The Internationalization Of Human Rights And The Importance Of Normative Dialogues Between International And National Courts

A Internacionalização Dos Direitos Humanos E A Importância Dos Diálogos Normativos Entre Tribunais Internacionais E Nacionais

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Abstract: This article intends to analyze in the context of the complexity of the process of internationalization of human rights, the definitions and tensions between cultural universalism and relativism, the essence of human rights discourse, its basic norms and an analysis of the normative dialogues in case decisions involving violations of human rights in international tribunals such as the European Court of Human Rights, the Inter-American Court of Human Rights and national courts. The well-established dialogue between courts can bring convergences closer together and remove differences of opinion on human rights protection. A new dynamic can occur through a complementarity of one court with respect to the other, even with the different characteristics between the legal orders.

Keywords: Internationalization of Law; Human rights; Universalism; Cultural relativism; Dialogue between courts.

Resumo: O presente artigo pretende analisar no contexto da complexidade do processo de internacionalização dos direitos humanos, as definições e tensões entre universalismo e relativismo cultural, a essência do discurso dos direitos humanos, suas normas básicas e uma análise acerca dos diálogos normativos em decisões de casos envolvendo violações de direitos humanos nos tribunais internacionais como a Corte Europeia de Direitos Humanos, a Corte Interamericana de Direitos Humanos e tribunais nacionais. O diálogo entre Cortes bem estabelecido pode aproximar convergências e afastar divergências acerca da proteção dos direitos humanos. Uma nova dinâmica pode ocorrer por meio de uma complementariedade de um tribunal em relação ao outro, mesmo com as distintas características entre as ordens jurídicas.

Palavras-chave: Internacionalização do Direito; Direitos Humanos; Universalismo; Relativismo cultural; Diálogo entre Cortes.

Introduction

International law is now built from complex processes of expanding its sources and traditional subjects, with the attribution of sovereign capacities and

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competences to the international level, with the creation of new influences of the international regarding the nationals, whilst there is the approximation of national rights and the diffusion of new normative sources, independent of States and International Organizations.

The expansion of the phenomenon of the internationalization of law occurs in many themes, with its own logics such as the environment, human rights, economic law, law and religion, among others, and contributes to the construction of law with different sources and actors that must be understood within a new complexity.

Law has established structures that make possible the existence of an international community with multiple organs and actors with distinct visions and expectations on justice and legitimacy. One cannot ignore the fact that there are structures that allow dialogues between different legal orders. The emerging international human rights law establishes obligations for States to all human persons, not just to foreigners.

This right reflects the general acceptance that every individual should have rights, which all States must respect and protect. Therefore, observance of human rights is not only a matter of particular interest to the State. This is not a mere domestic matter, but it is a matter of international concern and an object of international law.

Accordingly, the present article intends to analyze in the context of the complexity of the process of internationalization of human rights, the definitions and tensions between "universalism and cultural relativism", the essence of human rights discourse and its basic norms and an analysis about the relevance of the normative dialogues between case decisions on human rights violations in international and national courts. It is imperative, in the understanding of human rights, to study the architecture of international institutions, their functions, competences and interaction with standards, as well as the interaction of States with law and international organizations.

1. The process of internationalization of human rights and the universalist and relativist theories

The international human rights system presents its difficulty in the

relationship between cultural diversity and the global legal order. There is a clear tension between the abstraction and reason of universalism and cultural relativism. What is noticeable is that in the conviviality of international law with domestic law, there is no synchrony of norms, and this fact contributes in a negative way to the effectiveness index of international decisions within the countries. It is observed that the monist and dualist theories of international law have become fragile for the understanding of the current relationship of the States with the international system.

As a reference for a universalist system for the protection of human rights, with the 1948 Declaration, the protection of human rights has gained greater prominence in the international scenario, in the face of the approval of several international treaties aimed at the protection of fundamental human rights. The contemporary conception of human rights has emerged, marked by the universality and indivisibility of these rights. Universality because the status of a person would be the sole and exclusive requirement for the ownership of rights, human dignity being the foundation of human rights. Indivisibility because, unquestionably, the catalog of political civil rights is coupled with the catalog of social and cultural economic rights (DONNELLY, 1986).

The construction of human rights requires a greater conceptual elucidation within the process of globalization. This is the center of the two trends universality and cultural relativism. Truyol y Serra clarifies that the clear and universal awareness of human rights is modern and it is well-known that, throughout the historical context of the positivation of human rights, the universalist awareness of dignity has demanded a juridical-political protection of all the rights that this dignity corresponds to (2000).

