

The Politicization of Human Rights - Ángel R. Oquendo

I. Introduction

After evolving into a quasi-constitutional regime that boasts virtually universal recognition and a respectable compliance record in Latin America,¹ the Inter-American Human Rights System presently faces a life-threatening crisis. Several countries, under the leadership of the self-styled Bolivarian Axis of Venezuela, Ecuador, Bolivia, and Nicaragua,² have questioned the legitimacy of the key institutions, *i.e.*, the Commission and Court. Not surprisingly, high-profile actors have intervened in this interfamilial war. Ecuador's President, Rafael Correa, for instance, has urged the sponsoring Organization of American States, in the face of the ongoing dispute, to "revolutionize itself or disappear."³ Bolivian President Evo Morales, in turn, has proclaimed that the entity must either "die at the service of the empire or be born again to serve the peoples of the Americas."⁴ In this piece, I will analyze this transcontinental challenge and, ultimately, read it as a most-interesting, but partly problematic, call for the politicization of human rights. In other words, I will interpret and appraise it as the assertion that international decision makers should defer to governments, especially to those that are implementing the entitlements at stake as part of a politically correct project of social emancipation.

Of course, the Bolivarian nations have gone beyond mere rhetoric. They have complained, more loudly than other countries, about certain adverse determinations and critical findings. In addition, their representatives have specifically proposed not only depriving the Commission and the Court of the power "to adopt preliminary measures for the protection of

¹ The only Latin American countries that have neither signed the American Convention for Human Rights nor recognized the binding jurisdiction of the Inter-American Court of Human Rights are Cuba and Puerto Rico, which are not full members of the sponsoring Organization of American States.

² Nicaragua has played a relatively minor role in the controversy.

³ Mabel Azcui, *El presidente Correa dice que la OEA debe "revolucionarse o desaparecer,"* EL PAÍS (Electr. Version), June 5, 2012 (quoting Ecuadorian President Rafael Correa).

⁴ Mabel Azcui, *Evo Morales: "La OEA puede morir al servicio del imperio o renacer,"* EL PAÍS (Electr. Version), June 4, 2012.

potential victims” or “to consider individual petitions” altogether,⁵ but also barring states that have not ratified the Convention, such as the United States and Canada, from appointing Commissioners.⁶ In particular, the government of Ecuador has formally advanced the first of these proposals, in addition to others, such as a ban on external funding, the discontinuation of the so-called blacklist of delinquent states under Chapter IV of the Commission’s Annual Report, and the relocation of the seat of the Inter-American System of Human Rights from Washington to Buenos Aires.⁷ Finally, the Venezuelan authorities filed, in 2012, a Notice of Denunciation of the American Convention of Human Rights, which will become effective on September 6, 2013.⁸ Ecuador and Bolivia have threatened to follow suit.⁹

“Other countries, such as Colombia or Costa Rica,” have distanced themselves and have “argued that the Commission must preserve its autonomous and international character.”¹⁰ César Gaviria, former President of Colombia and Secretary General of the Organization of American States, has written that the suggested changes “would gravely debilitate the Commission and would make it easier for governments to disregard fundamental rights and to restrict freedom of

⁵ See Eva Sáiz, *La OEA, dividida ante la reforma de su órgano de derechos humanos*, EL PAÍS (Electr. Version), Dec. 7, 2012.

⁶ See César Gaviria Trujillo, *Mordaza a un líder de la libertad de expresión*, EL PAÍS (Electr. Version), Mar. 20, 2013.

⁷ See Eva Sáiz, *La OEA cierra en falso la reforma del su sistema de derechos humanos*, EL PAÍS (Electr. Version), Mar. 23, 2013; Eva Sáiz, “*La reforma del sistema de protección de derechos de la OEA no ha concluido*,” EL PAÍS (Electr. Version), Mar. 22, 2013; Eva Sáiz, *El ALBA afronta aislado la reforma del sistema de derechos humanos de la OEA*, EL PAÍS (Electr. Version), Mar. 21, 2013.

⁸ Venez., *Notice of Denunciation of the American Convention of Human Rights* (available at <www.oas.org>) (2012) (hereinafter Venez., *Notice of Denunciation*). See American Convention of Human Right (1969), Art. 78. In the Supporting Memorandum, the Venezuelan authorities also generally condemned the Commission for its partiality and vagueness in determining which countries to subject to special monitoring (black list), for its consideration of hypothetical facts, and for the elusiveness of its criteria for precautionary measures and individual petitions. Venez., *Supporting Memorandum, Notice of Denunciation of the American Convention of Human Rights 1-3* (available at <www.oas.org>) (2012) (hereinafter Venez., *Supporting Memorandum*).

⁹ Eva Sáiz, *La OEA cierra en falso la reforma del su sistema de derechos humanos*, EL PAÍS (Electr. Version), Mar. 23, 2013; Eva Sáiz, *El ALBA afronta aislado la reforma del sistema de derechos humanos de la OEA*, EL PAÍS (Electr. Version), Mar. 21, 2013; Eva Sáiz, *La OEA, dividida ante la reforma de su órgano de derechos humanos*, EL PAÍS (Electr. Version), Dec. 7, 2012; Mabel Azcui, *El eje bolivariano ataca la Comisión Interamericana de Derechos Humanos*, EL PAÍS (Electr. Version), Jun. 6, 2012.

¹⁰*Id.*

expression.”¹¹ Moreover, in March of 2013, the Organization of American States, as a whole, overwhelmingly rejected the reform plan promoted by the Ecuadorian authorities.¹² Nonetheless, it ordered its Permanent Council to “continue the dialogue on fundamental matters related to strengthening the Inter-American System of Human Rights.”¹³ In fact, Argentina submitted the relevant resolution in response to a “threat by Ecuador . . . to abandon the System.”¹⁴

This entire debate clearly constitutes a defining moment for the Western Hemisphere. It also offers the international community a unique opportunity to reflect upon the nature of human rights. This piece will seize the day and take a first step in such direction.

