt. Aspekte einer wunderbarer Freundschaft. *European Diversity and Autonomy Papers – EDAP.* 2007, No. 1. p. 6.

laps result in an increase in the national standard of protection, corresponding to the higher level of protection found in another member state within the given international or transnational community.

Under the regime of the Council of Europe, the cumulative presence of these three specifics possesses a somewhat different character:

a) international verticality:

It is clearly present and emerges from the practice of the member states, leading to the national constitutionalization of the Convention and the subsequent establishment of a pan-European minimum standard of human rights guarantees–all achieved irrespective of monist or dualist theories regarding the relationship between national and international law.

b) national verticality:

In the case of the Council of Europe, it possesses an implicit character, though paradoxically it is explicitly acknowledged in Article 53 of the Convention. Its essence lies in the tacit recognition of the higher national standards of protection by the ECtHR within the ongoing judicial dialogue. We will therefore refer to it as 'explicit implicit national verticality.'

c) normative horizontal overlaps:

They also possess an implicit character, as is clearly demonstrated on the case of Ireland in *McD. v. L & Anor*. This implicitness arises from the objective-subjective nature of the interpretation[66] of constitutional principles and from a crucial premonition in the application of law, shaped by the experiences and values of the national cultural environment.[67]

The specific form of these three distinctive normative overlaps between legal systems does not negate their multilevel nature, a view which is favored, for example, by the chairman of the German FCC Voßkuhle[68] or Armin von Bogdandy.[69]

We can also observe these three specific normative overlaps between the levels of legal systems within the European Union, following the adoption of the Charter of Fundamental Rights of the European Union. After its adoption, the importance of national constitutional principles slightly diminished within the normative horizontal overlaps. However, at the same time, the explicitly implicit national verticality of national identity protection was emphasized in application practice.[70] This has fostered implicit normative horizontal overlaps, as evidenced by the jurisprudence of the CJEU, particularly in its response to the *Solange III* decision during the european arrest warrant saga.

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[66] GADAMER, H.-G. *Pravda a metoda I. Nárys filosofické hermeneutiky. [Truth and method I. Outline of philosophical hermeneutics.]* Prague: Triáda, 2020, p. 416.

[67] PERELMAN, C. *Právna logika. [Juridicial logic.]* Bratislava: Kalligram, 2014, p. 152.

[68] VOßKUHLE, A. *Multilevel Cooperation of the European Constitional Courts, Der Europäische Verfassungsgerichtsverbund.* p. 178.

[69] BOGDANDY, VON A. *Pluralism, direct effect, and the ultimate say: On the relationship between international and domestic constitutional law.* p. 403.

[70] Originally, implicit national verticality in protection of the fundamental constitutional principles was already occuring in the year 1971 in *Solange I*. It was only explicitly enshrined by the Treaty of Amsterdam in 1997.

It is interesting to note that under both the Council of Europe and the EU regimes, national verticality often manifests as an explicitly implicit national verticality, recognizing a higher national standard for the protection of fundamental constitutional principles. In both organizations, there is also official recognition of multilevel constitutional ties, supported by a significant body of legal scholarship.

The shared increase in the protection of human dignity, resulting from international and national verticality as well as normative horizontal overlaps, can also be observed under the regime of the ACHR, as demonstrated in *Atala Riffo*. The key question is how domestic legal scholarship positions itself in relation to their theoretical conception and understanding. The following pages are dedicated to exploring this question, with primary focus on the acceptance of the theory of multilevel constitutionalism.