The term globalization refers not only to a pre-existing global law, but also to a movement that can so easily lead to a uniformity of alienation as to the *mondialité* that the poet Édouard Glissant distinguishes from globalization: "This unprecedented adventure which we are allowed to live in a world that, for the first time and in concrete form, is immediately and impressively conceived at once as a multiple (TRUYOL AND SERRA, 2000).

Universalist theorists argue for the existence of global norms and values that apply to all, indistinctly. On the other hand, relativist theorists defend cultural diversity as a source of human rights norms. In the analysis of regional disputes submitted to the

International Tribunals, situations that initially appear as irreconcilable with the universal system are verified. This tension is a current issue and suggests several challenges in the context of the internationalization of human rights.

In the current international legal scenario, universalism conceived with the objective of global incidence on all humanity ceases to exist. That earlier universalism advocated by Kant[3], abstract and rational, has undergone conceptual variations over time. Positivism itself has influenced the emergence of new values that are positively differentiated in each state. Each society has its human rights requirements in different proportions. In this research, we analyze the different performance in relation to the same law by two different regional systems of protection of human rights. Thus a dialogue between universalism and relativism is inevitable.

Norberto Bobbio stated that, from a theoretical point of view, he always defended that human rights, however fundamental they may be, are historical rights, that is, born in certain circumstances characterized by struggles in defense of new freedoms against old powers, and born gradually, not all at once, and not once and for all (2004).

It is noted that this influence of historicity on human rights implies the assertion that these rights are not exhausted and cannot configure a system of norms closed to cultural influences. Rights are seen differently throughout history. Relativism embodies relevant rights such as freedom of manifestation itself. The opinion of Boaventura de Sousa Santos is that:

> As long as they are conceived as universal human rights, human rights will tend to operate as globalized localism, a form of top-down globalization. They will always be an instrument of the "clash of civilizations" as conceived by Samuel Huntington, that is, as a weapon of the West against the rest of the world (1997, online).

It is possible to observe a variation in the process of universalization, according to the performance of each communication channel. Universalism expects solidarity, division and fight against poverty and the market society, marked by the

[3] For Kant, a just State is the rule of law insofar as there is the freedom of all in accordance with universal legislation, which seeks to achieve this supreme goal, that is, legislation that becomes more and more expression of rationality. Thus, Kant presents his categorical imperatives as determinations that the realization of ethics cannot exist without. Therefore, Kant's imperatives are: to act in such a way that one's action is considered a universal norm and to make mankind as final result and not as a means to an end.

growth of competition and inequalities. In order to establish a universal right, it is necessary to know comparative law and to prevent international law from being a mere extension of the stronger state law or the domain of totalitarian communicative discourses on human rights (MARTY, 2003).

The implicit universal human rights commitments can only be compatible with a wide variety of ways of living if implicit universalism is consciously minimalist. According to Ignatieff, there are distinct sources for the cultural challenge to the universality of human rights. Each of them is independent of the others, but together they have raised important questions about cultural validity and, therefore, the legitimacy of human rights norms (IGNATIEFF, 2000). In this conception, a universal human rights regime must be compatible with moral pluralism and must be capable of introducing mechanisms of protection depending on the civilization, culture and religion.

According to Ignatieff, since 1945 the language of human rights has become a source of power and authority. Inevitably, power invites challenge. The doctrine of human rights became powerful but also confused and thoughtlessly imperialist in its claims that it began to invite serious intellectual attack on the legitimacy of its norms and claims. These challenges have raised important questions about whether human rights deserve the authority it has acquired; whether its claims of universality are justified, or whether it is just another crafty exercise in a Western moral imperialism (2000).

What is observed in the current performance of regional protection systems is an overvaluation of the place, which causes a fragmentation in the international and national human rights scene. The process of building these rights must be dynamic, evolving, interactive, complex, built on the internationalization of law and intercultural dialogue. It is an interactive and evolutionary process (MARTY, 2003).

One cannot conceive the construction of a human rights core based only on the universal system of legal rules. This construction must take into account the multiplicity, plurality and complexity of the legal system and contemporary reality (BOGDANDY, 2012). The challenge is to identify global differences without imposing a fusion of universal legal rules inspired by hegemonic powers (MARTY, 2003). One of the issues that presents a challenge in the field of internationalization of human rights is

whether it would be possible to universalize human rights in the face of inequalities and particularities at the national and local levels.