Part II will identify the underlying Bolivarian claim. It will first consider whether the claim primarily rests on the notions of sovereignty and nonintervention (A) or on a repudiation of certain, specific decisions (B). Upon discarding these two possibilities, Part II will interpret the claim as a demand for the politicization of human rights (C).

Part III, in turn, will assess the claim. It will refuse the classical reaction of denying any role for politics in human rights (A) and recognize the important, though far from exhaustive, political dimension of these entitlements (B). Part III will then maintain that states deserve deference with respect to negative-rights petitions and, especially, with respect to positive-rights petitions, but far less than the dissident nations seek (C).

Part IV will offer some concluding thoughts. The Bolivarian Axis and its enemies seem to agree that human rights must involve, exclusively, either politics or principles. Furthermore,

¹¹ César Gaviria Trujillo, *Mordaza a un líder de la libertad de expresión*, EL PAÍS (Electr. Version), Mar. 20, 2013.

¹² Eva Sáiz, *La OEA cierra en falso la reforma del su sistema de derechos humanos*, EL PAÍS (Electr. Version), Mar. 23, 2013.

¹³ *Id.* (quoting from the “final text”).

¹⁴ *Id.*

they appear to have converged upon a utopianism of sorts, according to which judicial and political institutions should approach human rights in absolute harmony, with one leading the way and the other following along. Part IV will counter, on the one hand, that human rights touch upon politics as well as principles. It will insist, on the other hand, that adjudicators and governments inevitably engage in a power struggle around the two components of these entitlements and that they must accept conflict as a way of life.

II. Claim Identification

(A) On first impression, the dissident states appear to be asserting a traditional sovereignty and nonintervention claim. They seem to be denying the legitimacy of international human rights. From such a perspective, the community of nations has no business second-guessing how governments treat their citizens.¹⁵

Sometimes, critics have characterized the Bolivarian campaign in precisely these terms. For example, José Miguel Vivanco, Director of Human Rights Watch’s Americas Division,¹⁶ has portrayed it as a crusade, undertaken by “governments . . . nostalgic for sovereignty and for the principle of nonintervention,” “to discredit and weaken the Commission”¹⁷ Indeed, he has censured the whole effort as an attempt to undermine and, if possible, abolish the Inter-American System of Human Rights.¹⁸

¹⁵ The British government has complained about the European System of Human Rights along these lines. See Estelle Shirbon, *British Minister Floats Quitting European Rights Convention*, Reuters, Mar. 9, 2013 (The ruling “Conservative Party has long criticized the Strasbourg-based European Court of Human Rights (ECHR), which enforces the convention, as an encroachment on British sovereignty.”).

¹⁶ In 2008, the Venezuelan government “apprehended” and “expelled” Vivanco after he and his Deputy Director, Daniel Wilkinson, “released a long report . . . documenting rights violations in Venezuela.” Simon Romero, *Venezuela Expels 2 After Report on Rights*, N.Y. TIMES, Sept. 20, 2008, at 8A.

¹⁷ José Miguel Vivanco, *Derechos Humanos, Insulza, Brasil y el ALBA*, EL PAÍS (Electr. Version), June 3, 2012.

¹⁸ *Id.*

Occasionally, the pronouncements of the concerned regimes appear to bear out this characterization. Venezuela's Notice of Denunciation, for instance, charges the Commission and the Court with "interventionist actions" and with the violation of "basic and essential principles, which international law has amply consecrated, such as the principle of state sovereignty."¹⁹ In each of its last two paragraphs, the instrument invokes, once again, the notions of nonintervention and "sovereignty."²⁰ Similarly, the Supporting Memorandum brands some of the Commission's work "an affront to the sovereignty of the Venezuelan state."²¹ Elsewhere, it refers to "the legislative sovereignty of the nation" and to "the sovereignty" that "inalienably resides in the people."²²

In reality, however, the dissident governments are not basing their objections on the notions of state sovereignty and of nonintervention. After all, they are pleading for reform, not for the eradication of the Inter-American System of Human Rights. Even if this proposal for change does not prosper, the Bolivarian Axis evidently intends not to give up on the entitlements in question, but, rather, to create an alternative human rights scheme.²³

In fact, the just cited Venezuelan Notice of Denunciation itself describes (1) the ratification "of the American Convention of Human Rights" and (2) the institutionalization of "mechanisms" for "the promotion and protection of human rights" as "very important" for the "region."²⁴ In the same instrument, Venezuela takes pride in having ratified the treaty before any other state, in doing so "through a unilateral declaration," and in being the second country "to

¹⁹ Venez., *Notice of Denunciation* at 2.

²⁰ *Id.* at 9-10.

²¹ Venez., *Supporting Memorandum* at 2.

²² *Id.* at 2, 22.

²³ See Eva Sáiz, *La OEA, dividida ante la reforma de su órgano de derechos humanos*, EL PAÍS (Electr. Version), Dec. 7, 2012 (The "presidents of Bolivia and Ecuador, Evo Morales and Rafael Correa, warned that [their countries] might withdraw from the Inter-American System of Human Rights and that [they were] considering the creation of a similar body under the Union of South American Nations.").