III. TRANSFORMATIVE, INTER-AMERICAN AND MULTILEVEL CONSTITUTIONALISM IN SOUTH AMERICA

Paradoxically, if we are to talk about constitutionalism in South America and in particular, transformative constitutionalism, which this region is most known for, we first need to take a small trip to post-apartheid South Africa, from where the theory itself originated from. Author of the transformative constitutionalism is an american legal theorist Karl E. Klare, who first introduced the thought in 1998 in South African journal of human rights. In his article, he devoted his attention to the changes that legal methodology underwent in the context of South African constitutionalism from the end of apartheid era.[71] Klare puts forth a question, whether the judicial law-making in the process of interpretation could lead to positive changes in the legal reality of post-apartheid society. He is of an opinion, that while conscientious judge would stay loyal to the positive law, which he is meant to protect and enforce, he would interpret it strategically in a way, that would lead to developments in the areas of freedom and justice.[72]

Etienne Mureinik, one of the most fierce proponents of transformative constitutionalism in South Africa, underlines the role of judges in developing the areas of justice and freedom as follows: *"If we find that conscientious judges are so tightly constrained by the fetters of unjust laws as to destroy their capacity to do justice, and that they should therefore resign, we have discovered most of what we need to know to determine the moral duty of a conscientious legal practitioner. If there is no point in being a conscientious judge, there is no point in being a conscientious advocate, because the arguments of a conscientious advocate are calculated to persuade only conscientious judges. Nor can there be any point in being a conscientious attorney .... [and] little point in being a conscientious academic lawyer, because the most important kind of legal research is addressed to conscientious judges and practitioners, and teaching is a worthless activity unless it is addressed to conscientious students; and there can be no point in being a conscientious law student,*

[71] HAILBRONNER, M. Transformative Constitutionalism: Not Only in the Global South. *The American Journal of Comparative Law.* 2017, Vol. 65, No. 3, p. 532.

[72] KLARE, E. K. Legal culture and Transformative Constitutionalism. *South African Journal on Human Rights.* 2017, Vol. 14, No. 1, pp. 148–150.

because you would be preparing yourself for nothing."[73] If judges are not allowed to modify existing legislation via the process of interpretation in a way that promotes justice, it has a negative cascading effect on the entire legal system. Judges are therefore directly responsible for transforming authoritative regime into society, where human rights are enforced and protected.

Armin von Bogdandy considers the constitutional developments taking place in South America as an expression of transformative constitutionalism. In his opinion, transformative constitutionalism represents a process of interpretation and application of constitutional norms in manner that promotes deep societal change. This phenomenon has specific meaning in the context of South America, with the past of violence, discrimination and unstable government structures.[74] South American transformative constitutionalism is a two-level system, in which international protection of human rights represented in American convention is supplemented in horizontal interaction with national institutions working towards similar goals. These actors are primarily made up of national judges, but also prosecutors, ombudsmen, specialized officials and nongovernmental organizations. Transformative constitutionalism in South America therefore does not operate only through judicial power, but also through other legal and nonlegal means.[75]

Theory of transformative constitutionalism also faces a lot of criticism. The most common criticism is that the role of a judge is not to be a politician, and he should only limit himself to interpreting the law as set out by the legislator.[76] Beyond any doubt, democratic institutions and constitutions created with an end goal of transforming the society are afforded more legitimacy from the constituents when being promoted by their chosen representatives. Moreover, taking division of powers into account, transformative constitutionalism heavily prioritizes judicial power over legislative power. In the opinion of several critics, judges should leave politics to the politicians and focus only on the interpretation of valid positive law.[77]

Reacting to the criticism, Karl E. Klare argues that a strict, positivist approach to law is as much an expression of political orientation as an open interpretation of law.[78] As an example, he cites the european legal space, where a more open approach to the interpretation of law led to a deepening of the protection of human rights.[79] Regardless of our preferred approach to legal interpretation, judges often need to undertake an extensive interpretation of the law in order to apply it to any given case. Their influence on the resulting value in a society is therefore undeniable. Proponents of transformative constitutionalism base their theory on the works of Philipp Nonet and Phillip Selznick,[80] authors of the so-called "responsive" law, in which *"the legal system, built on the idea of law separated from politics, responds to social demands and goals."* This process requires

