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INFORMATION AND HUMAN RIGHTS

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Towards an Internet Based on Human Rights

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Digital Inclusion as Public Policy:
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PRESENTATION



SUR 18 was produced in collaboration with the organizations **Article 19** (Brazil and United Kingdom) and **Fundar** (Mexico). In this issue's thematic dossier, we have published articles that analyze the many relationships between information and human rights, with the ultimate goal of answering the questions: What is the relationship between human rights and information and how can information be used to guarantee human rights? This issue also carries articles on other topics related to today's human rights agenda.

Thematic dossier: Information and Human Rights

Until recently, many human rights organizations from the Global South concentrated their activities on the defense of freedoms threatened by dictatorial regimes. In this context, their main strategy was whistleblowing, closely linked to the constant search for access to information on violations and the production of a counter narrative capable of including human rights concerns in political debates. Since they found no resonance in their own governments, the organizations very often directed their whistleblowing reports to foreign governments and international organizations, in an attempt to persuade them to exert external pressure on their own countries.*

Following the democratization of many societies in the Global South, human rights organizations began to reinvent their relationship with the State and with the system's other actors, as well as how they engaged with the population of the countries where they were operating. But the persistence of violations even after the fall of the dictatorships and the lack of transparency of many governments from the South meant that the production of counter narratives continued to be the main working tool of these organizations. Information, therefore, was still their primary raw material, since combating human rights violations necessarily requires knowledge of them (locations where they occur, the main agents involved, the nature of the victims and the frequency of occurrences etc.). Their reports, however, previously submitted to foreign governments and international organizations, were now directed at local actors, with the expectation that, armed with information about the violations and endowed with voting power and other channels of participation, they themselves would exert pressure on their governments. Furthermore, after democratization, in addition to combating abuses, many human rights organizations from the Global South aspired to become legitimate actors in the formulation of public policies to guarantee human rights, particularly the rights of minorities that are very often not represented by the majority voting system.

In this context, the information produced by the public authorities, in the form of internal reports, became fundamental for the work of civil society. These days, organizations want data not only on rights violations committed by the State, such as statistics on torture and po-

lice violence, but also activities related to public management and administration. Sometimes, they want to know about decision-making processes (how and when decisions are made to build new infrastructure in the country, for example, or the process for determining how the country will vote in the UN Human Rights Council), while at other times they are more interested in the results (how many prisoners there are in given city or region, or the size of the budget to be allocated to public health). Therefore, access to information was transformed into one of the main claims of social organizations working in a wide range of fields, and the issue of publicity and transparency of the State became a key one. This movement has scored some significant victories in recent years, and a growing number of governments have committed to the principles of Open Government** or approved different versions of freedom of information laws.***

This legislation has played an important role in the field of transitional justice, by permitting that human rights violations committed by dictatorial governments finally come to light and, in some cases, that those responsible for the violations are brought to justice. In their article **Access to Information, Access to Justice: The Challenges to Accountability in Peru**, Jo-Marie Burt and Casey Cagley examine, with a focus on Peru, the obstacles faced by citizens pursuing justice for atrocities committed in the past.

As the case of Peru examined by Burt and Cagley demonstrates, the approval of new freedom of information laws no doubt represents important progress, but the implementation of this legislation has also shown that it is not enough to make governments truly transparent. Very often, the laws only require governments to release data in response to a freedom of information request. They do not, therefore, require the State to produce reports that

**The Open Government Partnership is an initiative created by eight countries (South Africa, Brazil, South Korea, United States, Philippines, Indonesia, Mexico, Norway and United Kingdom) to promote government transparency. The Declaration of Open Government was signed by the initial eight members in 2011, and by the end of 2012 the network had been joined by 57 nations (Available at: <http://www.state.gov/r/pa/prs/ps/2012/09/198255.htm>). The initiative takes into account the different stages of public transparency in each of the member countries, which is why each country has its own plan of action for implementing the principles of open government. More information on the initiative is available at: <http://www.opengovpartnership.org>.

***In 1990, only 13 countries had some form of Freedom of Information legislation (Cf. Toby Mendel. 2007. Access to information: the existing State of affairs around the world. In VILLANUEVA, Ernesto. *Derecho de la información, culturas y sistemas jurídicos comparados*. México: Universidad Nacional Autónoma de México). By 2010, however, approximately 70 countries had adopted such a law. (Cf. Roberts, Alasdair S. 2010. A Great and Revolutionary Law? The First Four Years of India's Right to Information Act. *Public Administration Review*, vol.70, n. 6, p. 25–933.). Among them, South Africa (2000), Brazil (2012), Colombia (2012), South Korea (1998), India (2005), Indonesia (2010), Mexico (2002) and Peru (2003).

*K. Sikkink coined the term "boomerang effect" to describe this type of work by civil society organizations from countries living under non-democratic regimes.

make the existing data intelligible, nor to release the information on their own accord. The problem is exacerbated when the State does not even produce the data that is essential for the social control of its activities. Another area in which transparency is deficient is information on private actors that are subsidized by public funding, such as mining companies, or that operate public concessions, such as telecommunications providers.

Many organizations from the South have spent time producing reports that translate government data into comprehensible information that can inform the working strategies of organized civil society or the political decisions of citizens. Human rights organizations have also pressured their governments to measure their performance against indicators that can help identify and combat inequalities in access to rights. This is the topic of the article by Laura Pautassi, entitled **Monitoring Access to Information from the Perspective of Human Rights Indicators**, in which the author discusses the mechanism adopted recently by the Inter-American System of Human Rights concerning the obligation of States-Parties to provide information under article 19 of the Protocol of San Salvador.

The relationship between information and human rights, however, is not limited to the field of government transparency. The lack of free access to information produced in the private sphere can also intensify power imbalances or even restrict access to rights for particularly vulnerable groups. The clearest example of this last risk is the pharmaceutical industry, which charges astronomical prices for medicines protected by patent laws, effectively preventing access to health for entire populations. The privatization of scientific production by publishers of academic journals is another example. The issue gained notoriety recently with the death of Aaron Swartz, an American activist who allegedly committed suicide while he was the defendant in a prolonged case of copyright violation. Sérgio Amadeu da Silveira opens this issue of SUR with a profile of Swartz (**Aaron Swartz and the Battles for Freedom of Knowledge**), linking his life to the current struggles for freedom of knowledge given the toughening of intellectual property laws and the efforts of the copyright industry to subordinate human rights to the control of the sources of creation.

Since the internet has taken on a crucial role in the production and dissemination of information, it is natural for it to have become a battleground between the public interest and private interests, as illustrated by the Swartz case. On this point, civil society and governments have sought to adopt regulations intended to balance these two sides of the scale, such as so-called Internet Freedom, the subject of another article in this issue. In **Internet Freedom is not Enough: Towards an Internet Based on Human Rights**, Alberto J. Cerda Silva argues that the measures proposed by this set of public and private initiatives are not sufficient to achieve their proposed goal, which is to contribute to the progressive realization of human rights and the functioning of democratic societies.

The importance of the internet as a vehicle of communication and information also means that internet access is now a key aspect of economic and social inclusion. To correct inequalities in this area, civil society organizations and governments have created programs aimed at the so-called "digital inclusion" of groups that face difficulty accessing the web. Fernanda Ribeiro Rosa, in another article from this issue's dossier on Information and Human Rights, **Digital Inclusion as Public Policy: Disputes in the Human Rights Field**, defends the importance of address-

ing digital inclusion as a social right, which, based on the dialogue in the field of education and the concept of digital literacy, goes beyond simple access to ICT and incorporates other social skills and practices that are necessary in the current informational stage of society.

Non-thematic articles

This issue also carries five additional articles on other relevant topics for today's human rights agenda.

In **Development at the Cost of Violations: The Impact of Mega-Projects on Human Rights in Brazil**, Pétalla Brandão Timo examines a particularly relevant contemporary issue: the human rights violations that have occurred in Brazil as a result of the implementation of mega-development projects, such as the Belo Monte hydroelectric complex, and preparations for mega-events like the 2014 World Cup.

Two articles address economic and social rights. In **Land Rights as Human Rights: The Case for a Specific Right to Land**, Jérémie Gilbert offers arguments for the incorporation of the right to land as a human right in international treaties, since to date it still only appears associated with other rights. In **Reaching Out to the Needy? Access to Justice and Public Attorneys' Role in Right to Health Litigation in the City of São Paulo**, Daniel W. Liang Wang and Octavio Luiz Motta Ferraz analyze legal cases related to the right to health in São Paulo in which the litigants are represented by public defenders and prosecutors, in order to determine whether the cases have benefited the most disadvantaged citizens and contributed to the expansion of access to health.

Another article looks at the principal UN mechanism for the international monitoring of human rights. In **The United Nations Human Rights Council: Six Years on**, Marisa Viegas e Silva critically examines the changes introduced to this UN body in the first six years of its work.

In **Human Rights, Extradition and the Death Penalty: Reflections on the Stand-Off between Botswana and South Africa**, Obonye Jonas examines the deadlock between the two African nations concerning the extradition of Botswana citizens who are imprisoned in South Africa and accused in their country of origin of crimes that carry the death penalty.

Finally, Antonio Moreira Maués, in **Supra-Legality of International Human Rights Treaties and Constitutional Interpretation**, analyzes the impacts of a decision in 2008 by the Supreme Court on the hierarchy of international human rights treaties in Brazilian law, when the court adopted the thesis of supra-legality.



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SÉRGIO AMADEU DA SILVEIRA

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ABSTRACT

In this article, the author offers a succinct overview of the story of Aaron Swartz, one of the major victims of the war surrounding so-called intellectual property. Aaron was found hanged on January 11, 2013 in his apartment in New York. A programmer and cyberactivist, he was accused by the U.S. government of infiltrating computers for the supposed release of copyrighted academic articles and could have been sentenced to 35 years in prison. The text ties in with the life of Swartz the current battles for freedom of knowledge amid the stiffening of intellectual property legislation and the shadowy activities of the copyright industry, which aim to subordinate human rights to the control of creative sources.

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KEYWORDS

Aaron Swartz – Cyberactivism – Intellectual property – Sharing – Free knowledge



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AARON SWARTZ AND THE BATTLES FOR FREEDOM OF KNOWLEDGE

Sérgio Amadeu da Silveira

Professor Pedro Rezende, a cryptographer at the University of Brasilia, considers Aaron Swartz the first big victim of the cyberwar (REZENDE, 2013). But is there a cyberwar? Who are the armies? What is at stake? The discernible battles are part of a war for the control and modulation of global society in an informational context in which value is increasingly found in symbolic products and intangible goods; that is, in a nonmaterial economy. In this transitional period in history, from an industrial world to the information age, sovereign and disciplinary powers are being supplanted by widely distributed controls which increasingly generate dominions connected to large corporations. These corporations end up assuming powers previously organized within States. In this world knowledge is a direct source of wealth and power in a manner completely distinct from other periods in history.

Aaron Swartz is one of the major victims of the war surrounding so-called intellectual property. Aaron was found hanged in his New York apartment on January 11, 2013. His death, currently held to be a suicide, occurred during the intense battle that the young programmer and cyberactivist was waging with the courts and the police in the United States. Accused by the government of infiltrating computers to supposedly release copyrighted academic articles, he could have been sentenced to 35 years in prison. Federal prosecutors in the US sought an exemplary conviction to compensate for various defeats suffered in the battle to reduce the sharing of digital files on information networks.

With his life interrupted at the age of 26, Swartz, considered an Internet genius, was the co-author of RSS (Really Simple Syndication) when he was only 14. Aggregating the content of sites that are constantly updated, RSS is widely used on the net by both large gateways and small blogs. The idea of sharing culture, knowledge and information was from that very moment present in the actions of the young Aaron, who combined a great passion for freedom with a refined expertise for the development of collaborative network solutions.

To this day, the Internet and the Web are open structures that move forward collaboratively; that is, their principal protocols and standards are defined by public documents called RFCs (Requests for Comments). In 2001, Swartz began working with the World Wide Web Consortium (W3C), an international community that develops open standards with the goal of guaranteeing the growth of the web. In 2004, Swartz signed the publication of RFC 3870, titled “application/rdf+xml Media Type Registration,” with the aim of describing a type of media for use with the XML language together with the RDF platform, used to support the Semantic Web. The talented young Aaron Swartz, born on November 8, 1986 in Chicago, wasn’t worried about patenting and blocking access to his contributions to the world of technology.

In 2005, while attending Stanford University, Aaron Swartz started the company Infogami, which supported the Open Library project from the Internet Archive portal. Maintained by a non-profit organization, the Internet Archive project works to build a digital library of Internet sites and other cultural artifacts in digital format. Just like a traditional library, it offers free access to its files on the net to researchers, historians, academics and the general public. Here, one can again note Aaron’s vocation for the dissemination of and free access to knowledge. In November 2005, Infogami merged with Reddit, a site in which users can vote on links to appear or disappear from the front page. After Reddit was acquired in 2006 by Condé Nast Publications, Swartz did not adapt to work at the new office, leaving the company.