²⁴ Venez., *Notice of Denunciation* at 1.

accept the [Inter-American] Court's jurisdiction."²⁵ It also calls attention to the wide-ranging set of human rights enshrined in its own 1999 Constitution.²⁶

Despite this act of denunciation, the Venezuelan authorities commit to respect and comply with "other mechanisms . . . for the promotion and protection of human rights" ²⁷ They also "express their firm intention . . . to contribute to the construction of Our Own American System of Human and Popular Rights" ²⁸

In any event, a sovereignty and nonintervention claim would not be of much interest for purpose of a transnational discussion on human rights. Such a claim might have appealed to many people up to the middle of the last century. Nonetheless, it sounds much less attractive today. Since the end of the Second World War, many of the key international treaties have established that the international community has not only the authority, but also the obligation to stop states from encroaching upon citizens' entitlements. More significantly, international law as a whole rests nowadays on the notion of universal human rights.

Coincidentally, the fact that a group of nations profoundly upset by the work of the Inter-American Commission and Court feels compelled to profess its devotion to the entitlements at issue deserves attention. It confirms that human rights have attained a high degree of respectability and recognition. Indeed, these entitlements have come a long way in the course of their relatively short history.

(B) Alternatively, the Bolivarian Axis might be merely raising specific objections to the decision making within the Inter-American System of Human Rights. It might believe that the

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 9.

²⁸ *Id.* at 10.

Court and Commission engage in error or show bias when they approach particular issues or cases.

Indeed, the dissident nations have taken vigorous exception to certain of these bodies' omissions. Ecuador's President Rafael Correa, for instance, has generally declared the following:

Unfortunately, the Inter-American System has not lived up at all to our epoch's challenges. It has failed to offer solutions or to take a firm and decisive position with respect to problems such as the existing colonies in the Americas, *i.e.*, the Malvinas Islands, or the criminal embargo against a sister nation, *i.e.*, Cuba.²⁹

The "System," according to Correa, has not even done "simple things, like trying the individuals responsible for the *coup d'état* against [Honduran] President Zelaya."³⁰ Venezuelan authorities, for their part, complained, in their Notice of Denunciation, about the Commission's silence in the face of two massacres that took place in Venezuela in the 1980s and about its denial of preventive measures in favor of then-President Hugo Chavez during the 2002 *coup*, as well as about the implicit endorsement of the insurrectionist regime.³¹

President Hugo Chávez himself focused on the System's actions, rather than on its inaction, when he resolved to have his administration repudiate the American Convention of Human Rights. He was then reacting to the 2010 Report issued by the Commission "alerting to the deterioration of democracy in Venezuela."³² He did so in the following, unambiguous terms: "It's pure garbage. We should prepare to denounce the treaty through which Venezuela adhered

²⁹ Mabel Azcui, *El presidente Correa dice que la OEA debe "revolucionarse o desaparecer,"* EL PAÍS (Electr. Version), June 5, 2012 (quoting Ecuadorian President Rafael Correa).

³⁰ *Id.*

³¹ Venez., *Notice of Denunciation* at 4-5.

³² Maye Primera, *Chávez ordena la salida de Venezuela de la CIDH,* EL PAÍS (Electr. Version), Feb. 26, 2010.

(or whatever) to that nefarious Inter-American Commission for Human Rights and to get out of there because it's not worth it.”³³

The Commission and the Court may very well have failed in some or in all of these instances. Of course, they probably never received a petition that would have enabled them to adjudicate, except in the case of the 2002 Venezuelan *coup*. Nonetheless, the Commission might have acted, *sua sponte*, through its investigative and reporting powers. In addition, it might have toned down its 2010 Report on Venezuela. In any case, the general protestations regarding these cases do not provide sufficient information to figure out how the decision-making process might have malfunctioned.

Fortunately, the Venezuelan state did further specify the grounds for its dissatisfaction, or, rather, outrage, in its Notice of Denunciation and in its Supporting Memorandum. It identified and discussed six cases in which the Commission and the Court admitted petitions on matters that national tribunals either were still considering or never had the opportunity to consider.³⁴ Venezuela's authorities, accordingly, alleged a violation of the exhaustion-of-domestic-remedies requirement.³⁵ In addition, they averred that in *Usón Ramírez v. Venezuela*, the Inter-American Court of Human Rights arrived at its judgment “without listening to the arguments, to the parties, or even to the answers to its own questions.”³⁶

All the same, these objections to specific determinations do not seem to lie at the heart of the Bolivarian challenge to the Inter-American System of Human Rights. At most, they read as a series of contentions that the government might formulate in a motion for reconsideration or review of the particular judgments in question. Furthermore, the opinions discussed constitute a

³³ *Id.* (quoting Venezuelan President Hugo Chávez).

³⁴ Venez., *Notice of Denunciation* at 4.

³⁵ *Id.*

³⁶ *Id.* at 7.

miniscule minority of the caseload concerning Venezuela. Finally, they might justify, if they pointed to a larger pattern of mistake and bias, a call for a regeneration of the membership of the Commission and the Court, but not for an overhaul of the System.

Not surprisingly, all member states of the Organization of American States have faced adverse judgments and findings. Some have expressed disappointment or even indignation. In fact, “Brazil . . . pulled out its ambassador to the Organization in 2011 upon receiving an official request from the Commission to suspend the construction of a hydroelectric plant in Belo Monte.”³⁷ It also joined Argentina and Venezuela in “very strongly criticizing the work of the Inter-American Commission on Human Rights” during the “inaugural session” of the 2012 “General Assembly” of the Organization of American States.³⁸ Brazil, Argentina, and Guatemala have supported the overall call for change.³⁹ Nevertheless, non-Bolivarian nations have maintained their adherence to the Inter-American System of Human Rights and could have hardly based an existential onslaught on it over their disagreement with a series of adverse determinations.