In relation to this dichotomy of the universalist and relativistic system, Donnelly's theory of strong universalism recognizes the existence of a universal human rights core that can vary according to regional contexts, in relation to their interpretation and limits of incidence (DONNELLY, 2003). It is observed in this theory the possibility of coexistence between the regional and the universal, without the radical conceptions that culture would be the only source of norms and that the universal system has indisputable norms.

It is important to think about human rights in a way that is associated with other social, civil, and economic rights. In the opinion of Delmas Marty, in order to avoid a cultural clash in the contextualisation of human rights, one must think of a harmonization of these rights with civil economic rights with the aim of inventing a common pluralist law (MARTY, 2003). The point is to seek to convert the traditional positive relativism into actions based on pluralism, as a way of universalizing the relative and relativizing the universal.

Human rights are symbols of legal universalism and illustrates the positive and negative aspects of fragmentation. Fragmentation affects both universal concepts (human rights, humanity as perceived through crimes against humanity and the common heritage of mankind, or the market) and responses to globalization (applicable law to globalized crime, the flow of intangibles or global risks).

In this context, Delmas Marty argues that the idea is the change from the traditional descriptive relativism to prescriptions of conduct that respect pluralism. Relativizing the universal and universalizing the relative in a dialectic without precise synthesis, becomes possible to think of a world right (MARTY, 2004).

2. Dialogues and normative interactions in the legal systems of the regional international protection systems and national law.

It is recognized in international law that the courts have often called upon other courts to solve problems of the system itself, that is, the law has become subject to a kind of exchange (ALARD, GARAPON, 2006). Studies on the phenomenon of dialogue between courts have become frequent in the international human rights scene.

This dialogue consists in the incorporation of a decision of a court by another court, be it international, foreign or national. An important methodological clarification for understanding this dialogue is that it would involve the European Court of Human Rights (ECHR), the Inter-American Court of Human Rights (IACHR) and national courts. The dialogue can make possible contributions from the ECHR to the extension of the normative scope of jurisprudence.

Dialogue between courts is possible, which has been called, for example, the global community of courts. This community encompasses the idea that international court judges share the same objective of judging disputes on international issues. Thus, decisions would not be used by other Courts, merely with a simple illustrative function, but with an argumentative or persuasive authority that would give rise to an emerging global jurisprudence (SLAUGHTER, 2003).

The model of understanding the performance of regional systems for the protection of human rights with universal norms would take place in the design of Delmas Marty through a harmonious construction. The idea would be an orderly pluralism that does not consist in the unification of normative identities, but rather harmonization, a combination of differences with coherence, in a way that contributes positively, inclusively, to the accessibility to the regional systems of protection. According to Delmas, the processes of normative interaction occur through cross reference (2004).

It is possible to observe the Inter-American Human Rights System cite or base its decisions on international decisions of the European Human Rights System and vice versa, using the Delmas Marty cross-reference process. It is common for International Courts to use decisions of other International Courts in their decisions. The question that arises before this fact is: What are the criteria to characterize cases as being similar in different territories, with different cultural values? What is the legitimacy of these grounds? Cultural diversity hampers the interaction process. At the global level, cross-references, also called cross-fertilization, are increasing as

international instruments multiply under the influence of human rights and economic globalization (HENKIN, 1993).

The international protection system of human rights has new designs that have replaced the traditional and hermetic system of normative scaling proposed by Kelsen. Thus, many international documents gain prominence in the scenario. For Flávia Piovesan, in face of this multiplicity of norms, actors and courts, there are three types of dialogues between legal orders: the dialogue between regional systems, the dialogue between the regional and constitutional system and the dialogue between constitutional systems. A common point in these dialogues is the cross-reference, from international or foreign country decisions delivered by another system, may it be a vertical or horizontal dialogue (PIOVESAN, 2015).

This cross-referencing, or so-called cross-fertilization, in relation to the application of the norms of protection to human rights leads to so-called judicial diplomacy. The question that now stands out is which democratic principle is used to justify this choice of judges in preferring international decisions and arguments in their decisions? In the conception of Antoine Garapon:

> There is a growing increase in the inclusion of international law texts in the reasoning and support of court decisions. In addition to a constitutional review, today national judges must also be subject to a conventionality control, that is, how to apply at a domestic jurisdiction level the normative precepts that exists in treaties and international conventions ratified by the State. Thus, judges are no longer restricted to the application, in factual cases of the word of the country legislator, a fact that opens gaps for the use not only of arguments derived from international normative texts, but also of foreign jurisprudence (2006, 19).