[73] Ibidem, p. 147.
[74] BOGDANDY, VON A., URUEÑA, R. *International Transformative Constitutionalism in Latin America.* pp. 404–405.
[75] Ibidem, p. 411.
[76] MARLE, VAN K. Transformative Constitutionalism as/and Critique. *Stellenbosch Law Review.* 2009, Vol. 20, No. 2, p. 289.
[77] KLARE, E. K. *Legal culture and Transformative Constitutionalism.* pp. 156–157.
[78] Ibidem, p. 152.
[79] HAILBRONNER, M. *Transformative Constitutionalism: Not Only in the Global South.* p. 528.
[80] For more detail, see: NONET, P., SELZNICK, P., KAGAN, A. R. *Law and Society in Transition: Toward Responsive Law.* New York: Routledge, 2001.

a constant redistribution of resources in a society, which changes its overall social and power structure.[81]

The process of transformative constitutionalism in South America prepared fertile ground for various theories and models of the relationship between national and international law. One of them is the theory of transconstitutionalism, authored by a Brazilian theorist Marcelo Neves. According to him, a plurality of legal systems can be perceived in South America, all having a complementary nature to each other. These legal orders address the same constitutional problems and constantly develop/transform their position in relation to the whole.[82] Neves compares the protection of human rights in South America to the fight between Hercules and the Lernean Hydra from Greek mythology. Ioalus, the nephew of Hercules, helped destroy the severed heads of the Hydra with fire so that they would not grow back. Likewise, in their mutual dialogue with the IACtHR, national courts serve as complementary institutions whose purpose is to enter the arena of national legal norms and principles and find a legal interpretation that is socially acceptable and at the same time offers an appropriate and consistent legal solution.[83]

Transconstitutionalism is fiercely criticized by Daniel Rivas-Ramírez, who claims that national and international levels both speak their own constitutional language, therefore there is little sense comparing the two. The language of constitutionalism gets lost in the mutual dialogue. He also criticizes its orientation on the person of judge as a viable instrument for societal change. According to him, in democratic states, the change must first of all pass through the legislative body, together with guarantees of equality and legal certainty. The theory of transconstitutionalism makes judges administrators of the legal order who have exchanged loyalty to the legal order for loyalty to the social conglomerate. It is a vision of the judiciary as synonymous with the desires and needs of citizens. But at the same time, this destroys the harmonious cooperation between the individual branches of power within the state, as well as between the national and international legal systems.[84]

Rene Fernando Urueña Hernandez moves between monism and pluralism, offering not one, but two different models as viable explanations of the observed reality. Inter-American constitutionalism perceives the American Convention as a declaration of human rights comparable to the ones we can identify in national constitutions and national judges are direct actors of international law.[85] The model assumes the supremacy of the IACtHR over national courts. In our opinion, this model can be compared to classical European constitutionalism. European constitutionalism views national law and EU law as one common constitutional system in which both legal systems are hierarchically arranged with EU law on top.[86]

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[81] BOGDANDY, VON A., URUEÑA, R. *International Transformative Constitutionalism in Latin America*. p. 406–407.

[82] RAMÍREZ, R. D., FUENTES-CONTRERAS, H. É. Transconstitucionalismo: teoría sin práctica? Análisis crítico de una de las teorías actuales sobre las relaciones entre órdenes jurídicos. *Díkaion*. 2022, Vol. 31, No. 2, pp. 12–17.

[83] Ibidem, p. 18.

[84] RAMÍREZ, R. D., FUENTES-CONTRERAS, H. É. *Transconstitucionalismo: teoría sin práctica? Análisis crítico de una de las teorías actuales sobre las relaciones entre órdenes jurídicos*. pp. 20–24.

[85] ALVARADO ACOSTA, A. P. El Pluralismo Constitucional Como Respuesta a Los Desafíos De La Protección Multinivel En Latinoamérica. Comentarios a La Propuesta De René Urueña. *Revista derecho del Estado*. 2013, Vol. 31, pp. 348–349.