More significantly, the Venezuelan criticisms of the precedents listed in its Notice of Denunciation and Supporting Memorandum do not come across as particularly exciting or compelling. In the context of its main contention, Venezuela never acknowledges the existence of exceptions to the exhaustion requirement, let alone explains why none of these exceptions should apply. To be sure, the imputation of prejudgment in *Usón Ramírez* carries more weight. Nonetheless, it requires not in-depth jurisprudential analysis, but, instead, careful consideration of the available evidence on point.

³⁷ Eva Sáiz, *La OEA, dividida ante la reforma de su órgano de derechos humanos*, EL PAÍS (Electr. Version), Dec. 7, 2012.

³⁸ *Id.*

³⁹ *Id.*

(C) The Bolivarian Axis might actually be calling for the politicization of human rights. It might be contending, in other words, that the Inter-American Human Rights System should recognize and focus on the politics of these entitlements. Accordingly, the decision-making bodies should support, rather than undermine, the effort of countries such as Venezuela, Ecuador, and Bolivia on behalf of the political values and of the policies that underlie the American Convention.

This claim breaks down into three independent, but interrelated points. First, the signatory states have posited, as part of their political engagement, the specific entitlements in question and, consequently, the Inter-American Human Rights System should defer to their construction thereof. Second, human rights generally involve politics and, as a result, the government deserves deference because of its democratic legitimacy and its expertise. Third, decision makers should pause before condemning nations that have politically devoted themselves the most to the emancipatory ideals that underlie these entitlements.

From this perspective, the Commission and the Court have been doing exactly the opposite of what they should on all three fronts. As a whole, they have declined to defer to the states, whether as signatories of the relevant treaties, specifically, or as governmental units, generally. Moreover, these international bodies have refused to appreciate the extent to which Bolivarian nations have excelled in politically sustaining entitlements such as the right to equality, to dignity, to health, to housing, and to cultural diversity.

Furthermore, the Commission and the Court have, supposedly, violated or manipulated the rules to assail a most progressive political project and to side with reactionary individuals or groups. Finally, they have allegedly inverted the hierarchy of human rights, to the detriment of

policy-loaded, emancipatory entitlements. Specifically, these institutions have placed free speech at the top of the scale and social, economic, and cultural rights at the bottom.

As with the previous formulation, someone might ask why the solution should not simply consist in sanctioning or replacing the members of the Commission and the Court. In response, the dissident nations might point to a more pervasive problem. They might explain that the Organization of American States, under the perverse influence of the United States, has no interest in progressivism, imposes its conservative agenda, and blocks all efforts to revamp the Inter-American Human Rights System.

Of course, the Bolivarian Axis has never explicitly articulated this entire claim, as such. Nonetheless, it has made pronouncements that appear to point in a similar direction, particularly with respect to the third point. For instance, Venezuela's Ambassador to the Organization of American States has accused the Inter-American Commission on Human Rights of acting as a front for "a mafia" that operates like "an inquisition especially against leftist governments."⁴⁰ He thus echoed an earlier declaration by former President Hugo Chávez: "There's a mafia in there. The last thing that institutions like the nefarious Inter-American Commission on Human Rights do is defend human rights. It is a politicized body, utilized by the empire to attack governments such as that of Venezuela."⁴¹

For his part, Bolivian President Evo Morales has stated that the Organization of American States, as a whole, "has covered up for dictatorships and has intervened in nations" and "has allowed the repression and the punishment of social movements."⁴² Morales has

⁴⁰ Eva Sáiz, *La OEA, dividida ante la reforma de su órgano de derechos humanos*, EL PAÍS (Electr. Version), Dec. 7, 2012 (quoting Venezuela's Ambassador to the Organization of American States).

⁴¹ Maye Primera, *Chávez ordena la salida de Venezuela de la CIDH*, EL PAÍS (Electr. Version), Feb. 26, 2010 (quoting Venezuelan President Hugo Chávez).

⁴² Mabel Azcui, *Evo Morales: "La OEA puede morir al servicio del imperio o renacer,"* EL PAÍS (Electr. Version), June 4, 2012 (quoting Bolivian President Evo Morales).

specifically demanded the “disappearance of various organs”⁴³ of “domination and subjugation.”⁴⁴ Upon threatening to withdraw his country from the Inter-American Human Rights System, he likened the Commission to a “military base of the United States.”⁴⁵

The Spanish newspaper *El país* has extensively covered the controversy surrounding free speech. “The Bolivarian Axis” has reportedly “accused the Rapporteurship for Freedom of Expression of the Inter-American Commission on Human Rights of sustaining the hegemony of the media, which do not practice ‘freedom of expression, but rather of extortion.’”⁴⁶ According to the dissident nations, “this exercise of power . . . boils down to a ‘dictatorship of the media’ against progressive governments in the region.”⁴⁷

One of Ecuador’s reform proposals would have prevented “third-party States” or “other institutions” from earmarking their financial contributions for “particular purposes.”⁴⁸ It would have thus seriously compromised the Commission’s finances and would have effectively “terminated the Rapporteurship for Freedom of Expression.”⁴⁹ “This Rapporteurship, *qua* special, is the only one that is not financed with funds of the Organization of American States and that depends entirely on international cooperation programs.”⁵⁰ In fact, “it disposes of a budget that, due to these circumstances, thrice exceeds that of other rapporteurships.”⁵¹

⁴³ *Id.*

⁴⁴ *Id.* (quoting Bolivian President Evo Morales).

⁴⁵ Eva Sáiz, *El ALBA afronta aislado la reforma del sistema de derechos humanos de la OEA*, EL PAÍS (Electr. Version), Mar. 21, 2013 (quoting Bolivian President Evo Morales).

⁴⁶ Mabel Azcui, *El eje bolivariano ataca la Comisión Interamericana de Derechos Humanos*, EL PAÍS (Electr. Version), Jun. 6, 2012.