1 Free knowledge activism

In 1984, Steven Levy wrote *Hackers: Heroes of the Computer Revolution*. His work looked to translate what would be the fundamental traits of the so-called hacker subculture, which arose in the United States in the 1960s, decisively influenced by the North American counterculture. Levy clarifies the ethical pillars of hacker collectives in the following passage:

*Access to computers... should be unlimited and total...
All information should be free...
Mistrust authority – promote decentralization...
Hackers should be judged by their hacking,
not bogus criteria such as degrees, age, race, or position...
You can create art and beauty on a computer...
Computers can change your life for the better.*
(LEVY, 2001, p. 27-33)

In these terms, Aaron Swartz can be seen as a hacker in the original sense of the expression. An aficionado for source code and the sharing of intellectual challenges that he could overcome. Pekka Himanen, who studies the hacker ethic, observed that “the primary value that guides the life of a hacker is passion; that is, some interesting goal that moves him or her and that in fact generates

happiness in its accomplishment” (HIMANEN, 2001, p. 18). Aaron Swartz never seemed worried about making money. Following his short life, one notices that, for him, the greatest wealth was in collaborating in the creation and dissemination of knowledge. What is most interesting is that supporters of private ownership and file-share blocking could never make the claim against Swartz that his defense of sharing was the fruit of technical shortcomings or technological inferiority, which feeds much shadowy and prejudiced rhetoric. Swartz had impressive intelligence and creative capacity.

In 2008, he utilized a script that automated the download of more than 2 million documents from PACER, the website on which all United States federal court documents are stored. To access PACER documents, one had to use an online payment system. Swartz used his program to get around the payment system, allowing free access to the texts, which were public. Because of this, the FBI investigated him. However, since no formal complaint was registered, his case was shelved.

Proposing a civic insurgence against the privatization of knowledge – which for him came from a collective construction, emerging from what was common – Swartz in 2008 released the *Guerilla Open Access Manifesto*, which clearly outlines his ideology of freedom of access to cultural and scientific resources. The following excerpts clearly demonstrate the kind of guerrilla Aaron was proposing:

Information is power. But like all power, there are those who want to keep it for themselves. The world’s entire scientific and cultural heritage, published over centuries in books and journals, is increasingly being digitized and locked up by a handful of private corporations. Want to read the papers featuring the most famous results of the sciences? You’ll need to send enormous amounts to publishers like Reed Elsevier.

(...)

We need to take information, wherever it is stored, make our copies and share them with the world. We need to take stuff that’s out of copyright and add it to the archive. We need to buy secret databases and put them on the Web. We need to download scientific journals and upload them to file sharing networks. We need to fight for Guerilla Open Access.

With enough of us, around the world, we’ll not just send a strong message opposing the privatization of knowledge — we’ll make it a thing of the past. Will you join us?

Aaron Swartz July 2008, Eremo, Italy.

Free access and exchange of knowledge constitute part of the so-called hacker culture. It inspired thousands of other software developers dedicated to sharing, such as Richard Stallman, the founder of the free software movement. It is notable that all of these developers believe in the utopian possibilities of the democratization of access to information and in the importance of the free flow thereof. This hacker perspective was opposed by large corporations, who wanted

to transform algorithms and code into products that were artificially similar to the merchandise of the industrial world. Hackers were therefore subject to semiotic attacks by the media, who depended on the advertising revenue of the source code industry conglomerates.

Furthermore, studying the way that hackers were seen by the mass media, Sandor Vegh noticed that after September 11, 2001, there was a change in the discourse. Hackers, who had been depicted as common criminals, came to be described in the news as cyberterrorists. Vegh (2005) also found that articles in the United States media increasingly used a sensational tone when talking about hackers, while observing that one of the principal consequences was to open the way for the approval of laws and regulations that limit cyberactivism and “hacktivism.”

Despite this scenario of growing persecution of hackers and activists, Swartz deepened his role in defense of transparency and the sharing of knowledge. In 2008, he founded Watchdog.net, to aggregate and visualize data about politics. In 2010, he was one of the co-founders of Demand Progress, a collective dedicated to political reform of the government and civil liberties activism.

2 Informational capitalism, intellectual property and human rights

Informational capitalism found its growth in the codification and digitalization of knowledge, culture and symbolic and nonmaterial goods and products. Cybernetic technologies operated by software made digital networks viable. These networks covered the planet and became indispensable to the daily life of a large part of society, making communication a structural element of social, economic, cultural and political processes. But digital communication is a form of communication mediated by software. Cybernetic, informational society, which can be seen as a society of control, has in software its principal media.

Researcher Lev Manovich (2008) was very astute in affirming that, just as electricity, the machine, and combustion made industrial society possible, it is software that makes global informational society possible. Software, seen as media that guarantees the growing digitalization of social activities and practices, is not apparent to this same society. Its role is not clear, much less evident. Seen as akin to any other technology, and presented by the market as merely a product, software contains source code that defines it and determines what it is capable of doing. Meanwhile, software has the power to completely determine our communication. Its design, its functions, operations and interfaces are defined by the programmers that create and maintain it. This code, in general, is closed-source and incomprehensible to those that use it.

This is something obscure, lacking any transparency. For the software market, it is this opacity of the code for its users that makes up part of the intellectual property rights of its creators. The mainstream software market was structured around a model of remuneration of property based on the denial of access to the knowledge of its logically nested routines. But the lack of source

code transparency in the context of intense digital codification isn't limited to the software market. It extends to the bodies and essential codes of the species. It is in the fusion of various disciplines with Biology and Computer Science that biotechnology, nanotechnology, and genetic engineering arise. As Adriano Premebida and Jalcione Almeida point out:

With the influence of cybernetics, a live organism is treated like an information system, with an extensive history of adaptation, able to be both interpretable and executed by molecular biology. Politics about life tends to center around the indifferenciation of the borders between species and understand the materiality of living beings as 'a matrix of virtual,' or possible, 'genetic combinations' (Ferreira, 2002: 238). The junction between techniques and policies in the manufacture of living beings is what will be at the center of the contemporary commercial/industrial dynamic in areas of knowledge informed by genetic engineering. 'Life can no longer be simply thought of as the result of reproduction. Life is now able to be produced' (Ibidem, 223). Biological life is part of modern power strategies and currently these strategies also focus on genetic information.

(PREMEBIDA; ALMEIDA, 2010)

The remuneration model of genetic encoding in cognitive capitalism involves closed source code or restrictions on its use through patent enforcement. Thus we witness the proximity of Microsoft and Monsanto, or Pfizer and Oracle, in their business models. Blocking free access to scientific knowledge is a profound concern for large corporations. And that is exactly where Aaron Swartz was vigorously involved.

On January 6, 2011, at 24 years old, Aaron was arrested for electronic fraud, computer fraud and unlawfully obtaining information from and recklessly damaging a protected computer. Specifically, Swartz was accused of downloading 4.8 million documents from the JSTOR academic article archives, violating its terms of use, and circumventing the Massachusetts Institute of Technology's (MIT) attempts to stop him.

According to the report, Swartz bought a laptop in 2010 and registered on the MIT network under a ghost username. On this computer, Swartz wrote a script in the Python language that allowed him to rapidly download articles from JSTOR. JSTOR detected the script and blocked the IP address. According to the report, Swartz repeatedly changed the IP and MAC address to evade JSTOR's and MIT's efforts to block access.

When JSTOR normalized MIT's network access some weeks later, Swartz had changed his technique to download the files. He was accused of going to a room containing networking equipment and hiding his laptop behind some equipment so that it would not be found. He thus circumvented existing blocking and filtering mechanisms via the direct connection to the servers, successfully executing his downloads. The police report describes how Swartz, as he went to recover his laptop from its hiding place, had his bicycle helmet clearly filmed, despite using a mask to cover his face.

The United States government alleged that Swartz probably downloaded the articles to freely distribute them on P2P (peer-to-peer) networks. However, JSTOR itself recognized that the downloaded content was not used, transferred nor distributed. But, for government representatives, mass downloading many articles from academic journals constitutes a hacker crime and should be punished by imprisonment. The interesting part is that Swartz, as an MIT student, had free access to any of the articles that he downloaded. The criminal attitude was the use of a script to download many articles.

The United States federal prosecutors sought an exemplary conviction. They wanted a sentence of 35 years and said they were acting to discourage copyright violation. Pressure mounted on the young Swartz, who had a large role in the campaign against the Stop Online Piracy Act (SOPA) and PROTECT IP Act bills in the U.S. Congress in January of 2012. These proposed bills sought to block U.S. citizens' access to digital contents and applications that supposedly were in violation of intellectual property. Furthermore, companies in the United States would have five days to block access to such sites.

The stiffening of intellectual property legislation and the shadowy activities of the copyright industry are an attempt to gain control of the sources of creation and knowledge. The case against Swartz is a legal aberration, since the only consistent accusation was over his intention to release academic texts on P2P networks for free downloading. Computer forensics consultant Alex Stamos, who is frequently asked to testify in cases to determine if intrusions in digital systems and informational crimes occurred, wrote on his blog:

Aaron did not "hack" the JSTOR website for all reasonable definitions of "hack". Aaron wrote a handful of basic python scripts that first discovered the URLs of journal articles and then used cURL to request them. Aaron did not use parameter tampering, break a CAPTCHA, or do anything more complicated than call a basic command line tool that downloads a file in the same manner as right-clicking and choosing "Save As" from your favorite browser.

(STAMOS, 2012)

Following the tragic death of Aaron Swartz, United States federal prosecutors dropped all of the charges against him. Many people around the world noted the truculence and arbitrariness being practiced in order to block the sharing of cultural goods and knowledge. The battles do not appear to be cooling down. The possibilities for collaboration, interaction and digital file exchange will continue to grow if the Internet continues to be open, not proprietary, and not submitted to the telecommunications infrastructure controllers. Still, the copyright industry articulates its next steps to turn cultural goods and symbolic expression proprietary, as if they were limited resources. Governments, such as the United States, coordinate treaties and laws to subjugate the rights of all citizens to the defense of intellectual property. Yes, Aaron was a major victim of this war. But millions of young people do not live and have never lived under proprietary licenses. They want to share the possibilities that information

technology creates for all. There no longer seems to be any doubt that one of the principal conflicts of the twenty-first century centers around the sharing of knowledge and cultural goods.

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RESUMO

O artigo relata sucintamente a história de Aaron Swartz, uma das grandes vítimas da guerra travada em torno da chamada propriedade do conhecimento. Aaron foi encontrado enforcado no dia 11 de janeiro de 2013, no apartamento em que morava em Nova York. Programador e ciberativista, acusado pelo governo norte-americano de invadir computadores para uma suposta liberação de artigos acadêmicos protegidos por *copyright*, poderia ser condenado a 35 anos de prisão. O texto articula a vida de Swartz com os embates atuais pela liberdade do conhecimento diante do enrijecimento das legislações de propriedade intelectual e da atuação obscura da indústria do *copyright* com vista a subordinar os direitos humanos ao controle das fontes de criação.

PALAVRAS-CHAVE

Aaron Swartz – Ciberativismo – Propriedade intelectual – Compartilhamento – Conhecimento livre

RESUMEN

Este artículo relata de forma resumida la historia de Aaron Swartz, una de las grandes víctimas de la guerra instaurada en torno a la llamada propiedad del conocimiento. Aaron fue encontrado ahorcado el día 11 de enero de 2013, en el apartamento en el que vivía en Nueva York. Programador y ciberactivista, fue acusado por el gobierno norteamericano de invadir computadoras para una supuesta liberación de artículos académicos protegidos por *copyright*, por lo que podría ser condenado a 35 años de prisión. Este texto articula la vida de Swartz con las luchas actuales por la libertad del conocimiento frente al endurecimiento de las legislaciones de propiedad intelectual y de la oscura actuación de la industria del *copyright* con el fin de subordinar los derechos humanos al control de las fuentes de creación.

PALABRAS CLAVE

Aaron Swartz – Ciberactivismo – Propiedad intelectual – Intercambio de información – Conocimiento libre



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ABSTRACT

Technological development provides new opportunities for the progress of humanity as well as for the realization of human rights, although, at the same time, it also creates new risks for these rights. In recent years, public-private initiatives have advanced the need to promote and preserve freedom on the Internet as an essential assumption for the progress towards the realization of human rights and the functioning of a democratic society. One of these is called Internet Freedom.

In this article, the author maintains that the focus of Internet Freedom is, however, limited, because it provides a skewed view of the relevance of human rights in the online environment. After noting these limitations, the author suggests elements that should be integrated in an Internet approach sustained by a comprehensive focus on human rights for the Internet.

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KEYWORDS

Internet Freedom – Human rights – Digital citizenship – Internet governance – Corporate responsibility



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INTERNET FREEDOM IS NOT ENOUGH: TOWARDS AN INTERNET BASED ON HUMAN RIGHTS

Alberto J. Cerda Silva

1 Introduction

The Internet has burst into our lives. Since the late Sixties, when it was just a network of interconnected computers at a handful of universities to share computing resources, until today, when one in three people on the planet is a user, the Internet has permeated virtually every facet of our work. Now we connect not only for a couple of minutes a day. Many of us are permanently connected. We not only receive and send e-mails, but also form social networks, shop online, interact with government offices, and even unwind on the network.

