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Interamerican judicial dialogue and the constitutionalization of international law

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Presentación

Los *Documentos de Trabajo* son un espacio para la reflexión y el debate. A diferencia de otros formatos, esta serie ofrece un palco para los trabajos inacabados, para la discusión de las ideas en formación y el perfeccionamiento de los procesos de investigación. Se trata pues, de textos que salen a la luz para ser enriquecidos con la crítica y el debate antes de pasar por el tamiz editorial.

En esta colección se sumarán cinco grandes áreas del conocimiento: el derecho constitucional, el derecho internacional, la sociológica jurídica, la teoría y filosofía del derecho. Además, de poner a prueba nuestras ideas, el cometido principal de esta publicación es aportar a los debates actuales, tanto aquellos que se viven en la academia como los que resultan de la cada vez más compleja realidad nacional e internacional.

Esta publicación está abierta a todos los miembros de nuestra Casa de Estudios, profesores y estudiantes, así como a quienes nos visitan. Esperamos contar con el aporte de todos aquellos interesados en la construcción de academia.

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Directora del Departamento de Derecho Constitucional

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Editora

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Interamerican judicial dialogue and the constitutionalization of international law

The last time we met, I explained in broad terms what are, in my view, the greatest contributions of Strasbourg and Costa Rica in building an appropriate context to the international constitutionalism; I tried to show the importance of international judges and human rights in the framework of the constitutionalization of international law and the imminence of this process.

During the development of my research, which aimed to deepen those ideas, I discovered that the changes generated by the regional judges, in particular the Interamerican one, are much deeper and more meaningful. In fact, I realized that the Interamerican Court of human rights (IACrHR), thanks to an on-going dialogue with national judges, has created a judicial network of protection, where it performs functions of constitutional judge and under which it sets an Interamerican ius commune and, therefore, a regional community of law.

So today, I intend to outline the concept of judicial protection network and the scenario that has led to the interaction of the judges of protection (i) and the scope of such collaboration (ii). We must say that although we are aware of many gaps and barriers to the idea of judicial network, we do not deal with them given the scope of this text.

I. THE JUDICIAL NETWORK IN THE INTERAMERICAN SCENARIO

We meant by judicial network the set of formal and informal interactions among judges of protection from different levels. In our case, this network is regional, so that the interaction is between the supranational and national judges of the interamerican scenario. But, what do we mean by judges of protection? The judge of protection is the one that, either pursuing his work at national, supranational or international level, accounts within their primary duties for protecting the fundamental rights, through binding decisions that

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determine the content and scope thereof, and specify the consequences of its violation.

From our point of view, in our region we can speak about the existence of a judicial network thanks to a combination of three particular factors: the context, the rules under which it is based and the judicial tools that are being used. About the context, we must say that there are two phenomena that have determined the characteristics of both, the interamerican order and the national law, these are: humanization and neo-constitutionalism.

These are two concomitant processes from different scenarios -national and international- that pursue a common goal and agree on the tools to achieve it. Indeed, humanization and neo-constitutionalism agree, first, on the relevance of human dignity to the legal system and, therefore, on the need to protect human rights, second, the importance of judges to achieve such protection and, finally, the essential role of the interaction of national and international legal systems to that common goal. This confluence of objectives and tools explain why the rules of either system made possible their harmonization.

With regard to national standards, despite the wide differences between national systems in the region, we can point out three common features that allow interaction between those two orders. First, most orders recognise constitutional or supra legal level to the International Human Rights Law (IHRL), second, many constitutions include an obligation to read national standards in light of the mandates of IHRL; finally, in many orders there are national norms called "bridge norms", ie, the rules that determined the ways to fulfil international judgments.

Meanwhile, the interamerican order has several useful standards to the harmonization process. First, the principle of subsidiarity (preamble ACHR), second, the general obligations to respect, guarantee (art. 1.1 ACHR), adapt (art. 2 CADAH) and made an appropriate interpretation (art. 29 ACHR), third, the right of access to justice as contained in articles 8 and 25 of the Convention, finally, the rule about integral reparation (article 63 ACHR), the one about mandatory sentencing (art. 68) as the one about the rules to develop the supervision process (art. 68 ACHR and art. 69, IACrHR Rules).