⁴⁷ *Id.*

⁴⁸ Eva Sáiz, *La OEA cierra en falso la reforma del su sistema de derechos humanos*, EL PAÍS (Electr. Version), Mar. 23, 2013. See also Eva Sáiz, *La OEA, dividida ante la reforma de su órgano de derechos humanos*, EL PAÍS (Electr. Version), Dec. 7, 2012.

⁴⁹ Eva Sáiz, *La OEA cierra en falso la reforma del su sistema de derechos humanos*, EL PAÍS (Electr. Version), Mar. 23, 2013.

⁵⁰ *Id.*

⁵¹ *Id.* See also Eva Sáiz, *El ALBA afronta aislado la reforma del sistema de derechos humanos de la OEA*, EL PAÍS (Electr. Version), Mar. 21, 2013.

In its Notice of Denunciation, the Venezuelan government expressed its commitment “to a balanced realization of economic, social, cultural, civil, and political rights.”⁵² It thus hinted that it would rank positive entitlements ahead of their negative counterparts, including free speech. Bolivian President Evo Morales, for his part, has also focused on the former over and above the latter and has insisted, for example, that “all Latin American peoples should have access to all basic services, such as energy, water, and telecommunications, as a human right.”⁵³ He has additionally spoken of an “obligation to break the monopoly on medicines.”⁵⁴

Curiously, Venezuela’s Notice of Denunciation itself accuses the Commission and the Court of acting politically. It specifically chastises them for “becoming a political throwing weapon.”⁵⁵ The same document refers to the disputed “cases” as “clearly politicized and biased against the Venezuelan state.”⁵⁶ It thus evokes the previously quoted declarations by former President Hugo Chávez writing off the Inter-American Commission on Human Rights as “a politicized body, utilized by the empire to attack governments such as that of Venezuela.”⁵⁷

This language obviously suggests that Venezuela perceives the politicization of human rights as a problem. Nonetheless, it may also indicate that the Venezuelan authorities oppose politicizing such entitlements in a particular manner. Venezuela’s government may be merely condemning the Commission and the Court for injecting the wrong type of politics, *viz.*, of a reactionary and non-democratic kind, into their decision-making.

All in all, the Bolivarian Axis has not precisely defined its objections to the Inter-American Human Rights System. Nonetheless, it has clearly criticized the Commission and the

⁵² Venez., *Notice of Denunciation* at 10.

⁵³ *Id.* (quoting Bolivian President Evo Morales).

⁵⁴ *Id.*

⁵⁵ Venez., *Notice of Denunciation* at 2.

⁵⁶ *Id.* at 4.

⁵⁷ Maye Primera, *Chávez ordena la salida de Venezuela de la CIDH*, EL PAÍS (Electr. Version), Feb. 26, 2010 (quoting Venezuelan President Hugo Chávez).

Court for not deferring sufficiently to the Signatory States, especially the most leftist ones, and for excessively focusing on free speech. Moreover, the official protestations point in the direction of a call for a politically correct construal of the American Convention, along the lines traced in this section.

Quite revealingly, the concerned governments have dealt with the vindication of rights at home in a manner that parallels and sheds some light on their actions abroad. They have, (1) first, assailed the national judiciary for playing a destructive, rather than supportive role with respect to their political program, (2) then, instituted new constitutions that reflect their progressive political ideals, and, (3) finally, striven to keep the newly invested justices and judges in line, politically.⁵⁸ In Venezuela, Ecuador, and Bolivia, the authorities have evidently read from the same script in politicizing constitutional rights and judicial institutions.

These regimes most certainly intend to continue this political crusade in the international sphere. In fact, they have already taken the first step upon attacking the judicial and quasi-judicial decision-makers of the Inter-American Human Rights System. The Bolivarian Axis perhaps feels no need to undertake the complicated task of altering the regional conventional norms because the wide-ranging entitlements presently in place cohere well enough with its politics. Nonetheless, it probably dreams of introducing adjudicative institutions that share or, at least, do not interfere with its agenda.

In any case, the claim described sounds provocative precisely because it entails approaching rights politically. By the same token, it comes across as counter-intuitive. As a whole, the assertion invites reflection upon the relationship between rights and politics. It approaches from a different angle the call, which groups on the right and on the left have articulated, for deference to the political powers.

⁵⁸ See ÁNGEL R. OQUENDO, *LATIN AMERICAN LAW* (Chap. III) (2011) (hereinafter OQUENDO (2011)).

III. Claim Assessment

(A) The Bolivarian claim, as just defined, impinges upon a powerful view of human rights. Finding inspiration in the writings of Immanuel Kant, some contemporary philosophers have conceived of fundamental entitlements generally as apolitical. In other words, they have sought to show that such rights do not constitute part of the realm of politics.

Jürgen Habermas, for instance, distinguishes the moral and the ethical-political spheres and places fundamental entitlements in the first, rather than in the second of these spheres. Moral matters universally interest all persons everywhere:

In asking moral questions, humanity--or a presumed republic of world citizens--constitutes the reference system to justify regulations that are equally in the interest of all. The decisive reasons must in principle be able to be accepted by anyone.⁵⁹

Ethical-political matters, in turn, concern a particular community:

In asking ethical-political questions, the life form of “our respective” political collectivities constitutes the reference system to justify regulations that express a conscious and collective self-understanding. The decisive reasons must in principle be able to be accepted by all the members who share “our” traditions and firmly held values.⁶⁰

While moral reasons are deontological, ethical-political reasons are teleological. In other words, the former impose obligations independently of the purposes of the agent; the latter are binding to the extent that the agent adopts a particular end or “*telos*”.⁶¹

Moral reasons, accordingly, possess hierarchical priority and prevail over their ethical-political counterparts. They are associated with principles or norms, as opposed to values. Because of this association, principles may not clash with each other but rather build a coherent

⁵⁹ JÜRGEN HABERMAS, FAKTIZITÄT UND GELTUNG: BEITRÄGE ZUR DISKURSTHEORIE DES RECHTS UND DES DEMOKRATISCHEN RECHTSSTAATS 139 (1992) (hereinafter, FG).