Over the years, the myth of an Internet exempt from regulation has given way to an Internet subject to regulation. Powered by its decentralized structure, cross-border communications, and virtual anonymity, the Internet tried to resist the regulatory attacks of the 1990s, without success (BARLOW, 1996). Today, the Internet is a space in which state regulations are superimposed on cybercrime, consumer protection, personal data, electronic commerce, and so on. And it is a setting in which human rights are fully applicable.

The Internet has positively contributed to the defense of human rights. It has helped activists circumvent state censorship in China, has allowed the denunciation of repression against indigenous communities in Latin America, has facilitated access to public information in Mexico, and has contributed to political accountability in the Arab world. Rightly, it has been said that today our fundamental rights can be read in a technological lens (ÁLVAREZ-CIENFUEGOS SUÁREZ, 1999, p. 15-22), since the Internet facilitates their realization, as evidenced by online education initiatives, telemedicine, and electronic government. Recently, a proposal has been formulated an international human rights instrument for the

Notes to this text start on page 30.

online environment.¹ Whatever the real need for such an instrument, it makes clear the enormous synergistic potential of the Internet and human rights. The same can be said of the controversy surrounding establishing Internet access as a human right (CERF, 2012).

The Internet has also contributed to the violation of human rights, however. It has facilitated the identification of political dissent in Iran, intensified state surveillance in the United Kingdom, increased the threat to the linguistic and cultural identity of individuals, and broadened everywhere the gap between those with access and those without. And the potential of the Internet and new technologies to erode our rights will increase, as more and more elements of our lives take place in an online setting. This possibility has already provoked some initial reactions, one of which has been associated with the concept of Internet Freedom.

2 Internet Freedom

Internet Freedom designates a series of public-private initiatives which intend to confront government demands to implement systems of censorship and surveillance of people through the Internet (CLINTON, 2010). These initiatives have in common the aim to avoid state censorship, protect the privacy of individuals online, and prevent any measure restricting the free flow of information.

The Internet fosters freedom of expression, as each user can potentially reach a wide audience, as well as gain access to a plurality of content. But that freedom can be uncomfortable for some governments, which have been implementing technological and legislative measures to silence dissenting discourse. Internet Freedom rejects such governmental influence and advocates for the preservation of freedom of expression in the online environment.

The Internet facilitates the violation of the right to privacy, as each time a user connects to the network, his or her identity and online behavior can be monitored. The information gathered through monitoring mechanisms would allow government repression of dissent and thus the abolition of political and religious freedom, among others. Internet Freedom repudiates the government surveillance practices aimed at repressing the network users.

The Internet is the paradigmatic example of globalization, which has allowed for information to circulate globally, overcoming many of the obstacles to its flow that were imposed by analog media. Unfortunately, some governments have imposed technical and policy measures that hinder the dissemination, access, and data traffic across the network. Internet Freedom rejects the claim of those who want to change the structure of Internet governance to restrict the free flow of information.

There are several initiatives that strive for Internet Freedom, but it seems relevant to highlight those carried out by the United States Department of State, which have been incorporated as a component of the country's foreign policy. This has led to the implementation of a comprehensive work program that assists social organizations fighting for Internet access and the free flow of information online,

especially in countries facing adverse situations. A component of the program includes an annual evaluation of other countries in relation to the compliance with Internet Freedom, which focuses precisely on freedom of expression and state surveillance in the online environment. This assessment is published in the Country Reports on Human Rights Practices produced by such Department. The Department of State also supports the Global Network Initiative, which brings together human rights organizations and American companies from the technology sector, generating recommendations on freedom of expression and privacy online.

The Internet Freedom approach is not limited to the United States; other countries have also adopted it. After the unleash of revolutions in Northern Africa and the Middle East known as the Arab Spring, many countries saw the need to prepare their own version of Internet Freedom, with an emphasis on freedom of expression, rejection of government censorship, and an ambiguous role for the private sector. In fact, several European governments implemented Internet Freedom programs, including Germany, France, Holland, and Sweden (WAGNER, 2011, p. 18-19). Similar voices have also been heard in other latitudes.

With the support of the Department of State, and the backdrop of the Arab Spring and the role that the Internet played in it, the Internet Freedom approach has succeeded in defining the role, benefits, and risks that the online environment has on freedom of expression and privacy. And certainly it has contributed, together with a report on freedom of expression developed by United Nations Special Rapporteur Frank de La Rue (NACIONES UNIDAS, 2011), to place the issue on the international agenda and to obtain the adoption of a specific United Nations resolution, which though notoriously late, has recognized the importance of the Internet in relation to all human rights, but particularly to freedom of expression (NACIONES UNIDAS, 2012).

Internet Freedom has helped to highlight the role of freedom of expression, protection of privacy, and the free flow of information online. However, this focus is limited because it provides a biased view of the importance of human rights on the Internet. The following section briefly describes some of these constraints in order to suggest elements that should be integrated into an approach based on a comprehensive view of human rights for the Internet.

3 The limitations of internet freedom

Although Internet Freedom represents progress, it has several limitations that make it inadequate. First, it is an approach that encapsulates concerns and prioritizes topics from a U.S. perspective and therefore lacks comprehensiveness. Second, it presents a narrow view of the relevance and synergies resulting from the interaction between the Internet and human rights. Third, it ignores that the Internet is an essentially private environment and therefore demands greater accountability from the private sector. Fourth, it ignores Internet governance. Fifth, it prioritizes market needs rather than the respect for human rights. In the next sections, each of these objections shall be briefly reviewed.

3.1 A local approach

Internet Freedom emerges as an approach that catalyzes U.S. concerns dating from the middle of the last decade (GOLDSMITH; WU, 2006). Until then, a significant number of companies from the technology sector had been collaborating with the Chinese government in the identification of dissidents and the censorship of online content. This complicity was uncomfortable, especially in the face of an unsuccessful United Nations attempt to adopt an instrument that would make the respect of human rights by transnational corporations enforceable (NACIONES UNIDAS, 2003). It was a necessity to take action on the matter, but it had to be done without reaching the extreme of effectively regulating the technology sector, as suggested by the experience of the European Union. Internet Freedom takes a more restrained gamble, focusing its efforts against repressive governments and advocating voluntary commitments from the private sector in order to protect freedom of expression and the right to privacy without hindering the free flow of goods and information services.

Internet Freedom presupposes a more local than global view of freedom of expression in which the concept of speech is based more heavily on the First Amendment to the United States Constitution than on the concept of freedom of expression defined in international human rights instruments. We are faced with a freedom that is exhausted from the State, which avoids the complications of a system of exceptions and limitations accepted by international law, and that, in turn, feeds from the domestic regulatory framework.² This framework is suitable to deal with China's censorship machine, and even the Arab Spring, but is insufficient to analyze, for example, the criminalization of certain freedom of speech offenses in Latin America and Europe, the persecution of WikiLeaks, or the telecommunications and information technology sector's culpabilities when human rights are violated, not only in complicity with repressive governments but also on its own accord.

The protection of the right to privacy that Internet Freedom espouses is not global; rather, it is particular to the United States. It is essentially the government that is limited by the exercise of this right, but protection is evidently weaker in relation to the private sector, which in only exceptionally circumstances would respect it (CERDA, 2011a, p. 338-340). Thus, Internet Freedom appeals to a kind of corporate social responsibility around their protection and, on the other hand, avoids a regulatory approach, such as the one that exists in the European Union and Latin America, which could raise unnecessary barriers to the free movement of goods and services.

3.2 A partial approach

Internet Freedom is a partial approach to the importance of the network from a human rights perspective, since it is only limited to freedom of expression and the right to privacy. It is implausible to suppose that the contribution and

potential of the Internet for the realization of other human rights could still be disclaimed, but Internet Freedom does not pay attention to more than a couple of them, those that best reflect a nineteenth-century liberal conception of the State.

Internet Freedom does not include any mention of economic, social, and cultural rights. In this way, improving the accessibility for those without access is not a priority for Internet Freedom, even if it contributes to the reinforcement of democracy, individual and collective development, and the realization of other rights. It also omits the Internet's role in the preservation and promotion of cultural and linguistic identities, particularly considering the abrasive effects of the unidirectional flow of information from a small number of countries to many others.

The Internet has facilitated access to information, but Internet Freedom deliberately excludes from its scope a discussion of how the growing protection of intellectual property affects the realization of human rights (CLINTON, 2010). Intellectual property law grants a monopoly of the exploitation of certain inventions and creations. For example, the granting of patents on pharmaceuticals hinders the implementation of programs for universal access to medicine (COSTA; VIEIRA; REIS, 2008), as well as public policy measures that protect the right to health and life (CORREA, 2005; NWOBIKE, 2006).

The Internet promotes free flow of content, but, paradoxically, most of this content is subject to restrictions for use by intellectual property laws establishing copyright, that is, a monopoly on the exploitation of creative works, preventing their use without the owner's permission. This restricts freedom of expression, hampers development (DRAHOS; BRAITHWAITE, 2002), and crushes creative freedom (LESSIG, 2005; TRIDENTE, 2009). Especially in developing countries, copyright affects the realization of the right to education, by preventing the use of content without further authorization and payment to the copyrights holder (BRANCO, 2007).

In recent years, there has been a systematic effort by some developed countries to inspire the adoption of international standards of intellectual property enforcement colliding with the right to privacy by requiring user identification for alleged indiscriminate copyright infringement (CERDA, 2011b, p. 641-643); with due process, to expel the alleged infringers from the Internet without appropriate judicial guarantees (FRANCIA, 2009), and including the limitations for penal intervention imposed by international instruments in matters of human rights, by imposing imprisonment for simple civil debts (VIANNA, 2006, p. 941-942). The Special Rapporteur La Rue himself has called attention to the censorship practices of freedom of expression based on intellectual property protection (NACIONES UNIDAS, 2011, p. 13-15).

The conflict between the rules of intellectual property and human rights is a symptom of the growing inconsistency between the rules of international law applicable to trade and those concerning human rights (DOMMEN, 2005; FORTIN, 2008). But Internet Freedom turns a deaf ear to the excesses of intellectual property and its damaging effects on human rights.

3.3 The role of the private sector

The Internet rests on a massive plot of willpower and private sector efforts. Technical agencies that manage network resources, transatlantic communications providers, telecommunications service providers, corporate network access, content providers and online services. A long list of actors make the Internet an essentially private environment. However, traditionally, human rights catapulted by the atrocities of World War II have centered on state action and, therefore, seem to allow most of what happens in the network to be exempt of control.

The Internet has increased concern about the role that companies have in the violation of human rights in complicity with certain governments. In addition to some operators known for collaborating with political repression in China, there is the supplying of technology for tracking opponents online in Syria and the export of electronic surveillance tools to governments with a questionable commitment to democracy in Latin America. Internet Freedom recognizes this problem and urges the private sector to adopt voluntary guidelines to respect human rights, whose effectiveness is questionable and their results are still precarious.

Internet Freedom disregards the fact that, oftentimes, it is the companies themselves, not in complicity with the state, that violate people's rights. There are many examples of this, including service providers who unduly process users' personal information, surreptitious, online surveillance service providers, and telecommunications operators who interfere with the electronic communications of their customers (NUNZIATO, 2009). As the Internet penetrates deeper into our lives, an approach that minimizes the responsibility of the private sector is insufficient. In fact, to obtain adequate protection for our rights in the online environment, both against the actions of public and private actors, becomes a priority.

3.4 Internet governance

Internet Freedom is nurtured by the false belief that the network was born, has grown and flourished apart from the action of the State, whose interference is strongly rejected (LIDDICOAT, 2011, p. 14). It will be the new citizens of the virtual environment—technical, users, and suppliers – who will define the Internet and those who will adopt self-regulatory standards. It is understandable, then, that Internet Freedom does not question the digital *laissez-faire* assumption, which conceals the total social divestment in the future of the Internet. In fact, network governance is a muted theme in the discourse of Internet Freedom.

It is no coincidence, then, that those who advocate for Internet Freedom reject any initiative to adopt a mechanism for global Internet governance. The recent initiative by the International Telecommunications Union, the United Nations specialized agency in the field, to adopt certain rules for the network is proof of this attitude. The media attention ignored its work providing Internet access in developing countries and, instead, focused on underestimating its technical capacity and demonizing their intentions, which were aligned with those of totalitarian regimes. Little or nothing is said about that, even if the agency was not the most

appropriate and had not dealt with many difficulties, it was and is necessary to have some legitimate global governance mechanism for the Internet in order to overcome the evanescence of borders online, facilitate the construction of a space for governmental coordination, and promote democratization and respect for human rights in the Internet.