In addition, national and interamerican judges themselves have developed tools that incentive jurisprudential dialogue and harmonization. National court uses the rule of "harmonious interpretation" under which they must always interpret the national standards in light of international protection mandates seeking thereby the interpretation most favourable to individual´s rights. For its part, the IACrHR has created the "conventionality control" under which both the regional and national judges should consider the compatibility of national rules with the interamerican commitments. If they find an inconsistency, they are required to exclude the norm from the national law or, at least, avoid its use.

In what follows we will try to provide an outline of the scope of these standards and tools, but above all, the main reasons why they form a whole that allows the dialogue between the judges of protection and thus the formation of the Judicial Network.

Let's take as a starting point the hierarchy and harmonization rules at the national level. According with that rules, judges are compelled to make use of international law as grounds for their decisions, or at least as a hermeneutic tool. In addition to this constitutional framework, we have the articles 1.1, 2 and 29 of the Convention. These rules come to strengthen national provisions of interpretation and hierarchy where they exist or to fill the gap left by its absence in those jurisdictions which does not have them.

Indeed, national courts use IHRL as supra- legal or constitutional norms if their legal order allows them, but if not, the judiciary can claim that such use is justified in fulfilling an international commitment of protection, adaptation and / or interpretation pro personae. So, either by constitutional command or under an international obligation, the local judge is compelled to project his work in the light of regional standards; it is not just a matter of courtesy but of strict compliance with a legal duty.

Similarly, given the importance of national law for the effectiveness of interamerican order, and taking in consideration the principle of subsidiarity and the article 29 of the Convention, the regional court has been concerned with the recognition of the relevance of national standards to fulfil their tasks.

Consequently, the context for dialogue is served. It is the result of a working circle built by hierarchy and harmonization standards, as well by the obligations to respect, guarantee and adaptation, and thanks to which it has been a serious transformation in the way that national and interamerican order are related.

Precisely in this context of recognition and use it is even easier to understand the relationship between the different standards that we have listed. For example, as noted by Carozza (2003, AJIL Vol. 93:38), the subsidiarity principle has two aspects, one negative and one positive. Once the States decide to adapt their national law to the international commitments, the negative side of the subsidiarity principle is guaranteed because the national judges will safeguard human rights in light of the regional law, ensuring in every case the best possible protection, so the activation of the regional protection mechanism will be exceptional as expected by the ACHR.

Under the positive side, the principle enjoins to the national law and its agents to provide an effective protection mechanism, an issue that is closely related to the implementation of Articles 8 and 25 of the Convention, rules which in turn, are aligned with national provisions on judicial structures and powers. All of them are trying to build a more effective scenario to guarantee the right of access to justice and, specifically, to supply suitable resources for the protection of human rights.

Finally, we note that the existence of "bridge rules", and overall national rules related to compliance with international court decisions, are the counterparts of the provisions of articles 63 and 68 of the Convention. Both are articulated to ensure the effectiveness of interamerican protection so, at the end, the scope of international protection is closely related to the provisions of national law.

As shown, either under constitutional standards or as a result of international mandates or because the sum of them, the dialogue is not only practical, but above all, mandatory.

In this context arise the judicial mechanisms that contribute to this interaction: the control of conventionality and the "consistent interpretation", both as different steps of the same process of harmonization. Thus, judicial officers are compelled, always, to seek the most favourable interpretation of human rights (either under a constitutional clause or Article 29 of the Convention). Failure to achieve the most favourable interpretation of the norm and, the judges must, or avoid its use, or exclude it from the national legal order. It is, in any case, a harmonization exercise, with different effects, which seeks the effective protection of human rights.

II. SCOPE OF JUDICIAL INTERACTION

Exposed the reasons that lead us to understand the national and international regulatory framework as a whole and the legal tools identified as cause and logic effect of that articulation, the question that remains is: what is the result of this ensemble?

From our point of view, one and others have led us to a growing judicial dialogue based on which is developed a progressive harmonization of constitutional law with interamerican law. This dialogue allows us to speak of a judicial network and the existence of an interamerican ius commune. Examples of this interaction abound. However, given the scope of this text, we cannot deal with them; we just want to mention that every day more judges use the work of their counterparts on the basis of authority and as a hermeneutic tool.