⁶⁰ FG 139. *See also* JÜRGEN HABERMAS, DIE EINBEZIEHUNG DES ANDEREN: STUDIEN ZUR POLITISCHEN THEORIE 252 & 254 (1996) (hereinafter EA).

⁶¹ FG 127 & 188.

system. Values, for their part, often compete against each other and call for a ranking according to the extent to which the subjects adhere to them.

Ronald Dworkin provides another articulation of this overall position. He distinguishes principle from policy along the following lines:

I call a “policy” that kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community (though some goals are negative, in that they stipulate that some present feature is to be protected from adverse change). I call a “principle” a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice or fairness or some other dimension of morality.⁶²

Dworkin generally identifies fundamental entitlements with principle and with morality, rather than with policy and politics. He specifically describes the interpretation of “individual rights” as “moral rather than political” and as primarily the prerogative of the judiciary.⁶³

Dworkin and Habermas, hence, agree that basic human rights rest on principles and pertain to the realm of morality, instead of that of politics. They also both believe that these entitlements oblige categorically and that they take precedence over political ideals.

Even some present-day critics of the concept of human rights, who draw on the philosophy of Aristotle, Hegel, Marx, or Nietzsche, appear to agree with this definition. For example, Richard Rorty, invoking the work of Eduardo Rabossi, rejects these entitlements precisely because they rest on principles that purportedly derive from universal reason and apply to all rational beings.⁶⁴ The “trouble with rights talk,” he contends, “is that it makes political

⁶² RONALD DWORIN, TAKING RIGHTS SERIOUSLY 22 (1977). *See also* RONALD DWORIN, A MATTER OF PRINCIPLE 72-103 (1985).

⁶³ Ronald Dworkin, *Constitutionalism and Democracy*, 3 EUROPEAN JOURNAL OF PHILOSOPHY 2, 10-11 (1995). *See also* Ronald Dworkin, *Rights as Trumps*, THEORIES OF RIGHTS 153 (Ed. Jeremy Waldron 1984).

⁶⁴ *See* Richard Rorty, Human Rights, Rationality and Sentimentality, in Belgrade Circle, ed., THE POLITICS OF HUMAN RIGHTS 67-83 (Ed. Belgrade Circle) (New York: Verso, 1999) (“Rabossi’s claim that human rights foundationalism is *outmoded* seems to me both true and important; it will be my principal topic in this lecture. I shall be enlarging on, and defending, Rabossi’s claim that the question whether human beings really have the rights enumerated in the Helsinki Declaration is not worth raising. In particular, I

morality not a result of political discourse—of reflection, compromise, and choice of the lesser evil—but rather an unconditional moral imperative”⁶⁵ Rorty follows Annette Baier’s lead in his shift away from human rights and toward an approach based on sympathy, trust, sentiments, care, and solidarity.⁶⁶

Bernard Williams, for his part, censures attempts to expand the notion of human rights beyond a narrow core of instances of “unjust coercion”⁶⁷ onto “good things” generally, like “so-called positive rights, such as the right to work.”⁶⁸ He explains that “there are human goods the value of which is perhaps not best expressed in terms of rights.”⁶⁹ Of course, Williams emphasizes “the importance of thinking politically about human rights abuses.”⁷⁰ All the same, he cautions “that the political does not simply exclude principle; it includes it, but many other things as well.”⁷¹

These philosophers would all reject any endeavor to politicize human rights along the lines previously detailed. They would do so based on different reasons, but would converge in viewing the identification of such entitlements with a specific political project as problematic.

From this general perspective, a human-rights claim presents a question of principle. An assessment involves figuring out whether or not the alleged violator encroached upon the moral norm at stake. It has nothing to do with politics, whether that of the framers of the entitlement at issue, that of politically legitimate and competent entities, or that of particularly progressive parties to the dispute.

shall be defending the claim that nothing relevant to moral choice separates human beings from animals except historically contingent facts of the world, cultural facts.”)

⁶⁵ Richard Rorty, *What’s Wrong with “Rights”?*, HARPER’S 292: 1733 (June, 1996), pp. 15-18, p. 15.

⁶⁶ *Id.*

⁶⁷ Bernard Williams, *Human Rights: The Challenge of Relativism* 12, SACKLER DISTINGUISHED LECTURE: UNIV. CONN. (Apr. 23, 1997).

⁶⁸ *Id.* at 2-3.

⁶⁹ *Id.* at 3.

⁷⁰ *Id.*

⁷¹ *Id.* at 13.

For example, a citizen may charge a certain government with infringing upon her free speech. The adjudicating institution must deontologically determine whether a violation of the underlying principle has taken place and, if so, find for the claimant. It should pay no mind to whether the authorities participated in the drafting of the provision that establishes the entitlement in question, or whether they have any special expertise or legitimacy in politics, or whether they undertook the contested actions in pursuit of a noble political project.