Some have suggested that Internet governance should take place through a model that brings together all stakeholders, such as and companies that provide services, including social organizations and government, and users. This model, however, does not clarify the decision-making scope of these stakeholders. It is also doubtful that corporate interests would have the same level of legitimacy as those represented by governments, particularly if they enjoy democratic representation. Finally, this model assumes the existence of a strong and vigorous civil society, a quality which few countries can boast, in fact, it is most common that, in the regulation of the Internet, it does not exist or it is co-opted by corporate interests or the contemporary government.

3.5 Prioritizing the market

Internet Freedom demonstrates a commitment to freedom of expression and the right to privacy, but only to the extent that they harmonize with the free flow of information. This last expression has no background in human rights instruments, but it is found in instruments issued in trade forums, from the Organization for Economic Cooperation and Development (OECD), to the Asia Pacific Economic Cooperation Forum (APEC), and more recently in the proposed text of the Department of Commerce of the United States to the Trans-Pacific Strategic Economic Partnership Agreement Treaty that encourages the creation of a free trade area in the Pacific basin.³ In all of these instruments, the free flow of information is used to clarify the degree of protection that will be provided to the right to privacy and personal data protection. In APEC they further require, to recognize that the free flow of information is essential for the development of market economies and social growth.

Internet Freedom, then, prioritizes access and operation of the market for information providers, from the technology and software industries, to the content and entertainment industries. This would explain some of the corporate membership of the Internet Freedom initiative. But it is even clearer when you re-order its components and consider its omissions. Basically, Internet Freedom protects freedom of expression and to a lesser degree the right to a private life, provided they do not impede the compensation of services and the supply of information goods. Of course, information protected by intellectual property rules is deliberately excluded from such free flow. To do so, Internet Freedom rules out government intervention, avoids a global governance system, and ignores the imposition of liability for violation of human rights by the private sector. This ensures the absence of obstacles to the operation of the free market of information online. In sum, the free market can continue to function and the protection of some human rights has been a pretext, perhaps a positive externality, but not the priority.

4 Towards an Internet based on human rights

A recent body of literature explores the progressive inclusion of the African-American population in the United States. Despite having obtained their freedom in 1865, this population was systematically excluded and their aspiration of equality betrayed, even by the government itself (GOLDSTONE, 2011). The doctrine of “Separate but Equal” promoted by the Supreme Court perpetuated segregation and inequality, and made freedom an illusion. This policy caused social damage among the population, but a century had to pass before the doctrine in question was abolished, and civil and political rights were granted to the African-American population. Calling for the construction of a more egalitarian society to deal with the problem, then-President Lyndon Johnson, charged that “freedom is not enough” (PATTERSON, 2010). The same can be said of Internet Freedom.

An Internet policy based on human rights should be sustained on a comprehensive and global view of those rights, including not only freedom of expression and right to privacy, but also social, economic, and cultural rights, including the right to development. The policy should also empower people to effectively exercise their citizenship in the digital setting and to be participants in the governance of the Internet, either directly or through democratic channels. The policy should also establish clear responsibilities for private sector actors, who exercise more control in the structure of the Internet. And, although it does not need to challenge the market, it does require that priority be placed on human rights demands rather than free the market. Let us briefly examine each of these points.

4.1 *A global approach*

The Internet is a global digital communications platform. The aspiration to regulate or deregulate its operation based on a local approach, even if it is consistent with human rights, is insufficient because it disregards the Internet’s trans-boundary nature. It is such evanescence of borders online, which requires not only global coordination, but also that it is produced on the basis of certain, global, consensus-driven values. It is no longer just the local version of certain freedoms or rights, but one based on international human rights law.

It would not be fair to blame a couple or even a group of countries for pushing a reduced rights agenda according to their own interests, but it would be just to criticize those that make their own without criticism, and certainly to criticize ourselves when we shirk the responsibility of contributing to their improvement from our own realities. Even if an agenda is global, its precision and implementation requires locating the priorities (BERTONI, 2012), but without losing sight of a comprehensive approach.

4.2 *A comprehensive approach*

The legal declarations and their constitutional recognition initially concentrated on putting limits on state action in order to prevent that the government subjugate the citizens. Thus, by hindering state intrusion in the home, or prohibiting censorship.

However, this view becomes limited because it omits that the state can act as a guarantor of freedom, especially against the impact of the concentration of private power over our freedoms (FISS, 1996). A comprehensive approach to human rights also recognizes such capacity in the State and, indeed, demands the necessary intervention to protect and promote the rights of the people.

A comprehensive approach based on human rights should be extended to all the rights susceptible to Internet technology. Freedom of expression and right to privacy may seem the most obvious, but the Internet's increasing penetration demonstrates its potential risk to the realization of a wide range of civil and political rights as well as social, economic and cultural ones. And of course, the right to development must be included among them, particularly given the widening gap between people and individuals online and those disconnected from the Internet.

An Internet approach based on human rights should not just look at them comprehensively, but it must also articulate a process to identify how the Internet affects those rights so that standards that are specifically applicable can be established. Accurately, it has been suggested that a rights-based approach must emphasize participation, introduce supervision, empower people, avoid discrimination, and connect decisions with accepted human rights standards (LIDDICOAT, 2011, p. 16-17). A human rights-based Internet thus requires expressing human rights standards in its content and in its formulation.

4.3 Corporate responsibility

Unlike other contexts, the Internet puts us in an environment that private actors essentially dominate. Most governments lack the technical and economic capabilities available to many computer or telecommunications businesses in order to condition the operation of the Internet and to eventually infringe the rights of individuals. To pressure these actors to voluntarily comply with standards based on human rights is, even if commendable, insufficient and puts the State itself in breach of its duty to protect people against the violation of their basic rights.

Therefore, an Internet based on human rights cannot avoid the responsibility that the private sector holds in the violation of human rights, not only when it acts in conjunction with the state, but also when it does it on its own accord. This requires us to unambiguously determine permissible behavioral patterns in both the public and private sectors. For example, the European Union sets comprehensive standards that protect people from the unjust treatment of his or her information and the violation of his or her privacy by those who process such information, whether they are public bodies or private sector entities. Similarly when countries in Latin America, and more recently also in Africa, incorporate human rights standards in their constitutions, they must ensure that those standards apply not to only the State but also to the private sector.

Moreover, this responsibility must be protected with effective mechanisms to make it enforceable. This is no longer just a social responsibility, but also a legally enforceable one. Here there is room for significant improvements domestically. The experience of those countries that, in addition to holding

private actors responsible for the violation of human rights, have incorporated specific procedural mechanisms to achieve the effective respect of both the government and the private sector is valuable at this point. This is the case of the constitutional mechanisms used daily in several countries in Latin America to make fundamental rights enforceable. Thus, telecommunications providers have been forced to guarantee the neutrality of the network; credit reports providers have been required to change their personal information processing policies; Internet service providers have been instructed not to snoop on employees' electronic communications, and video surveillance services have been required to make proportionate use of their technology.

However, the protection of human rights offered by local enforcement mechanisms is insufficient, particularly when attempting to apply to those who provide online services from third countries. Thanks to the free flow of information! Thus, some operators can take advantage of the greater flexibility certain countries give with regards to others, in what can be defined as "human rights dumping," which originates from the asymmetries in which human rights are respected from one country to another, such as those who manufacture products in third-world countries under degrading environmental conditions, or those who stock their shelves with goods produced with child labor or under very poor working conditions.

The growing importance of the Internet in our lives, and the privileged role that private actors have in the network, force us to consider their responsibility in relation to the violation of human rights online. However, voluntary mechanisms or local solutions are not fully effective, however. Maybe it is time to revisit the United Nations initiative to establish a treaty which makes the respect of human rights enforceable, not only by states but also by private actors, who today control the Internet.

4.4 Digital citizenship and Internet governance

The absence of an effective international forum for Internet governance perpetuates certain asymmetries of power between those who currently manage it and those who do not. To reject such governance on the basis that the network is outside of governments' reach is a misleading and outdated argument, whereas to advocate for a management system jointly operated by the various stakeholder groups ignores the democratic representation systems and overlooks the virtual absence of an empowered civil society.

In addition to being an open and free space, the Internet establishes a real common patrimony of humanity. Consequently, it should have a system of governance, an international regulatory framework, and institutional operations similar to other goods with common patrimonial interests, such as Antarctica, the radio spectrum, or the High Seas. This is not to discard the participation of various interest groups, which contribute to the analysis of the network's complexities, along with introducing transparency, encouraging public debate and providing improvements to the results.

An Internet based on human rights cannot depart from the assumption that citizens and civil society organizations have established capacities to participate in Internet governance. Quite the contrary. With the exception of a few, most countries lack such capacities, or they are co-opted by the private sector or the government in office. An Internet policy based on human rights should empower people so that they can effectively exercise their citizenship in the digital environment and can to be participants in Internet governance, either directly or through democratic channels.

4.5 First human rights, then the market

To claim that human rights operate in a vacuum would be naïve; they are the result of historical circumstances and their degree of development also rests on the conditions of time and space in which they occur. A certain amount of realism requires paying attention to these circumstances, just as the operation of most of the global economy on the market base. However, considering the market cannot involve yielding to their needs or their efficiency standards, particularly if they involve the erosion of human rights.

A human rights-based Internet must give preference to human rights rather than to the market. So, you cannot advocate for moderation with respect to the right to privacy or any other right, in order to preserve the free flow of wealth. Nor can one exclude the imposition of limitations on intellectual property, or other essentially private interests, when they are necessary to ensure the realization of human rights. Human rights first, the market after.

5 Final Considerations

The Internet each day takes on an increasingly larger role in social life and it is necessary to prepare a clear human rights policy with its regard. This policy cannot, however, be limited to a local and partial approach of only certain fundamental rights that favors market operation, silences the role of the state, and omits the challenges of effective global Internet governance.

An Internet policy based on human rights should be sustained by a global and comprehensive view of these rights, including civil and political rights, as much as social, economic, and cultural rights, including the right to development. This policy should empower individuals to effectively exercise their citizenship in the digital environment and to be able to participate in Internet governance, to establish clear responsibilities for private sector actors and to give preference to human rights over market demands.

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NOTES

1. See Internet Rights & Principles Coalition, Beta Version of the Charter of Human Rights and Principles for the Internet, available at: <<http://internetrighsandprinciples.org/site/charter/>> (Last accessed on: 16 Mar. 2013).

2. The American system establishes a liability for third party intermediates for copyright infringement online and an immunity regime for other content. See, 17 United States Code § 512: Limitations on liability relating to material online, and 47 United States Code § 230: Protection for private blocking

and screening of offensive material.

3. See, Organization for Economic Cooperation and Development (OECD), Recommendation of the Council concerning Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data, adopted for the Council on September 23, 1980 – OECD Doc. C(80)58/Final; y, Asia-Pacific Economic Cooperation (APEC), APEC Privacy Framework, adopted at the APEC 16th Ministerial Meeting, held in Santiago, Chile between November 17th and 18th, 2004.

RESUMO

O desenvolvimento tecnológico oferece novas oportunidades para o progresso da humanidade, assim como para a concretização dos direitos humanos, embora, ao mesmo tempo, também crie novos riscos para estes mesmos direitos. Em anos recentes, diversas iniciativas público-privadas trouxeram à luz a necessidade de promover e preservar a liberdade na Internet, como pressuposto essencial para a progressiva realização dos direitos humanos e o funcionamento de uma sociedade democrática. Trata-se de *Internet Freedom*. Neste artigo, sustenta-se que o enfoque de *Internet Freedom* é, entretanto, limitado, pois oferece uma visão tendenciosa da relevância dos direitos humanos no ambiente *online*. Após constatar essas limitações, o artigo sugere os elementos que deveriam integrar uma abordagem da Internet baseada em um enfoque pormenorizado dos direitos humanos para a Internet.

PALAVRAS-CHAVE

Internet Freedom – Direitos humanos – Cidadania digital – Governança da Internet – Responsabilidade empresarial

RESUMEN

El desarrollo tecnológico ofrece nuevas oportunidades para el progreso de la humanidad, así como para la concreción de los derechos humanos, aunque, a la vez también crea nuevos riesgos para estos mismos derechos. En los recientes años, diversas iniciativas público-privadas han enarbolado la necesidad de promover y preservar la libertad en Internet, como un supuesto esencial para la progresiva realización de los derechos humanos y el funcionamiento de una sociedad democrática. Se trata de *Internet Freedom*.

En este artículo, el autor sustenta que el enfoque de *Internet Freedom* es, sin embargo, limitado, porque brinda una visión sesgada de la relevancia de los derechos humanos en el entorno en línea. Tras constatar dichas limitaciones, el autor sugiere los elementos que debería integrar una aproximación a Internet sustentada en un enfoque comprensivo de los derechos humanos para Internet.