From our point of view, this growing dialogue between the judges allows us to speak of the existence of a judicial network which can be characterized as a multilevel and constitutional one. This is a scenario articulated at several levels, among which there is no hierarchical relationship and whose objective is the organization towards the attainment of constitutional objectives.

So the idea of network we propose is similar to the image of a cobweb: there are vertical interactions between the national and regional judges and horizontal relationships between the various constitutional judges. In this paper we have addressed only the vertical axis of the network whose construction is ahead on the occasion of the formal dialogue which results in a combined reading of interamerican and constitutional standards of the region.

In this picture, the cornerstone of the cobweb is the Interamerican Court, which serves as a beacon of judicial protection in the Americas. Just this articulating role of the regional court leads us to recognize her as a regional Constitutional Court. From our point of view, the commitment to the constitutional role of the Interamerican Court is entirely timely and appropriate if we consider the context that we propose.

First, under article 2 of the Convention -together with the articles 1.1, 63 and 68 of the same- the Court may declare the incompatibility of national legislation with the interamerican law and demand his expulsion from the national legal system. She can too require to the states that advance all the necessary procedures and constitutional and legal reforms for coupling the regional law commitments. This power is enhanced, as indicated, by the articles of incorporation of international human rights law into national law.

Second, the rulings of the Interamerican Court have interpretative effects. Indeed, the judges of the region, either under constitutional mandates or because of the interamerican standards, have recognized the mandatory force of the interamerican case law since in its rules the regional court determines the content and scope of conventional clauses with authoritative force.

Finally, thanks to the "right of individual petition" and the interim measures under the Convention, the IACrHR provides direct protection to individuals either as a preventive or remedial way. In these events the task is assimilated to that exerted by the constitutional courts of the region as part of the writ of amparo.

From our point of view the recognition of the IACrHR as a Constitutional Court does not necessarily imply superiority in rank to the national constitutional courts. On the contrary, we are witnessing a living example of constitutional pluralism under which what matters is not who provides the protection, but if in fact this is guaranteed.

In fact, according to constitutional pluralism, which reliably examples the interaction between the various judges who exercise constitutional functions in Europe (this is the ECHR, the ECJ and national courts), we can have as many regimes and constitutional authorities as many jurisdictions based on constitutional principles exist, provided that these are met.

In this vein, recognizing the IACrHR as a constitutional court does not mean it is hierarchically superior. The recognition of its constitutional functions only serves to the extent of registering the scope of its jurisdiction and to position itself as the network's coordinating body whose principal role as protector is only to be activated in the absence of national protection.

To conclude this section, we must deal with the idea that judicial dialogue, which leads us to the consolidation of a protection network in which the IACrHR serves as the cornerstone, has allowed us to claim the existence of an Interamerican ius commune. The idea of ius commune arises in the field of human rights to recognize the existence of a minimum standard of

protection, built by the judges, whose protection is mandatory in the light of constitutional and international norms. Its existence stems from the recognition of human dignity as a universal value but whose content is given, from a pluralist perspective, from a regional scenario. That facilitates the respect of the differences in regional and global environment.

Such common minimum is characterized by its dynamic and progressive nature. Thus, the ius commune responds to the regional reality and, therefore, will evolve only insofar as national laws and interamerican law evolve as well, thanks to that mechanical interaction that we have described so far.

To conclude we can say that, through judicial dialogue, the subsequent creation of a judicial network and the formation of the interamerican ius commune there is now a regional legal community in the Americas. It is precisely this idea that determines the contribution of the interamerican judges to the process of constitutionalization of international law.

III. CONCLUSIONS

The interaction presented and above all its consequences help us to build some useful concepts for developing the constitutional process from a pluralistic perspective.

1. The concept of network allow us to articulate the exercise of constitutional functions beyond the national scene,

2. The harmonization exercise helps us to keep the two areas of protection but avoiding, on the one hand, the contradictions and, on the other, the subsumption,

3. The judicial network, and the particular context of the Americas, let us recognize the constitutional nature of the regional judge

4. The idea of ius commune allows us to adapt the concept of human dignity to the interamerican context, in respect of the particularities of the region and the sovereignty of each State

5. The idea of joint network permit us to articulate the interamerican advances to other levels of protection, such as the universal, without losing the local and / or regional nuance.

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