The regime might nonetheless insist that it curtailed the petitioner's expressive liberties because, for instance, she was working to undermine an ethically impeccable program to redistribute land. It might even show that allowing people like her to agitate will visit unimaginable harm upon the population as a whole. In response, however, the decision maker could simply quote John Rawls: "Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override Therefore in a just society . . . the rights secured by justice are not subject to political bargaining or to the calculus of social interests."⁷² Not surprisingly, Ronald Dworkin takes a similar position: "A right against the government must be a right to do something even when the majority thinks that it would be bad to do it and even when to do it would harm the majority."⁷³ "If a person has a right to something," Dworkin elucidates, "it is bad for the government to deny it even when it is in the general interest."⁷⁴

(B) This overall response sounds too easy, though. The Bolivarian Axis might point out that politics must play a part in the enforcement of rights. It might offer social, economic, and cultural rights as an example.

⁷² JOHN RAWLS, A THEORY OF JUSTICE 3-4 (1971).

⁷³ RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 194 (1977).

⁷⁴ *Id.* at 269.

Of course, the previous section already mentioned Bernard Williams' skepticism *vis-à-vis* "so-called positive rights, such as the right to work."⁷⁵ Williams elaborates:

Declarations of human rights standardly proclaim rights of this kind, but there is a problem with them. Nobody doubts that having the opportunity to work is a good thing, or that unemployment is an evil. But does this mean that people have a right to work? The problem is: against whom is this right held? Who violates it if it is not observed? . . . [E]ven if governments accept some responsibility for levels of employment, it may not be possible for them to provide or generate work, and if they fail to do so, it is not clear that the best thing to say is that the rights of the unemployed have been violated.⁷⁶

Williams thus voices a concern common in philosophy and law. Philosophers often declare these positive entitlements "mere aspirations." Lawyers frequently note the lack of enforceability of such rights.

At this juncture, the critics of the Inter-American System of Human Rights would point out, without hesitation, that the American Declaration of the Rights and Duties of Man includes the right to work, as well as other positive entitlements,⁷⁷ and that the San Salvador Protocol does too.⁷⁸ They would also note that the American Convention of Human Rights similarly contains a Chapter on "Economic, Social, and Cultural Rights."⁷⁹ In fact, national and international decision-makers in the region have consistently held these entitlements enforceable.⁸⁰

In light of these and other international documents and decisions, philosophers can hardly deny the international recognition of such entitlements. Nonetheless, they might dig in their heels and maintain that reasonableness precludes deeming such an entitlement a genuine right.

⁷⁵ *Id.* at 2-3.

⁷⁶ Bernard Williams, *Human Rights: The Challenge of Relativism* 3, SACKLER DISTINGUISHED LECTURE: UNIV. CONN. (Apr. 23, 1997).

⁷⁷ American Declaration of the Rights and Duties of Man (1948), Art. XIV; *See also id.*, Arts. XI-XVI.

⁷⁸ San Salvador Protocol (1988), Art. 6; *See also id.*, Arts. 9-18.

⁷⁹ American Convention of Human Rights (1969), Chap. III ("Economic, Social, and Cultural Rights").

⁸⁰ *See* OQUENDO (2011), Chap. VI.

Rather than entering this endless debate, the Bolivarian Axis might merely note that policy inevitably plays a role in the implementation of even so-called negative rights. For instance, a court might face the issue of whether the state has impinged upon the right to equality with respect to primary educational opportunities. It would first have to make a political assessment as to what constitutes a minimally acceptable education and then consider the extent to which all children have attained that minimal level.

In fact, Jürgen Habermas and Ronald Dworkin would perhaps concede as much. The former acknowledges that fundamental rights allow for different interpretations and for variance from one context to the next.⁸¹ The latter, in turn, recognizes that the same concept of a particular principle may give rise to a multiplicity of legitimate conceptions. The interpretive latitude undoubtedly responds to the influence of ethical-political and policy considerations, respectively.

The dissident nations might pursue this line of argument further and take a position close to that advanced by U.S. legal realism and, later, by the critical legal studies movement. These schools, in part, sought to debunk notions such as objectivity and formalism in order to postulate understanding law in terms of the instrumental realization of political objectives. One might make a similar kind of move with respect to human rights, instead of the law as a whole.

The Bolivarian Axis might contend, specifically, that these entitlements should serve to attain social justice. It might demand deference because its members participated in the framing of the American Convention, have political expertise and legitimacy as governments, and have set a formidable political agenda in motion. From this point of view, if the Inter-American Commission and Court of Human Rights are thwarting this lofty project of emancipation, they

⁸¹ FG 162 (“Consequently, the sections that enumerate fundamental rights in the various historical constitutions can be understood as contextual interpretations *of the same* system of rights.”). *See also*, FG 163, 226, 238, 379, 527; EA 245.

should step aside. At the same time, states should engage vigorously in the realms of politics and law in order to force these institutions out.

(C) All the same, one should not dismiss the distinction between morality and politics too quickly. It has, in fact, considerable appeal. One should merely resist the temptation to place rights entirely one the on side or on the other.

Of course, keeping only fundamental entitlements inside the category of principle and allowing other entitlements to fall outside will not do. As observed in the previous section, almost any basic right will involve matters of policy under certain circumstances. Conversely, virtually any positive right will entail, in some cases, normative questions.

The dichotomy at issue suggests that the extent of deference of the judiciary and of society as a whole to the authorities will vary depending on whether the particular controversy mainly turns on norms or on values. In a classical freedom of religion dispute, courts and citizens should defer minimally to the government. In a right-to-housing claim, they should defer maximally.

Oddly enough, the practical totality of cases that have generated controversy within the Inter-American System of Human Rights touch upon traditional negative rights. Venezuela, Ecuador, and Bolivia have mostly complained about free-speech decisions and findings, as well as about the Rapporteurship for Freedom of Expression of the Inter-American Commission on Human Rights. Furthermore, the Venezuelan Notice of Denunciation and Supporting Memorandum zero in on six opinions: two involving free speech, two about due process, and one each concerning political persecution and humane treatment.