PALABRAS CLAVES

Internet Freedom – Derechos humanos – Ciudadanía digital – Gobernanza de Internet – Responsabilidad empresarial



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ABSTRACT

The main objective of this study is to examine digital inclusion as a field of State activity and public policies. We first examine some of the meanings attributed to digital inclusion and the public policy dilemmas that arise from them. We do this by referring to the discussions present in human rights literature, understanding the right to communication as one aspect of the issue. We subsequently defend the importance of approaching digital inclusion as a social right through the establishment of a dialogue with the field of education. We then present the concept of digital literacy, which looks far beyond access to ICTs, requiring that the social skills and practices necessary for society's current technological juncture be defined in order for them to become the focus of new public policies.

Original in Portuguese. Translated by Peter Musson.

KEYWORDS

Digital inclusion – ICT – Human rights – Public policies – Digital literacy



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DIGITAL INCLUSION AS PUBLIC POLICY: DISPUTES IN THE HUMAN RIGHTS FIELD*

Fernanda Ribeiro Rosa**

[...] the right to freedom of speech possesses little substance if, due to a lack of education, there is not much to be said that is worthwhile saying and no means of making oneself heard if there is anything to say.

(MARSHALL, 1967, p. 80)

1 Introduction

In order to understand digital inclusion as a new field of State action and therefore, of public policies, it is crucial to observe that the term “digital inclusion” is involved in a wide-ranging dispute. Due to its objectives and the ways in which it is conceived, when viewed as one single concept, it transmits little of its complex field of meanings.

In this article, this field is examined on account of its richness on the one hand, and the difficulties that emerge in terms of public policy formulation on the other. It is not uncommon for digital inclusion to be understood as resulting from disputes involving innovations between corporations at the cutting edge of the technology market more than as a subject of public policy. It is also understood more as an issue that needs to be resolved ‘naturally’, expanding access to new technologies, and less as an area where the focus needs to be placed on the subjects, practices and skills necessary for their development.

Inspired by the dialogue with the literature produced in the field of human rights, and understanding the right to communication as part of it, we attempt to analyze the challenges faced by new information and communication technologies (ICT) as subjects of public policies. The results of the analysis lead to the necessity

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of understanding of the field of digital inclusion as a dimension of citizenship. This understanding is encompassed in the concept of digital literacy, which focuses on the quality of access and the autonomy of the users as targets of government action.

The article begins by showing the context in which the field of digital inclusion emerged and the different roles played by the States in the development of telecommunications, as well as the massification of the new information and communication technologies (ICT). In this context, it is possible to identify different elements of policy among different countries, affording a view on how different visions of digital inclusion are applied. The ways in which human rights are conceived in each of these instances are good cues for understanding the differences.

Next, seeking an in-depth understanding of the disputes concerning the concept of digital inclusion as a human right, we have used public policy analytical models that emphasize “ideas”, that is to say, values and concepts present in the universe of public policy disputes. After examining some assumptions behind these models, we attempt to understand conflicts and meanings which are often not explicit in the discourse of digital inclusion stakeholders but which nevertheless influence the choice for certain policies and not others.

In order to analyze these dilemmas, we use as a reference the example of the emergence of education as a new social right at the beginning of the 20th century, when educating individuals became crucial to a new paradigm of economic development.

The article closes with a discussion of digital literacy as a crucial concept for channeling the struggle for recognition of digital inclusion as a social right and for promoting new public policies focused on the skills and social practices needed for the formation of autonomous citizens in contemporary society.

2 Digital inclusion: meanings that emerge in a new field of State activity

The incorporation of digital inclusion into the field of public policy is recent, especially when it is compared to other social policies, such as health and education, or infrastructure policies, such as telecommunications (MORI, 2011). In this context, the meaning of digital inclusion has become the object of dispute. In addition to defining a multi-faceted field – whose aggregating factor is the focus of new communication and information technologies (ICT), among them computers, cell phones and most importantly, the Internet -, digital inclusion is a term used to describe different actions, programs, and public policies geared towards ICT. Consequently, seeking to understand this concept in a plural way is not overzealous or mere faddism, neither is it uncommon to come across references to the idea of “digital divide/s” in opposition to different kinds of inclusions (BARZILAI-NAHON, 2006).

Castells stresses the importance of the great technological advances experienced at the end of the 20th century, which have given rise to the more recent “technological revolution” of humanity, “bringing about a pattern of discontinuity in the material bases of the economy, society and culture” (CASTELLS, 2005, p. 68). As an example of this extraordinary process, in the United States it took four years for the Internet to reach 50 million users, while it took thirteen, sixteen, and thirty-eight years respectively for

the television, computer and radio to reach that many users (TAKAHASHI, 2000, p. 3).

Despite its capillarity and the acknowledgement of its importance, the distribution of new ICTs has never been equal; on the contrary, it has reproduced a pattern of inequality, first reaching regions where capitalism is at its most advanced and groups which live under the most favored socio-economic conditions. As an example, figures provided by the Brazilian Institute for Geography and Statistics – IBGE - for 2010 show that while in Africa the average of Internet users vary, depending on the region, from 6 to 10 per 100 inhabitants, in South America, the average is 33 users per 100 inhabitants. In North America (the United States and Canada) the average has already risen to 80 users per 100 inhabitants, and in Western Europe there are 82 users per 100 inhabitants.¹ It is against this background that the significance of ICTs in the social structure has become an issue, in which a viewpoint emerges contrasting those who participate with those at the margin of utilization of the new technologies and the ensuing benefits of these transformations. This process has become known internationally as the *digital divide* or *digital gap*. In Brazil, we have translated this as ‘exclusion’ (*exclusão*) or ‘digital breach’ (*brecha digital*), and its opposite – which carries a positive meaning - is known as digital inclusion (*inclusão digital*). In English-speaking countries, where it is less commonly used, it is known as *digital inclusion*.

Mori (2011) finds in international literature the word ‘divide’ meaning misunderstanding, division between parties or the segregation of social groups, which harks back to the **civil rights** struggles in the United States in the 1960s. It could be said that inclusion is related to debates often concerned with economic, political, social, cultural, and gender inequalities (MORI, 2011, p. 34). In Brazil, the word “inclusion” is also loaded with meaning, given the struggle for social rights set against a historically unequal society, marked by dictatorial regimes during which important advances have been witnessed in the field of social rights in the 20th century, despite the limits imposed on civil and political rights (CARVALHO, 2012). Such struggles have disseminated the idea of “social inclusion,” mainly from the middle of the 1970s, as a result of the birth of “new social movements” which to a large degree influenced the content of the 1988 Constitution, known as the “Citizens’ Constitution” (SILVA; YASBEK; DI GIOVANNI, 2004, p. 22). In this context, it does not appear to us that it was by chance that the concept of digital divide – historically more germane to the discussions concerning civil rights – has been the one to prevail in the United States, a country whose society is founded on egalitarian ideas, independence, and personal initiative (KOWARICK, 2003, p. 63), while in Brazil, the concept which is taking form is that of “digital inclusion”, marked by the struggle for social rights, which have historically featured prominently in the country.

3 Different concepts

Throughout the years, the issue of digital inclusion versus exclusion has been approached in different ways, distancing itself from binary logic – having or not having access - with the progressive realization that several possible gradations exist, (WARSCHAUER, 2006) or the concept of “digital inequality” among users (DIMAGGIO; HARGITTAL, 2001).

In a bibliographic survey, Mori (2011) identifies three dimensions in which the concept of digital inclusion may be understood: as “access,” as “basic digital literacy,” or as the “appropriation of technologies.” The first focuses on the distribution of goods and services to guarantee access to infrastructure and ICTs. The second dimension focuses on basic ICT skills, which allow the individual to make use of these technologies; and, in this case, both access to the physical means and academic literacy are the necessary requirements for it. The third dimension adds a step to so-called basic digital literacy: more than knowing how to use ICTs, individuals must develop an understanding of the new means that enables them to “own” these resources, “reinventing their uses, and not being mere consumers” (MORI, 2011, p. 40).

Although this last dimension may be understood as a conceptualization of digital inclusion, it has been called by different monikers by some authors concerned with highlighting the sense of appropriation of new technologies, as well as the one of autonomous development of individuals confronted with them, that it encompasses. This is why Schwartz (2006) calls the process that enables individuals to use technologies for building knowledge “digital emancipation”. Silveira (2008) uses the concept of “autonomous digital inclusion”, understanding that both individual knowledge and infrastructure – which is the target of the logic of market competition - are inseparable from the expected autonomy. Warschauer (2006) also discusses the difficulty of encompassing the idea of a form of social development that is greater than mere physical access to computers and connectivity within the concepts of “digital inclusion-exclusion”.

Another concept that emerges is that of digital literacy (SILVA et al., 2005; BUZATO, 2009; ROSA; DIAS, 2012). It originates in the field of education, in which literacy means more than merely being able to read and write and includes the ability to apply knowledge within a context (SOARES, 2004).

Although common sense defines literacy as an individual skill of being able to read and write, theoreticians of the “new literacy” prefer a more wide-ranging definition, which takes into account social contexts of practice associated with literacy [...] that which is considered as skilful reading or writing varies widely according to historical, political and socio-cultural contexts.

(WARSCHAUER, 2006, p. 65-66).

As regards ICT, this approach assumes that a digitally literate individual goes beyond dexterity when using digital tools, and is able to find a social use for ICT skills in their day-to-day life, acting in a conscious manner according to their needs. Thus, it can be seen that digital literacy is **not to be confused** with the idea of basic literacy, which is more geared towards initial technological skills.

We shall return to this theme further on, but let us now turn our attention towards the greater scope and political content established by the line of thought that defends digital inclusion as the appropriation of technology.

3.1 *Various goals*

Besides the various meanings associated to the concept of digital inclusion, it is also important to pay attention to the various purposes linked to it. As Mori (2011) notes, they are: digital inclusion as an element of economic development; as a solution to social problems; and as a tool for the multidimensional development of the individual, relating to the guarantee of citizen rights.

The approach advocating that economic development is a goal of digital inclusion is founded on the perceived need to give workers skills to increase their opportunities on the marketplace. The line of thinking associating digital inclusion with the solution of social problems bets on the power of technology as a catalyst for change and seeks to make digital inclusion synonymous with social inclusion. According to the author, however, this thinking implies a technological determinism, because it attributes to technology the power to solve problems of very different natures.

Finally, the approach relating digital inclusion to citizen rights is centered on the actors and focuses on the use of ICTs by individuals and communities in various daily activities, in ways that improve their quality of life. It takes into consideration the various dimensions surrounding these individuals and communities as well as the ICTs.

It should be noted that authors advocating for digital inclusion as the appropriation of technologies, discussed above, tend to see the goal of digital inclusion as the fulfillment of rights. Silveira, for example, argues that “[...] it is crucial that people be cognitively skilled, enabled to seek the satisfaction of their needs and the defense of their rights at the same speed as the elites” (SILVEIRA, 2008, p. 37).

In the light of this summarized explanation, it seems clear that digital inclusion appears as a new field of action in societies at the end of the 20th century. The question here is not whether new technologies are important or insignificant – although the way in which they are used, as well as the actors who take advantage of their effects, are the subject of some criticism. (CASTELLS, 2005; SILVEIRA, 2012). The main point in the debate which we identified above concerns **what is understood by digital inclusion** (access, digital literacy or appropriation of technology) **and what is its goal** (economic development, solution of social problems or fulfillment of rights), so that citizens may enjoy minimum standards that enable them to develop themselves, within a social scenario which requires the ability to use and the knowledge of new tools and digital resources. Despite partnerships with non-governmental players for technological development and expansion of access in different countries (TAKAHASHI, 2000, p. 33), as well as the strong presence of markets, producing ever more accessible digital tools, digital inclusion, principally in its sense of access to infrastructure, has gained the status of government action in various ways.

3.2 *Different approaches, universalization and focalization*

An example of a scenario in which the State’s active role is highlighted was the defining of Internet access as a basic right by the French Constitutional Council in a pioneering move, in 2009. Also in France at the end of the 1970s, the *Minitel* system, which connected a screen to telephones, was developed and distributed free

of charge by the government-owned telecommunications agency. For one of the agency's employees, the goal of the *Minitel* was: “[...] to computerize French society and assure France's technological independence” (SCHOFIELD, 2012). The device also offered services such as access to medical test results, banking, travel reservations, chats etc. In 1982, it was rolled out nationally and, in the 1990s, it was still used by over 25 million people. Curiously, the *Minitel* only started to become extinct in 2012, thirty years after its launch, due to its evident limitations compared to the Internet (SCHOFIELD, 2012).

Another experience of State-sponsored technology is the first *tele-cottages*, made available by Scandinavian governments since 1985, as spaces to provide communications to small towns and rural villages. The object of this action, initially set up in Sweden and Denmark, was more social than technical, and came to be known as the *Scandinavian model* of telecenters, as opposed to the *Anglo-Saxon model*. The latter was based on telecenters owned jointly by the public and private sectors, without any focus on vulnerable populations, such as with the first model. The goals of the Anglo-Saxon telecenters were more commercial. Its aims were to provide public access to the most modern technological resources available, to offer courses for businesspeople and workers, and hire out rooms for those wanting to work outside the home, but who did not have an office or tools to do this, in an incentive to telecommuting (MOLNÁR; KARVALICS, 2002).