[86] GRAGL, P. *Legal monism: Law, Philosophy, and Politics*. Oxford: Oxford University Press, 2018, pp. 340–341.

The second model put forth by Urueña is Inter-American pluralism. Domestic and international legal systems interact as equals, using common constitutional language and judicial dialogue. According to him, Inter-American pluralism is specific in that it is based on the promise of more effective protection of human rights in a plurality of closely connected states concentrated in the mechanism of the ACHR. This model is positioned against the hierarchical superiority of Inter-American constitutionalism and is based on the idea that in some cases a more appropriate solution is offered by domestic legislation.[87] We consider this model strikingly similar to constitutional pluralism as we know it in Europe. Constitutional pluralism is an umbrella term for theories that perceive national law and EU law as two equal individual legal systems arranged in a heterarchy with neither legal system being normatively superior to the other. These are still very closely connected legal systems however, and each of them must reflect the law of the other in its own system.[88]

Urueña himself does not lean towards one or the other model. According to him, the arrangement of relations between national courts and the IACtHR in South America reflects a quasi-federal arrangement of relations, as can be seen in the theory of multilevel governance.[89] He considers the two models to be only a description to which most authors of South American constitutionalism subscribe. But if he had to choose one of them, he would choose Inter-American constitutionalism as he considers Inter-American pluralism to be more dangerous. The international protection of human rights protection exists to limit the power of national authorities, which proved to be unreliable sources of human rights protection. This is in direct contradiction to the theory of pluralism, which allows national courts to interpret human rights law differently than the IACtHR. This puts them on par with international law. In a region with a rich history of human rights violations such as South America, he considers this theory to be normatively undesirable.[90] In response to these objections, it can be stated that neither legal practice nor subsequent legal theory confirm these concerns. Reservations expressed by judicial authorities regarding international or supranational obligations do not lead to a lowering of the standard of protection, rather the opposite. Similarly, pluralist theories, in an effort to increase legal certainty and the predictability of court decisions, aim to structure the ongoing judicial dialogue in more detail.[91]

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[87] ALVARADO ACOSTA, A. P. *El Pluralismo Constitucional Como Respuesta a Los Desafíos De La Protección Multinivel En Latinoamérica. Comentarios a La Propuesta De René Urueña.* pp. 348–349.

[88] FLYNN, T. Constitutional pluralism and loyal opposition. *International Journal of Constitutional Law.* 2021, Vol. 19, No. 1, p. 241.

[89] URUEÑA, R. Constitucionalismo sin Constitución, pluralismo sin pluralidad. Una réplica a Paola Andrea Acosta Alvarado. *Revista derecho del Estado.* 2013, Vol. 31, p. 372.

[90] Ibidem, pp. 370–374.

[91] BREICHOVÁ LAPČÁKOVÁ, M. Hľadanie metodologicky jednotného kolízneho pravidla v podmienkach viacúrovňového konštitucionalizmu. [The search for a methodologically unified collision rule in the context of multi-level constitutionalism.] In: Alexander Bröstl – Marta Breichová Lapčáková (eds.). *Nové dimenzie metodológie právnej argumentácie. Úloha právnych princípov vo viacúrovňovom právnom systéme. [New dimensions of the methodology of legal argumentation. The role of legal principles in a multi-level legal system.]* Praha: Nakladatelství Leges s.r.o., 2021, pp. 113–141; PAVLINSKÝ, R. *Viacúrovňový konštitucionalizmus – právno-teoretické východická a praktické dôsledky. [Multilevel constitutionalism – legal-theoretical starting points and practical consequences.] (dissertation thesis).* Košice: Právnická fakulta UPJŠ v Košiciach, 2025, pp. 137–149.