In these specific controversies, the Commission and the Court owed limited deference to the authorities. Independently of the entitlement at stake, the Venezuelan state nonetheless

expected extraordinary leeway for different reasons. It insisted that the petitions all came from morally and politically despicable individuals: respectively, (1) from journalists “of great belligerence against the government,”⁸² (2) from a lawyer charged with “the crime of conspiracy,”⁸³ (3) from an oppositional politician accused of acting “in support of the *coup d’état* of April 11, 2002,”⁸⁴ (4) from an “insurrectionist” General,⁸⁵ (5) from a “terrorist . . . convicted” for bomb attacks aimed at destabilizing Venezuela’s democracy,⁸⁶ and (6) from three judges who “committed a ‘grave judicial error of an inexcusable character.’”⁸⁷ As a matter of fact, however, the alleged unworthiness of the petitioners should have moved the international decision-makers to more, rather than less, vigilance.

Now, in a completely different scenario, should tribunals give the authorities a free pass with respect to policy-loaded positive rights? Actually, no: they should defer to a considerable extent under such circumstances, but not, by any means, abdicate their responsibilities. These entitlements qualify as rights precisely because they impose judiciable obligations on the government. They do not amount to mere recommendations.

Adjudicators should enforce these rights as programmatic. In other words, they should demand that the state show that it has developed a serious program on the matter. The authorities deserve deference on the details, but not on the need for credible engagement. They should face condemnation if they neglect to take any action whatsoever.

Thinking concretely about specific negative and positive rights will help understand the interplay of their principled and their political components and the extent to which judges should

⁸² Venez., *Notice of Denunciation* at 5.

⁸³ *Id.* at 6.

⁸⁴ *Id.*

⁸⁵ *Id.* at 7.

⁸⁶ *Id.*

⁸⁷ Venez., *Supporting Memorandum* at 13 (emphasis in original).

defer to the authorities. The present discussion will now focus, accordingly, on free speech, on the one hand, and on the right to health, on the other hand. It may start by noting the role of principle, which demands relatively strict adherence, in the vindication of both types of entitlement.

Of course, the work of Richard Rorty serves as a reminder of the importance of staying clear of rigid metaphysical assumptions when conceiving of morality. Bernard Williams, for his part, warns of the dangers of eternalizing human rights and, especially, of the perils of projecting modern constructions of such entitlements onto past civilizations. Nonetheless, some aspects of human rights indeed allow little elbow-room in light of the way in which contemporary societies understand notions such as reasonableness, justification, and acceptability. These dimensions point to paradigmatically clear cases.

As already discussed, the authorities may generally not repress pure speech on the basis of their dislike of its content or of the speaker, or for any other reason. Similarly, they may not deny medical treatment to someone because they disapprove of her politics or out of a sheer arbitrariness or incompetence. In these instances, the judiciary and civil society need not defer much to government.

At times, however, the implementation of the entitlements at issue may come wrapped up with questions of policy. For example, the state may restrict corporate speech to prevent corporations from drowning out all other voices. One may reasonably conclude that a government does not thus infringe upon the rights of the concerned entities and that it has the political authority to adopt these kinds of measures.

Likewise, public hospitals may refuse to offer certain procedures to the elderly in accordance with a governmental goal of distributing scarce health-resources to those who will

benefit the longest. The state may legitimately maintain that it does not thereby encroach upon anyone's entitlements and that the approach in question falls within its political margin of discretion.

Obviously, the authorities may not escape an indictment for violation of rights simply by asserting that they are rightfully engaging in politics. They must bear the burden with respect to this assertion. The courts must, in turn, probe into the sincerity of the governmental contention and assure that the policies generally cohere with the entitlement at stake. They will have to defer to the state only after they have made a positive determination on these preliminary matters.

When the citizenry turns to national and international courts to vindicate human rights, it engages in participatory democracy of sorts. Of course, it should do so not in order to open up an alternative and parallel discussion on politics, but, rather, to make sure that the authorities stay within the bounds defined by the entitlements at issue.

As a consequence, the Bolivarian Axis may legitimately claim that the Inter-American Human Rights System should defer to the signatory states and to governments in general with respect to the political, though not the normative, dimension of rights. Furthermore, the Commission, like the Court, should give the dissident nations credit for their broad efforts on behalf of rights to equality, to dignity, to health, to housing, and to cultural diversity. Finally, it should painstakingly avoid implying that these entitlements matter less than others, such as freedom of expression.

Nonetheless, the Bolivarian Axis should not demand that national or international tribunals simply cheerlead. It should expect them to probe and confront. In the words of Viviana Krsticevic, Executive Director of the Center for Justice and International Law: "The

Inter-American Commission on Human Rights,” as well as the Court, “must continue making governments uncomfortable; that’s a sign that it’s doing its job.”⁸⁸

IV. Conclusion

One should resist the temptation to conceive of human rights as exclusively concerning principle or politics. They inevitably involve both. At the end of the day, the authorities merit considerable, though not absolute, deference regarding the political dimension, but much less so with respect to the principled dimension.

The Bolivarian Axis and its enemies converge not only in rejecting this position, but also in embracing a utopianism of sorts regarding human rights. Accordingly, they both expect permanent harmony between the adjudicator and the state and disagree simply on whether the adjudicator should yield to the state, as an expert on policy, or *vice versa*, insofar as the judiciary’s expertise consists in interpreting norms. The Inter-American Human Rights System will ineluctably perish, unless both sides learn to live with constant conflict in the enforcement of these entitlements.

⁸⁸ Eva Sáiz, *La OEA, dividida ante la reforma de su órgano de derechos humanos*, EL PAÍS (Electr. Version), Dec. 7, 2012 (quoting Viviana Krsticevic).