The Brazilian Communications Ministry in recent years has also provided support to the implantation of public and community telecenters in areas where access is difficult, through cooperation agreements with social organizations. In addition to furniture, equipment, and broadband Internet access, the government offers training grants to local monitors in partnership with non-government organizations (NGOs).²

Other countries offer examples involving different players and implantation strategies. In the United States, Computer Technological Centers (CTC) – maintained since the 1990s by non-governmental organizations and subsidies from universities and business – provide access and training courses in ICTs for vulnerable populations with support from sector giants, such as Apple and AT&T. Although this American case does not involve the State, it is interesting in that it highlights the differences in program design, as well as the non-exclusive character of players who might be responsible for digital inclusion activities. Despite the differences in their design, telecenter programs in Brazil and the United States are similar to the Scandinavian model in that they focus on people with little or no access.

Although these programs are obviously not representative of *all* digital inclusion policies in these countries, they offer a panorama of various possible ways of responding to social demands. At the same time, these experiences are examples of differences both in program conception and in the roles that can be played by the State, which leads to the important debate on universalization and focalization of public policies. In the French example, the role of the State is universal, while the cases chosen from Scandinavia, Brazil and the United States are examples of focalized programs. There are two distinct concepts behind these choices: universalization presupposes that a given good or service is a **right**, and, therefore, the State must guarantee that the whole population has access to it; focalization, on the other hand,

sees a good or service as a **capacity**, meaning that the State must provide it only to those unable to obtain it through their own means.

The choice for one approach or another is conditioned by the historical construction of options and political paradigms, as well as by the presence of players (BÉLAND; HACKER, 2004). Although digital inclusion is a recent field, the various ways of conceiving it dialogue, explicitly or not, with a territory of meanings concerning either civil rights, social rights or political rights, depending on the approach.³ They form a territory of “ideas” (FARIAS, 2003; KINGDON, 2011) that plays an important role in the trajectory followed by the field of digital inclusion as a public policy.

4 Why observe “ideas” and arguments in the analysis of public policy

We understand “ideas” as “the affirmation of values, [...], causal relationships, [...] solutions for public problems, symbols and images that express public and private entities, as well as worldviews and ideologies” (FARIAS, 2003, p. 23). This concept forms the basis of public policy analytical models that highlight the role of ideas and knowledge. For Kingdon (2011), ideas may be more important than pressure groups in the choice of a particular political agenda. He states: “The content of the ideas themselves, far from being mere smokescreens or rationalizations, are integral parts of decision-making in and around government” (KINGDON, 2011, p. 125). This means that, in decision-making processes, analyzing the ideas at play in the arena – beyond strategies, influence and pressure - is a significant step for understanding both the selection of alternatives to compose the political agenda and the formulation of the policies themselves.

In seeking to understand the complex universe of policy-making involving digital inclusion, with the goal of discerning the paradigms or themes about which there is confrontation and convergence of ideas in decision-making processes, **the field of ideas of human rights stands out.**

Firstly, as we have already seen, to speak about digital inclusion/exclusion or about a digital means to allude to meanings linked to rights: in Brazil, inclusion/exclusion is a vocabulary used in the fight for social rights; in the United States, *divide* reminds us of the struggle for civil rights. We have also seen that the field of rights is explicitly referred to in some approaches to digital inclusion, such as the one that sees it as a right of citizens. Moreover, the contrast between universalization and focalization in digital inclusion policies makes clear the dilemma over whether access to and use of ICTs is a right of all, to be provided by the State, or constitutes an individual responsibility, meaning that the State needs to act only to support those do not use it and do not have access to it.

Another evidence that the human rights field strongly influences discussion on digital inclusion is the existence of movements that fight, on the one hand, for freedom of expression, in the field of civil rights, and on the other, for the democratization of communications media, as social and political rights. Such movements include new ICTs in the debate on access to media, disseminating different views of digital inclusion in this disputed territory.

Nevertheless, the recognition of something as a right does not mean an absence of impediments to its achievement, given that human rights are an ideal, and, in some ways reflect what a society should be and not what it is. For this reason, due to its peculiar characteristics, the rights field becomes fertile ground for clashes in the political arena, and the themes pertaining digital inclusion, as we shall see, are a good example of this.

5 Human Rights: spaces for discussing meanings

5.1 *An approach to protection of individual freedoms: ICTs as a means*

As stated in article 19 of the Universal Declaration of Human Rights, “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers” (NAÇÕES UNIDAS, 1948).

In addition, article 13 of the American Convention on Human Rights (Pact of São Jose, Costa Rica), in effect since 1978, states that:

Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice. [...] The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.

(ORGANIZAÇÃO DOS ESTADOS AMERICANOS, 1969, *emphasis added*).

In a more recent document, published by the OAS in 2009 through the Inter-American Commission on Human Rights (ICHR), titled *A hemispheric agenda for the defense of freedom of speech*, one can see an example of the way the debate has developed around the right to freedom of expression. Firstly, this right is associated with the function of protecting the individual right of each person “to share with other people one's own thoughts and the thoughts of others” (COMISSÃO INTERAMERICANA DE DIREITOS HUMANOS, 2009). Secondly, the importance of freedom of expression is attributed to its “structural relationship to democracy” (COMISSÃO INTERAMERICANA DE DIREITOS HUMANOS, 2009). Finally, freedom of expression is credited with being “an important instrumental function, as it is an essential tool for the exercise of all other fundamental rights” (COMISSÃO INTERAMERICANA DE DIREITOS HUMANOS, 2009), such as the right to participation, education, and religious freedom. Therefore, “given the important instrumental role it plays, this right is located squarely in the center of the hemisphere's system for the protection of human rights” (COMISSÃO INTERAMERICANA DE DIREITOS HUMANOS, 2009, our translation).

We can see in the international documents dealing with the defense of freedom

of expression the construction of this defense as a **civil right**, protecting the individual. In this context, ICTs, understood as a **means for exercising this right**, gain relevance, and access to them becomes a necessary condition because of their potential and growing popularity as means for disseminating ideas.

5.2 *Approaching the defense of political and social rights: ICT as spaces of power*

According to Spennillo (2008), the right to communication gains strength as a collective right in Brazil and internationally at the beginning of the 21st century, when communication acquires an important role and multiple demands emerge for its questioning and recognition as a right. In this context, ICTs are seen not only as a means that must be accessed, but also as spaces of awareness-raising and power. **Focus on access** to new technologies becomes insufficient.

The freedoms of information and of expression currently in question are concerned not only with access of individuals to information as receptors, nor with the right to express oneself by 'any means' – which sounds vague and does not guarantee, for instance, access and control by citizens to the mainstream media – but with ensuring the right of citizens and of their collective organizations to access means of communication as emissaries – producers and broadcasters – of content.

(PERUZZO, 2005, p. 278-279).

The television and the Internet are, as well as communication practices, far-reaching means of communication maintained by private or public companies which act politically as established players who foster, sustain and hold powers in the current system. It is, therefore, against them that one must fight right of communication for all.

(SPENILLO, 2008, p. 15).

The concept found in these excerpts, which reformulates the idea of freedom of expression, aligns itself with the concept of *media literacy*, which requires individuals that are discerning when faced with traditional written and audiovisual sources, such as television and radio. More recently, it has also incorporated an expectation of the emergence of more active users, who are less consumers of information than participants in the construction of information in the Internet environment. As pointed out by Livingstone (2002, p. 2), “[...] media literacy is not reducible to a characteristic or ability of the user, but is better understood as a coproduction of an interactive engagement between technology and user.”

Some authors discussing the characteristics intrinsic to the new technologies and the risks of their usurpation have described which are the necessary conditions for the maintenance and expansion of Internet freedoms and for the appropriation of technologies that warrant the right to communication. “Asymmetries” due to the speed of the networks and the neutrality of the information circulating through them can strongly impact the environment so that autonomous individuals can play an important role in the digital media, whether to browse freely and create contents

of their own interest, or to alter standards, create solutions and innovate existing technological resources, independently of large corporations (SILVEIRA, 2011).

Complementing this picture, which shifts the approach on the role of ICT in societies, the civil society mobilization campaign *Communication Rights in the Information Society* (CRIS),⁴ plays an important and original role, by broadening the discussion to the area of human rights after the World Summit on the Information Society, sponsored by the United Nations in the 2000s.

The campaign defends four pillars to sustain the above-mentioned right: communication in the public sphere, which deals with the debate over political participation in society; knowledge of communications, which involves knowing how knowledge generated by society is communicated or blocked, benefiting certain groups; civil rights in communication, in defense of individual freedoms by means of communication and, finally, so-called cultural rights in communication, which involve communication between different cultures and identities, at the individual and social levels.

Under this approach, communication is understood as a right that goes beyond the field of civil rights, progressing in terms of political and social rights by including political participation and cultural rights. ICTs are not only the means for advancing them, but are themselves the object of the dispute for appropriation.

5.3 ICTs as means versus ICTs as spaces of power

By confronting the two approaches presented above, it is possible to conclude that defending the right to communication on the basis of freedom of expression, and considering ICTs as the means for exercising this right, presupposes, in Marshall's (1967) terms, an equality of status in a context of power inequality – an independent blogger complaining about a media group, for example, would express the full use of this freedom. But when one expands the debate, as some authors do, to question the ways in which ICTs are appropriated by users, as well as their degree of ability to use these technologies, one threatens the established social structure, entering into a dialogue with social rights and even progressing beyond them, if we consider that, historically, social rights have not been aimed at altering the social structure.⁵

In this sense, someone who learns how to use the new technologies in a critical and independent way may, depending on his degree of literacy, question standards and formats and create new solutions outside the market. There are no logical limits to its development. This observation shows how crucial are the arguments that, in the disputes over the meanings of digital inclusion, see ICTs as spaces of power and broaden the meaning of defending freedom of expression. Converting such ideas into public policies becomes, by this mode of argument, an even greater challenge.⁶

In this scenario, the debate leaves the exclusive field of civil rights, whose historic ideal is State abstention, to include the field of social rights, based on the expectation of active behavior by the State (MATTEUCCI, 2004). This has direct consequences on the disputes over public policy agenda-building and design that could arise from this scenario, as well as on which players that might be involved in them and which should be the goals of such activities.

We are not dealing only with enabling access to ICTs, but rather with providing it. In this case, the defense of ICTs as spaces of power can make room to the inclusion of independent access to ICTs and digital literacy for all citizens, in order to provide them with tools to appropriate the technology and exercise their civil rights in the context of their lives. Brought to the limit, this approach creates the conditions for advocating for digital literacy to be included in the school curriculum. This would be the crucial moment in which digital inclusion would reach the status of a social right. But there are various challenges to be overcome before this can happen.

6 Digital literacy as social right

6.1 *Why digital literacy*

We have seen that there is much literature arguing for and many movements and social organizations demanding an expansion of the concept of digital inclusion to include, at the infrastructure level, the guarantee of independent standards in the area of ICTs, and at the social level, autonomous individuals able to appropriate these resources.

This paper is aligned with such a view, but recognizes that the discussion is still limited to communities of cyber-activists and specialists, while most of the population is unaware of the conflicts over ICTs. This makes it difficult to increase pressure for effective public policies and regulatory frameworks dealing with these issues. We feel it is of fundamental importance that efforts to disseminate these issues be done via education, because we see it as the most consistent route, and with greater potential for transformation.

Digital literacy is not a meaningless neologism, but a concept with a history in the field of education. It enables one to foster discussion, in educational terms, of the complex world of new technologies, and to contribute to a society that is capable of both using the new ICTs and of thinking critically about the impacts they produce. In this way, its advocates aim to contribute to the formation of a society capable of building the conditions to reach “digital emancipation” of individuals (SCHWARTZ, 2006) and “autonomous digital inclusion” (SILVEIRA, 2008). Digital literacy can therefore be seen as a synthesizing element that brings with itself the environment best suited for its dissemination: schools.

Educating citizens for making use of ICT tools and developing themselves in their own particular roles should be the key to effective and permanent digital inclusion, viewing it from a rights-based, multidimensional perspective (MORI, 2011), with focus on the users. This education is necessary not only for exercising freedom on the Internet, but also for the autonomous development of individuals, as we have already discussed. It is also crucial for the social, economic, and democratic development of countries, which, when faced with technological changes, increasingly depend on citizens who can adequately use their ability to communicate, coexist, and appropriate the ICTs. Not focusing on this fertile public policy space could mean increased inequality between individuals and societies, within in a context in which the concept of citizenship is undergoing transformation.