Regarding Brazil, in the context of this new grammar brought by the processes of internationalization of law, the Federal Supreme Court is somewhat isolated in this new legal order of dialogues between jurisdictions. A simple verification on this court's website is possible, even if superficially, few decisions mention the Inter-American Human Rights System. There is no exchange of experience. The dialogues are incipient.

In this context, special attention is due to the judgment of ADPF 132 and ADI 4277 by the Federal Supreme Court, whose objects (homoaffective unions and

their legal recognition) were convergent in lawsuits of a different nature. In the decisions of these lawsuits, there are references to the IACHR's recognition, in some Latin American cases, of the legal protection granted to people's life project, which is part of the existential content of the dignity of the human person.

On the other hand, since its first decisions, the Inter-American Court of Human Rights articulated references of the European Court in the formation of its international jurisprudence. It is possible to observe this dialogue in the Velazques-Rodrigues case, which IACHR's decision determined that:

> La indemnización por violación de los derechos humanos encuentra fundamento en instrumentos internacionales de carácter universal y regional. (...) Lo propio ha hecho la Corte Europea de Derechos Humanos con base en el artículo 50 de la Convención para la Protección de los Derechos Humanos y de las Libertades Fundamentales (CIDH, 1989, §36).

In the ruling of this case, the Inter-American Court's reference to the jurisprudence of the European Court had the purpose of highlighting the IACHR's competence to determine the payment of damages in face of the violations verified in the Velásquez-Rodrigues case.

It is noted that the use of cross-reference by the Inter-American Court was very visible in the ruling of cases related to domestic amnesty laws. Some examples are: Barrios Altos vs. Peru (IACHR, 2001), Almonacid-Arellano Vs. Chile (IACHR, 2006), Gomes Lund Vs. Brazil (IACHR, 2010) and Gelman Vs. Uruguay (IACHR, 2011). All these cases of violation of the norms of the American Convention on Human Rights were brought to the IACHR for judgment. The argument in every case had the same reasoning that in periods of authoritarian regimes, human rights violations were not investigated by the internal order of each country. In every case, the IACHR acknowledged violations of the American Convention during the period of the national regimes.

The cases of violation of the rights provided for in the American Convention were brought before the Court so that the responsibility of the States for their occurrence could be analyzed. Due to the validity of local amnesty laws, adopted as part of the transition processes of authoritarian regimes in the four countries concerned, the alleged violations were neither investigated nor prosecuted. In the absence of judgments, the Inter-American Court examined the specific cases stating that

these States are responsible, before the American Convention, for the human rights violations that occurred during the corresponding national authoritarian regimes.

In the trials of these cases, the IACHR referred to the jurisprudence of the European Court of Human Rights as an authoritative argument. This argument, apparently, in the IACHR's conception, conferred a certain legitimacy to its decisions, considering the absence of jurisprudence of cases of amnesty laws within the framework of the Inter-American System.

To avoid the extremes of world disorder (radical separation and absolute relativism) and an order imposed by the most powerful nation in the name of universalism (total hegemonic fusion), one must go beyond the universal / relative dichotomy and explore the possibility of a law that would sort out the complexity without eliminating it, transforming it into orderly pluralism (MARTY, 2009).

One question that arises in this context is: How can a simple horizontal exchange without hierarchy be directed towards coordination? Dialogue, undeniably initiated by judges, can not by itself ensure coherency and consistency under the notion of order. To do this, cross-references should become a mechanism for sorting pluralism.

The point is not to return to the original agenda for global organization, but to reformulate it in light of today's complexity, becoming sufficiently pluralistic and evolving to be acceptable to all. Achieving pluralist stabilization of globalization processes at the global level will require vertically organizing regional and global levels and overcoming the fragmentation and privatization of reconciling universalism and globalization at the horizontal level (MARTY, 2009).

It should be noted that in this analysis of the work of Regional Systems for the Protection of Human Rights, one cannot consider the radical idea that culture is the only source of these norms. The system cannot be hermetically closed, but open to harmonious coexistence and congruent with other systems. The universality of human rights stems from its very foundation of consisting of rights inherent to every human being that must be protected in all spheres and contexts. However, in the efficacy of universal human rights, it is important to harmonize it with the cultural diversity of legal norms.

