



# **DIGITAL RIGHTS: LATIN AMERICA AND THE CARIBBEAN**

**EDUARDOMAGRANI(EDITOR)**

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## PREFACE

MICHAEL MOHALLEM

In the history of Human Rights, Latin America has been oscillating between defeat and inspiring leadership.

Following World War II, the region led the creation of the world's first extensive international Human Rights instrument — the American Declaration of the Rights and Duties of Man, in April 1948 — marking the beginning of the Rights Era, months before what would become its greater symbol, the Universal Declaration of Human Rights.

According to Paolo Carozza, 'the region exhibited a dedication to international Human Rights generally at a time when the idea was still viewed with reluctance or even hostility by most other states'.<sup>1</sup> But such commitment to rights was soon replaced by a succession of national dictatorial regimes, state violence and backlashes against freedom and democracy.

The long absence of democracy in Latin America was finally replaced by liberal regimes. The nineties witnessed governments as concerned with free elections as they were with flexible working rights, economic globalisation and the free market.

Finally, a period of intense transformations arose from the ascension to power of governments with repressed plans of more political participation, income, gender, racial and social equality, less influence of corporations in elections and freedom of expression.

The new wave of hopes blended with the promises of digital rights. Internet and technology invited politics into its core and since then have been delivering a renewed agenda of rights and regulatory debates.

But what makes the case of Latin America so special in relation to rights protection?

In addition to the historical relevance of Human Rights, it is possible to identify five main contemporary reasons for the adoption of strong legal protective schemes. First, the region has been subject to a common ideological influence of Human Rights principles through the Catholic

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<sup>1</sup> Paolo G. Carozza, 'From Conquest to Constitutions: Retrieving a Latin American Tradition of the Idea of Human Rights' 25 Hum Rts Q 281, 287.

doctrine and more recently through socialist thinking.<sup>2</sup> Though a global phenomenon, 'the impulse to incorporate dignity [into states constitutions] was clearly strongest in those circles which were influenced by Catholic or socialist thinking, and probably most strongly in those circles where both influences were present'.<sup>3</sup>

Secondly, the period of dictatorship regimes throughout the region encouraged the adoption of a higher level of protection of Human Rights. Although not all states in the region suffered a coup d'état, even in those where the constitutional tradition was maintained in the latter half of the twentieth century, deep social and political conflicts favoured the rise of a 'constitutional moment', as much as in the states in transition from civil-military (or just military) regimes back to democracy.

A third reason to be highlighted is the cultural and linguistic similarities, which favours not only the borrowing and coping of similar legal provisions, but also stimulate dialogues between courts and civil society movements.<sup>4</sup> Thus, a legal or social action producing positive outcome in one state is easily observed by the others and frequently replicated.

A fourth particularity of Latin America is the integration process.<sup>5</sup> The Mercosur was originally conceived as a regional free trade market but its motivations expanded to the political sphere resulting the Common Parliament of the South and many ambitious projects. The aspiration of

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2 Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' 19 *European Journal of International Law* 655-724, 664. Also relevant to note that despite the influence of the Catholic Church in Latin America, the constitutional reforms of the past twenty years 'generally tend to overcome certain religious tendencies in the legal systems of many countries that granted important privileges to the Catholic Church. New constitutions, when they are not clearly secular, tend to recognize equality between different religions, including indigenous religions', in Rodrigo Uprimny, 'The Recent Transformation of Constitutional Law in Latin America: Trends and Challenges' 89 *Texas Law Review* 1587, p. 1589.

3 Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' 19 *European Journal of International Law* 655-724, p. 673

4 Sometimes the reciprocal use of citations in courts reflects a 'larger project of economic or social integration, or as continuation of a common history'. Christopher McCrudden, 'Human Rights and judicial use of comparative law' in Esin Örüçü (ed), *Judicial comparativism in Human Rights cases* (United Kingdom National Committee of Comparative Law 2003) 12.

5 Since the end of the colonial period, the goal of regional integration is present in political discourses, diplomatic endeavours and internal legislative indications of will. For example, the Constitution of Venezuela not only brings the intention to integrate the region in its preamble but also in article 153 where it states that the 'Republic shall promote, and encourage Latin American and Caribbean integration' and to that end it may 'transfer to supranational organizations, through treaties, the exercise of the necessary authorities to carry out these integration processes'. Similarly, Ecuadorian Constitution prohibits the adoption of treaties in which the State accepts the jurisdiction of international arbitral tribunals, except for Latin American organs. Also Argentina gives special treatment to integrationist treaties with Latin American countries, art. 75(24).

supranational integration is one further factor pushing states to give effect to international commitments, despite the recent difficulties in advancing such goals.

Finally, a fifth reason is the common feature of expansion of the judicial role. The recent constitutional documents innovated by including thorough charter of individual rights, social and economic rights, and a considerable level of judicial independence. Those elements together bring to the constitutional jurisdiction a large number of issues and empowers the constitutional or high courts with a broad authority to interpret and construe domestic and international law.

Although previous moments of extraordinary impulse in Latin American rights agenda can be traced to many decades in the past, the recent years were crucial – and the book “Digital Rights: Latin America and the Caribbean” highlights precisely one of these waves of fast change and encouraging innovation.

Eduardo Magrani’s selection of key articles – originally edited by him on the [digitalrightslac.net](http://digitalrightslac.net) website – offers a complete view of all the relevant political moments in Latin American countries regarding privacy, data protection, state surveillance, freedom of expression, online censorship, cybercrime, net neutrality, internet governance, copyright laws and online political activism.

Yet the most valuable contribution of this book is the line-up of authors. “Digital Rights” joins together a constellation of activists, government officials, political leaders and academics who were either part of the policy development in their respective states, or followed closely the critical moment of a legislative debate. Thus, nearly all 80 articles in this book have the exclusive angle and the rare vision of those who were – and continue to be – protagonists in developing digital rights in Latin America.

**Michael Freitas Mohallem** teaches Human Rights Law and is the head of the Justice and Society Research Centre at Getulio Vargas Foundation Rio Law School, where he is also chair of the Editorial Council. He is PhD in Law Candidate at the University College London (UCL) and holds a LLM in Public Law and Human Rights from UCL, a Postgraduate Degree in Political Science from the University of Brasília and a LLB from the Catholic University of São Paulo. Previously worked as Campaigns Director in Brazil for Avaaz.org, legal advisor in the Brazilian Senate and in the Brazilian Ministry of Justice.

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## **DIGITAL RIGHTS: LATIN AMERICA AND THE CARIBBEAN**

The Internet is a decentralized global network that makes communication, information and learning easier. Basic democratic practices, such as discussing matters of public interest and participating in the political process, will be increasingly related to the digital world. This publication presents an overview of the most relevant issues in the area of Digital Law in Latin American countries, as a result of the Project “Digital Rights: Latin America and the Caribbean”, an International Newsletter coordinated in Brazil by Professor and Researcher of FGV, Eduardo Magrani. The project emerged in 2012 as an initiative of leading Latin American think tanks working on issues related to Internet regulation and governance interested in consolidating Human Rights in the digital world. The regulation of net neutrality, the regulation of copyright and the responsibility of intermediaries, restrictions on freedom of expression by electronic means and data protection policies are some of the themes that can be found in this work of selected articles. Being informed about these subjects is a fundamental requirement for promoting dialogue and consensus around these issues. This publication is intended to be a useful tool for a broad community of stakeholders interested in the Digital Law landscape in Latin America.

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