6.2 *Digital literacy and citizenship*

The process of emergence of new rights is always surrounded by conflict in societies. Advocating for perspectives that motivate users of ICTs to be not only consumers of available information, but also producers of knowledge, endowed with criticality and autonomy, enters into direct conflict with the private territory of established media and large telecommunications corporations. As Peruzzo points out, “the possibility of the emergence of an unlimited number of ‘journalists’ arises, favoring alternative communications and the attainment of the right to communication” (PERUZZO, 2005, p. 281). The term “journalists”, in this case, refers to any member of the public who is willing to describe and discuss ideas and events independently. This predisposition is crucial, given that the interest of individuals and communities in digital media tends to increase by the extent to which they can find, through its use, information meaningful to their contexts (WARSCHAUER, 2006). The dilemma that arises from this expansion of the right to communication and production of knowledge cannot therefore be ignored. Bobbio summarizes it as follows:

One cannot affirm the existence of a new right in favor of a particular category of people without suppressing some old right, from which other categories of people benefited: recognition of the right not to be enslaved implies the elimination of the right to possess slaves; recognition of the right not to be tortured implies the suppression of the right to torture. [...] But, in most cases, the choice is dubious and needs to be motivated. This depends on the fact that both the right being affirmed and that which is being denied have good reasons behind them [...] The difficulty of choice is resolved with the introduction of limits to the extension of one of the two rights, in such a way that part of the other is also safeguarded.

(BOBBIO, 2004a, p. 14).

The author provides elements for a debate on the barriers that may arise when both the right to independent knowledge from new technologies and the right to ownership of the means of communication are considered legitimate by society. At its limit, this debate challenges the possible changes that the meaning of citizenship may undergo when societies face the appearance of new rights.

According to Marshall, citizenship can be understood as “[...] a status granted to those who are integral members of a community. All those possessing this status are equal in terms of the rights and obligations pertinent to the status” (MARSHALL, 1967, p. 76). The author continues:

There is no universal principle that determines what these rights and obligations will be, but societies in which citizenship is an institution under development create an image of an ideal citizenship in relation to which success can be measured and in relation to which aspiration can be directed.

(MARSHALL, 1967, p. 76).

Since there are no fundamental principles that define what these rights *should be*, citizenship is a social and historical construction, which means that what today

is considered a right could cease being so because of social, economic or political changes, among other reasons, since citizenship represents the ideals of societies, or what they wish to be. “What seems important in an historical era and in a certain civilization is not important in other eras or other cultures” (BOBBIO, 2004a, p. 13).

In this context, understanding the process of the emergence of social rights is of great value, and the construction of education as new field of State action in an advanced capitalist country is elucidating.

Until the beginning of the 20th century, in England, while social programs in were generally interpreted as attacks on freedom and civil rights and thus strongly opposed, education took a different route as a social policy because it was understood, even by liberals who supported a minimal State, as necessary for the development of society at the time. Thus the predominant view of “self-improvement” as a solely individual responsibility gave way to a perspective according to which it was a social duty, once it was understood that a fully-functioning society depended on the education of its members (MARSHALL, 1967). The construction of the discourse that inverted the predominant reasoning can be seen in the excerpt below:

The right to education is a genuine social right of citizenship, because the aim of education during childhood is to shape the future adult. Fundamentally it should be regarded, not as the right of the child to go to school, but as the right of the adult citizen to have been educated.

(MARSHALL, 1967, p. 73).

It is interesting to note that education, differently from previous social policies, was not expressed in opposition to civil rights, which at the time were only granted to citizens who knew how to read and write. Education, the first social right to be established in England, went from *bête noir* to promoter of civil freedom. In addition, the transformation of education into a right occurred with an eye to development: the State educates children because it needs educated adults. And it educates all children; education becomes a condition for the enjoyment of individual freedoms. It was thus that an area of individual responsibility was converted into a social duty.

We can say that digital literacy represents, in the twenty-first century, what the paradigm of education represented at the beginning of the twentieth century, since it links the skills needed to deal with the technological revolution and faces the dilemmas inherent to this paradigm. Warschauer (2006) argues that, while school literacy (education) was a pre-requisite for the participation of individuals in the first stages of capitalism, access to ICTs is a condition for participating in the information stage in which we currently find ourselves. A stage that, we must add, imposes new means and standards on the exercise of freedom of expression, a landmark of civil rights.

Despite the affinity among these paradigms, we cannot ignore that the mediation of the market, in the case of digital literacy, is imperative, and it is a great challenge to be overcome. Both proprietary hardware and software⁷ are goods that intermediate the relationship between the user and the world of digital knowledge, imposing constraints on the user’s autonomy. An elucidating example of this problem

is given by Silveira (2012) when he affirms that human memory is being “imprisoned” as more users of ICT save their information on digital media with proprietary software formats (languages). This means, he argues, that users can access their information only as long as the formats in which they were saved exist. Considering that proprietary software formats are closed and controlled by the companies that produce them, users’ digital memories are also under their control, and may become inaccessible at the mere whim of corporations.

This is just one example, which, added to the issues discussed above, allows us to observe the impact this could have on the formulation of public policies. If digital literacy is composed of gradations, as Warschauer (2006) explains in the context of access to ICTs, and does not consist of a relationship of opposition between literate and illiterate, then we can imagine that it must be easier to reach a consensus among society’s heterogeneous players about certain levels of literacy to the detriment of others. This means that a literacy level that expresses an individuals’ ability to operate on the labor market as a user of office software, for example, can be more easily granted the status of right – and, consequently, be more easily incorporated into a public policy agenda – than levels of literacy that enable an individual to challenge proprietary software closed formats, given that these would foster questioning of the social order established in the world of ICTs.

Debates such as this highlight the need to define digital literacy in operational terms as well as the importance of identifying literacy levels in order to insert of this theme into the agenda of citizenship and public policies. Obviously, this will not occur without conflict; but it will tend to become more concrete as the debate expands to a larger part of society.

6.3 A definition to operationalize the concept of digital literacy

In order to contribute to raising digital literacy from a particular concept in the field of education, concerned with issues still restricted to certain debate circles around digital inclusion, to a subject of broader discussion, we propose an operating definition for the concept. Rosa and Dias (2012) developed a definition of digital literacy based on the study of primary data and literature: “the condition that enables an individual to use information and communication technologies to serve the needs of his/her social milieu and to develop himself/herself autonomously in the information society” (ROSA; DIAS, 2012, p. 51). With an eye to the need to progress in the practical field, whether by creating a school curriculum or by producing an indicator to measure its progress, we suggest that this concept be operationalized through the conjunction of two complementary dimensions of functional skills that an individual must possess: technical-operational skills in ICTs and informational skills in ICTs.

Technical-operational skills are the knowledge necessary to be able to handle ICTs and their tools so as to carry out an activity in a digital environment. For example, if the activity is to communicate with another person virtually, via computer, the technical-operationally literate person must know how to switch on the equipment, use an internet browser, find the appropriate toolbar to type an

address, whether of a social network or an e-mail provider, access his account, type a message in the appropriate place, and send it. Successful accomplishment of these activities denotes a technical-operationally literate person suited to today's needs (ROSA; DIAS, 2012, p. 51).

Informational skills, on the other hand, imply: (a) an ability to handle and integrate information of different levels and formats in the digital environment so that they can be transformed into useful information suited to the intended purposes of the individual; (b) an ability to evaluate information and situations to which one is exposed while using ICTs; and (c) an ability to understand working patterns that allow one to autonomously develop oneself in this environment. To stay with the example of communication between people, an informationally-literate person must be able to use language in a way that suits the medium, so as to express him/herself according to expected norms in the activity being carried out, preparing their message with different language elements – not only textual, if necessary – and with awareness of the veracity and security of the information and the situation (ROSA; DIAS, 2012, p. 51).

However, a digitally literate person will not necessarily fully reach high levels in both dimensions. Some people may possess only some of the operating skills and a greater development of the informational skills, or vice-versa.

In all cases, the skills described only make sense in context, in situations that reproduce day-to-day problems encountered in various social spheres. They are thus less skills of dexterity and more problem-solving skills.

6.4 Next steps

As an expression of the recognition of digital literacy as social right, which must be assured through public policies, we are of the opinion that it is first necessary to establish which skills and social practices are needed in order to consider a person as digitally literate. These requirements must point to citizens who are able to use ICTs and are aware of the role and the power these have in society: “Nowadays everything is high-tech, wi-fi, internet, bluetooth, awesome / digital heat proximity, virtual contact / [...] / It's up to us to know where we stand / know how to use the means without letting the means use us” (EMICIDA, 2010). In Rosa and Dias (2012), we see a prototype developed for a framework of ICT skills and competencies aimed at creating a digital literacy indicator in Brazil. In this study, included in the technical-operational skills are the pillars of *recognition* and *use*, and, in the informational skills, the *photo-visual*, *reproduction*, *ramification*, *information*, and *social interaction* pillars with their descriptors,⁸ with room for expansion in the face of the preminent need to encourage the integral appropriation of ICTs by citizens.

Simultaneous to the definition of skills and practices, a dialogue should be opened and disseminated within schools – allowing for the content to be appropriated by teachers and educators – without differentiation of disciplines and focused on the first years of schooling. The dichotomy between school literacy and digital literacy must be overcome, and progress made toward an integrating perspective, involving the interaction of skills and knowledge.

Finally, the development of a pedagogical methodology to share and transmit this content is required. This is no small challenge, bearing in mind that the new generations' interest and desire for discovery about digital tools are not compatible with any of the traditional approaches to transmission of knowledge.

We recognize the challenge in operationalizing this task, considering the complex relationship between society, technology, and the market. As Buzato points out, technologies are not neutral instruments “whose social effects are totally conditioned by the ways in which they are used, or by the intentions of those by whom they are being used” (BUZATO, 2007, p. 39). We cannot fall into the determinist discourse according to which there is a correct way of using these tools or this knowledge, and that this use would naturally generate improvements in living conditions. This would be a “naïve idea about technology [...] which ignores the fact that all technologies reify visions of the world and meanings in the contexts in which they are created” (BUZATO, 2007, p. 40).

The defense of digital inclusion in the context of digital literacy therefore requires a critical eye if we are to avoid being seduced by a normative concept of literacy that does not respect individual and local realities, implying unbalanced power relations between those who define criteria and curriculum and those who have to respond to them. The author throws further light on this:

[...] a more suitable approach to the relationship between society, technology and culture regarding the issue of digital inclusion should assume that technologies, like language, both influence the contexts in which they arise (or are introduced), and have their meaning, their form and their function transformed in time and in space by the way in which they are practiced in heterogeneous contexts.

(BUZATO, 2007, p. 41).

Defining what citizens must learn in this context is a thorny subject. Nevertheless, the initial step must be taken, otherwise we will be ignoring the potential of new ICTs to reduce inequality and catalyze development, as well as the important distributive role of the State. Qualifying the way it is used and placing the focus on the users is essential, but this is still far from implying a consensus.

7 Final considerations

In light of the discussion proposed here, we understand that, at the actual stage of ICT development, it is not enough to discuss digital inclusion without pressuring for a broader meaning of citizenship. In considering the challenges to social development in terms of the relationship between society, technology and the market, digital literacy stands out as the most essential among multiple approaches to digital inclusion, as its features tend to make a stronger contribution towards overcoming these obstacles and attaining the emancipation of individuals, especially when compared to other approaches for accessing and learning how to use ICTs.

Nevertheless, the elevation of digital literacy to the status of a right in a political arena, with heterogeneous players and various interests, will certainly require

negotiations in terms of the levels of knowledge that are to be attained by individuals. There is evidence that, in the field of struggles for rights, the emancipatory knowledge defended by cyber-activists is not the same that is desired by corporations acting to gain new customers. The consequences of this clash are unpredictable.

We need, at any rate, to broaden this discussion beyond the arena of specialists in order to promote widespread awareness of the potential of these new technologies, preventing citizens from reacting passively, as has historically happened in the development of traditional media.

Due to its great importance, digital literacy is a necessary condition for strengthening education and development in today's society. It would be a mistake to continue ignoring it in the public policy sphere.

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NOTES

1. For details, log on to Dados do mundo at <<http://www.ibge.gov.br/paisesat/>>. Last accessed on: 30 Apr. 2013.
2. For more details, log on to <<http://ctcnet.org/>> and <<http://www.inclusaodigital.gov.br/telecentros>>. Last accessed on: 30 Apr. 2013.
3. We refer here to the classic definitions of Marshall (1967). The author considers that citizenship is a composition of three parts: civil, political and social rights. The civil right groups together the rights needed for individual freedom, such as freedom to come and go, freedom of the press, thinking and faith, the right to property and the right to justice. The political right is composed of the right to participate in the exercise of political power, whether as a member of a political body or as a voter. Finally, the social right groups together rights ranging from the right to the minimum of economic wellbeing and security to the right to take part fully in the social sphere and live the life of a civilized being in accordance with the society's prevailing standards (MARSHALL, 1967, p. 63-64).
4. More information can be found at: <<http://www.crisinfo.org/>>. Last accessed on: 17 Mar. 2013.
5. For Marshall, as social class awareness develops, the most unpleasant signs of inequality are transformed into something making society uncomfortable. With social rights, better conditions are sought for those who are at the base of the pyramid without, however, altering its structure. Social rights mean, therefore, the right to equality of opportunity, "the equal right to be seen as unequal" (MARSHALL, 1967, p. 101).
6. This fact does not remove the importance of the struggle for freedom of expression as a civil right, which continues to be complex. The organization Article 19 (2012) (www.artigo19.org) reports cases of reclusion and attacks on life, among other situations of violence that members of the public have suffered for having tried to express themselves freely on the web.
7. Proprietary software are programs produced by companies that maintain under their ownership the source-code of the former and charge for their use, normally by the purchase of a license package. Free Software, on the other hand, have open source-codes and cooperative construction, normally involving communities of developers.
8. The pillars of informational skills benefit widely from the composed model of digital literacy proposed by Eshet-Alkalai (2008).