Final Remarks

Dialogues between systems for the protection of human rights are still

incipient. We emphasize that dialogues between international and national jurisprudence on human rights can strengthen the relationships of legal formation by bringing stability to the presence of divergences, by means of an approximation between legal orders in order to sort complexity. This approach demonstrates the usefulness of the protective instruments of human rights in the coherence of an ensemble capable of indicating a direction for the creation of a common right.

What is observed in the model of normative dialogues is that the activities of interpretation and creativity of the Judge should be more intense in the rulings of factual cases. We note that the complexity of the relationship between multiple international norms and even interaction with economic rights are more closely integrated with the model of orderly pluralism, since traditional legal systems have become fragile in the increasing strands of the internationalization process of law.

The use of foreign or international jurisprudence must obey criteria regarding the adequacy of concepts and methodologies in the use of a legal precedent. If these criteria are not obeyed in cross-references, there is a risk of using the precedent as a mere illustration, without any use for rulings. The study of the development of this normative exchange is still in its early stages, but it can lead to the expansion of court decisions for a variety of human rights issues, and also to expand dialogue with national courts such as the Federal Supreme Court for integration in rulings and a minimum standard of protection.

References

ALLARD, Julie; GARAPON, Antoine. *Os juízes na mundialização: a nova revolução do Direito.* Trad. Rogério Alves. Lisboa: Piaget Institute, 2006.

BOBBIO, Norberto. *A era dos direitos.* 3rd print. Translation by Carlos Nelson Coutinho; Presentation by Celso Lafer. Nova ed. Rio de Janeiro: Elsevier, 2004.

BOGDANDY, A. Von, *The European Lesson for International Democracy.* The Significance of Articles 9 to 12, EU Treaty for International Organizations, Georgetwon University, 2012.

IACHR. Inter-American Court of Human Rights. *Velásquez-Rodríguez vs. Honduras.* Ruling of July 21st, 1989.

IACHR. Inter-American Court of Human Rights. *Barrios Altos vs. Peru*. Ruling of March 14th, 2001.

IACHR. Inter-American Court of Human Rights. *Almonacid-Arellano vs. Chile.* Ruling of September 26th, 2006.

IACHR. Inter-American Court of Human Rights. *Gomes Lund vs. Brazil* Ruling of November 24th, 2010.

IACHR. Inter-American Court of Human Rights. *Gelman vs. Uruguai*. Ruling of February 24th, 2011.

DONNELLY, Jack. *International human rights: a regime analysis.* Massachusetts Institute of Technology, 1986.

DONNELLY, Jack. *Universal human rights in theory and practice.* New York: Cornell University Press, 2003.

HENKIN, Louis. *Internacional Law: cases and materials.* 3 ed. Minnesota: West Publishing , 1993.

IGNATIEFF, Michael. *Human Rights as Politics and Idolatry.* Princeton: Princeton University Press, 2000.

MARTY. *The imaginative forces of Law. Chinese Journal of International Law*. Oxford University, n. 2, 2003. Disponível em: <http://chinesejil.oxfordjournals.org/content/2/2/623.full. pdf+html>. Acesso em: 08.07.2017.

MARTY, Mireille. *Étude juridiques comparatives et internationalisation du droit.* Paris: Collège de France/Fayard, 2003.

MARTY. *Le relatif et L'universel*. Paris: Seuil, 2004.

MARTY, Mireille Delmas**.** *ORDERING PLURALISM: a Conceptual Framework for Understanding the Transnational Legal World,* Hart Publishing, 2009.

PIOVESAN, Flávia Piovesan, *Tema de Direitos Humanos,* 8º edition. São Paulo: Saraiva, 2015.

SANTOS, Boaventura de Sousa. *Para uma concepção multicultural dos Direitos Humanos,* Lua Nova, nº 39, 1997. Available on: http://dx.doi.org/10.1590/S0102-64451997000100007. Accessed in: 25.08.2017.

TRUYOL Y SERRA, Antonio. *Los derechos humanos,* Estudios sobre el Estado de Derecho y la democracia, Trotta, Madrid, 2000.

SLAUGHTER, Anne-Marie. Global Community of Courts. *Harvard International Law Journal.* Cambridge, v. 44, nº1, 2003.