Paolo Andrea Acosta Alvarado is also aware of the similarities between Urueña's Inter-American pluralism and constitutional pluralism and even compares it to the multilevel constitutionalism of Ingolf Pernice. Alvarado is of the opinion that the inter-judicial dialogue in South America constitutes an inter-american judicial network, in which the IACtHR acts as a quasi-constitutional court, connecting all the legal systems of the member states of the ACHR. This network, in addition to strengthening the protection of human rights in the region, enables the exercise of certain constitutional functions beyond the borders of the state, and for this reason one can speak not only of a model of multi-level governance, but of multi-level constitutionalism.[92]

Melina Girardi Fachin gives several reasons why multi-level constitutionalism in South America is possible. From the standpoint of national law, most constitutional systems in South America recognize the constitutional or even supranational status of the ACHR. At the same time, there is an obligation to interpret national legal norms in the light of the American Convention, as well as the possibility to supplement the constitutional catalog of human rights through the Convention. In some national legal systems, it is also possible to find the so-called "bridge" laws, norms that recognize the binding character of international judgments and contain procedures for their enforcement.[93]

According to her, the judicial dialogue that takes place between national courts and the IACtHR is a tool for strengthening the protection of human rights at both the international and national level.[94] She recognizes certain common values in both legal systems, among others the value of human dignity. Protection of these values is best carried out within a common constitutional framework consisting of both national and international levels.[95] At the same time, the common constitutional framework enables a more effective exercise of international authority on the territory of the member states of the ACHR. The relationship between the two levels is thus best viewed in terms of heterarchy. Potential conflicts are then best resolved on the basis of common constitutional principles rather than a specific norm that would decide who has the final word.[96]

CONCLUSION

Our comparison shows that the processes taking places under the regime of the ACHR are comparable to the observed processes in the application of the ECHR. A strong parallel can also be drawn between the judicial activism of the CJEU and the IACtHR.

Many of the theories that attempt to explain the relationship between EU law and the legal systems of its member states can therefore be applied to South America as well, including the theory of multilevel constitutionalism. The theory of multilevel constitu-

[92] ALVARADO ACOSTA, A. P. *El Pluralismo Constitucional Como Respuesta a Los Desafíos De La Protección Multinivel En Latinoamérica. Comentarios a La Propuesta De René Urueña.* pp. 348–350.
[93] Ibidem, p. 351.
[94] FACHIN, G. M., NOWAK, B. Democracies in danger: are judicial dialogues means to refrain setbacks in Latin America? *Revista de Diretio Internacional.* 2020, Vol. 17, No. 2, pp. 235–237.
[95] ALVARADO ACOSTA, A. P. *El Pluralismo Constitucional Como Respuesta a Los Desafíos De La Protección Multinivel En Latinoamérica. Comentarios a La Propuesta De René Urueña.* p. 351.
[96] Ibidem pp. 356–365.

tionalism is characterized by the concept of connection between multiple levels of the systems of positive law, creating a single integrated system. Its other features include the material unity of commonly shared values supplemented with the perspective of the citizen as the fundamental source of legitimacy, which is reflected in the common hermeneutical tools and procedures. The result is the observed increase in the protection of human dignity, which takes place against the backdrop of international verticality, national verticality and horizontal overlaps.

This theory, which primarily arises as a conceptualization of the connections emerging within the European Union, subsequently becomes a theoretical tool for explaining similar interpretative and application processes taking place in the Council of Europe and the broader framework of the european bermuda triangle. The transferability of theoretical insights of multilevel constitutionalism does not end there, however. In addition to its implications for the global level of general international law, we can observe the transfer of its insights to new geographical areas, such as South America against the backdrop of the interpretation of the ACHR.

Therefore, multilevel constitutionalism becomes a theory capable of explaining the gradual increase in fundamental rights and freedoms in the environment of multicultural international or supranational organizations. The theory of multilevel constitutionalism finds fertile ground in an environment where human rights are taken seriously and becomes a fundamental goal of international cooperation in a culturally pluralistic legal environment.