RESUMO

Este estudo tem como principal objetivo abordar a área de inclusão digital como um campo de ação do Estado e de políticas públicas, imersa numa pluralidade de concepções e num espaço de disputa por seus significados. Para isso, examinamos alguns sentidos dados à inclusão digital e os dilemas que deles advêm para a formulação de políticas públicas, tendo como referência as discussões presentes na literatura de direitos humanos e a compreensão do direito à comunicação como uma das faces dessa temática. Defende-se a importância de abordar a inclusão digital como um direito social, a partir do diálogo com a Educação e do conceito de letramento digital, o qual implica um olhar muito além do acesso às TIC e pressupõe a definição das habilidades e práticas sociais necessárias no atual estágio informacional da sociedade, para que sejam foco de novas políticas públicas.

PALAVRAS-CHAVE

Inclusão digital – TIC – Direitos humanos – Políticas públicas – Letramento digital

RESUMEN

El objetivo de este estudio es abordar el área de la inclusión digital como un campo de acción perteneciente al Estado y a las políticas públicas, inmersa en una pluralidad de concepciones y en un espacio de disputa por sus significados. Para ello, examinamos algunos sentidos dados a la inclusión digital y los dilemas que surgen a partir de ellos para la formulación de políticas públicas, utilizando como referencia las discusiones presentes en la bibliografía de derechos humanos y la comprensión del derecho a la comunicación como una de las vertientes de esa temática. Se defiende la importancia de abordar la inclusión digital como un derecho social, a partir del diálogo con la Educación y con el concepto de literacidad digital, lo que implica una mirada que va más allá del acceso a las TIC y presupone la definición de las habilidades y prácticas sociales necesarias en la actual etapa informática de la sociedad, para que se conviertan en el eje de nuevas políticas públicas.

PALABRAS CLAVES

Inclusión digital – TIC – Derechos humanos – Políticas públicas – Literacidad digital



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ABSTRACT

The article analyzes how production of and access to information form part of the process of developing and using human rights indicators, particularly in terms of their integration into the mechanism recently created in the Inter-American human rights system that corresponds to States Parties' reporting obligations in light of Article 19 of the Protocol of San Salvador. Next, the article analyzes the adopted indicators, the categories and crosscutting principles that complement the system of indicators, and how the standard of production of and access to information operates within that context. Finally, taking into account the principles of the interdependence, universality, and indivisibility of human rights, it identifies ways to strengthen and achieve a robust institution framework for economic, social and cultural rights (ESCR).

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KEYWORDS

Access to information – Indicators – Economic, social and cultural rights



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MONITORING ACCESS TO INFORMATION FROM THE PERSPECTIVE OF HUMAN RIGHTS INDICATORS

Laura Pautassi

1 Introduction

The first decade of the twenty-first century has seen numerous advances in the development of instruments that can assess the degree to which States are complying with human rights law. While there is consensus that the “full realization of a human right” exists insofar as effective mechanisms—be they administrative, judicial, or quasi-judicial—are available so that every person can demand respect for, protection, and effectiveness of a right, whether it be a civil or political right (CPR) or an economic, social, or cultural right (ESCR), the debate is over how to measure compliance or a decline in compliance.

The full realization of rights is therefore linked to a State’s compliance with negative and positive obligations, and this generates tension, especially in terms of agreeing to the parameters that will be used to determine the degree of compliance with obligations that need to be fulfilled in order to achieve full realization of the right. And that is where defining standards to interpret the scope of each right, from which levels of compliance with those obligations can be determined, in turn enables the development of indicators to measure a State’s compliance.

The standards, which are fundamental declarations about the desired result—based on an interpretation of a human rights treaty or a national constitution—are not designed to be directly verified (ABRAMOVICH, 2007). The definition of each standard includes the conditions necessary to be able to apply the obligations contained within the right; indicators are thus an indispensable tool by which to empirically reflect a State’s compliance with its obligations. In other words, human rights indicators are measurement tools—both quantitative and qualitative—that reflect the efforts undertaken by a State to fulfil human rights.

Conceptually and methodologically, defining human rights indicators

Notes to this text start on page 71.

starts with identifying the dimensions of different human rights, which are then translated into categories and variables that may be observed. However, because these deal with human rights, there are certain complexities, which are even more visible when it comes to ESCR because they contain obligations to act, with goals and results to achieve. This differentiates them from social indicators, because those identify—and quantify—a phenomenon in and of itself, and establish scales, behaviors, indices, and variables related to that phenomenon, with some interrelationships between the relevant areas (education, health, work, welfare), whereas human rights indicators, conceptually speaking, arise from the principle of the interdependence, indivisibility, and universality of human rights¹ such that they not only quantify but also qualify the behavior of States and establish relationships between civil and political rights and progress made in fulfilling ESCR. All three types of rights are characterized by comprehensiveness, which covers State responsibility in the three branches of government: executive, legislative, and judicial. This difference between socioeconomic indicators and human rights indicators applies in turn to the instruments of measurement: the former measure the degree of development achieved, whereas the latter measure whether progress has indeed been made.

In light of the obligations assumed by the States in terms of ESCR, not only with regard to the International Covenant on Economic, Social and Cultural Rights (ICESCR) and its Optional Protocol, but also with regard to the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (“Protocol of San Salvador”, or PSS), and in other human rights instruments, it has become necessary to have instruments to evaluate state conduct. In fact, the definition and use of indicators is not only a useful tool, but also an unavoidable obligation, especially if the goal is adequate supervision and monitoring of compliance with the obligations set forth in instruments ratified by the States.

What was stated earlier by way of introduction is also linked to a fundamental precondition for the use of indicators as a method to oversee compliance with human rights: the production of information. And the availability of that information, which includes the production and dissemination of public information, in turn requires efforts by the State to generate sources that will allow the use of indicators, because this is part of a State’s obligation to inform, both at the request of its citizens and before the international bodies that have the mandate to review periodic reports. In other words, it is a positive obligation of the State, and it will be analyzed as a crosscutting category of compliance with rights. However, while there has been significant progress in developing statistical systems and other public information sources, there is still a major deficit in most Latin American countries.

As demonstrated throughout this article, the production of and access to information forms part of the process of developing and using human rights indicators. Moreover, this obligation has been included in a mechanism recently created in the Inter-American System of Human Rights (IASHR), which corresponds to States’ reporting obligations under Article 19 of the Protocol of

San Salvador, about the measures taken to fulfill ESCRs. I refer specifically to the indicators that were approved to measure the obligations established in that instrument, which aim to evaluate the degree of compliance with a first grouping of rights (right to health, to social security, to education) (ORGANIZACIÓN DE ESTADOS AMERICANOS, 2011).

Given the importance of the Protocol of San Salvador, since it is the primary instrument of social rights within the Inter-American system, what follows is an analysis of the type of indicator definitions that have been adopted to measure the rights in question, and the categories and cross-cutting principles incorporated in that system of indicators, which is the way to monitor compliance with state obligations. In that context, the standard of production and access to information is central, and will be analyzed and highlighted throughout the article, in order to ultimately suggest ways to guarantee the right of access to public information.

2 ESCR and keys for measurement

The definition of human rights indicators, particularly those for ESCR, is founded on – and justified by – several bases, both conceptual and empirical. First, and directly linked to the very definition of ESCR, are both the text of the ICESCR, with the interpretations adopted by the international monitoring body—the Committee on Economic, Social and Cultural Rights (CESCR)²—and the Protocol of San Salvador (PSS), with the Working Group that serves as a regional monitoring body to analyze the national reports provided for in the PSS (WG).

In both of them, it is established that States commit to undertaking the measures necessary to fulfill the content of the rights to the maximum of their available resources, and taking into account their degree of development, for the purpose of achieving progressively and pursuant to their internal legislations, the full observance of the rights (COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, 1999, art. 1³). That is to say, the need for measurement is established under the unavoidable premise that the satisfaction of ESCR is only achieved in the long term because, in order to measure the obligation to make progress and the ban on backsliding, it is necessary to measure the scope of the right (for example, coverage of the education sector) in comparison to earlier and later levels of coverage, and with results (using the same example, the percentage enrolled in school, and those who complete primary school, disaggregated by sex, ethnicity, and geographic zone; and the illiteracy rate among those over age 15, by sex, ethnicity, age group, geographic area).

Thus, the indicators that are chosen must be appropriate to be able to capture that dynamic process, which means having elements that allow one to measure whether progress was made or whether there was a decline relative to a previous situation or exercise of rights.

In the case of the Protocol of San Salvador, which entered into effect on November 16, 1999,⁴ it incorporated a list of ESCR in the regional human rights structure, while also setting up two mechanisms to oversee compliance: it established a system to receive individual complaints of alleged violations of

the right to freedom of association (article 8.1) and education (article 13), and it established a second mechanism that consisted of a system of periodic reports on the progressive measures that States have adopted to ensure respect for the rights established therein (article 19 PSS).

However, the delay between the passage of the Protocol and its entry into force meant that it did not get the necessary push to be able to initiate appropriate monitoring in a timely manner; the OAS General Assembly did not approve the “Standards for the preparation of the periodic reports pursuant to the Protocol of San Salvador” until 2005 (ORGANIZACIÓN DE LOS ESTADOS AMERICANOS, 2005). These standards established the use of periodic reports from State Parties, containing progress indicators, as a way to verify compliance with the obligations set forth in the PSS. However, the General Assembly decided that the reporting would not start until a Working Group (hereafter referred to as WG) was established—and its composition agreed—to analyze these periodic reports, and also determined that the same body would approve the progress indicators against which the State Parties should report. Consequently, and for that purpose, it mandated that the Inter-American Commission on Human Rights (IACHR) propose indicators for evaluating the reports of the States.

In 2007, the IACHR presented the document “Guidelines for preparation of progress indicators in the area of economic, social, and cultural rights” (COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, 2008) where, in contrast to other international monitoring mechanisms that have adopted indicators (NACIONES UNIDAS, 2008 y 2006), the proposal combined progress indicators—that use qualitative indicators of progress—with crosscutting categories that pertain to all rights, and then applied them to two rights: social security and health. At the same time, adopting a human rights perspective, it established a link between commitments made by the States in the human rights instruments and internal public policies. This, was well received by different human rights advocates, academics, and specialized agencies, and it became the main regional basis for progress indicators.⁵

In parallel, the Group’s members were appointed and, in May 2010, the General Assembly decided that it was operational and commissioned the drafting of a new proposal for process indicators, based on the Standards (ORGANIZACIÓN DE LOS ESTADOS AMERICANOS, 2005) and the IACHR document (2008). The WG divided the different rights in the Protocol into two groupings; a first includes the right to health (art. 10, PSS), social security (art. 9, PSS) and education (art. 13 PSS), and for these, indicators were established in an initial document, postponing indicators for a second grouping comprised of the right to work and trade union rights (art. 6; 7 and 8 PSS), the right to adequate nutrition (art. 12 PSS), the right to a healthy environment (art. 11 PSS) and the right to the benefits of culture (art. 14 PSS).⁶ The WG also determined that each grouping of rights, and each right itself, should consider gender equality, the specific rights of boys, girls, and adolescents, the elderly, persons with disabilities, ethnic and cultural diversity, and the involvement of civil society organizations in the formulation of legislative proposals and public policies, which correspond to the other rights established by the Protocol (articles 15 to 18). Thus, the WG offers States a gradual

but comprehensive process for defining indicators for all of the obligations in the Protocol, and facilitates dialogue and the participation of a range of government and social actors, as well as organizations and the general public.

The Group then drafted an initial document that was released for open consultation for about six months, so that States, civil society, different United Nations organizations, universities, social organizations, unions, women's organizations, indigenous groups, communities of African descent, academics, and other interested parties could submit comments. After receiving a number of comments and statements of support, the WG incorporated many of the suggestions and contributions, and drafted the final document, "Progress indicators for measuring rights under the Protocol of San Salvador" (ORGANIZACIÓN DE LOS ESTADOS AMERICANOS, 2011), which was submitted in December 2011 for approval by the General Assembly. The resolution approving the document was presented by Argentina and co-sponsored by Peru, and submitted for final approval by the OAS General Assembly in the XLII ordinary session held in Cochabamba, Bolivia in June 2012 (ORGANIZACIÓN DE LOS ESTADOS AMERICANOS, 2012). In that resolution, the countries in the region adopted the document and pledged to submit the first national progress report in June 2014.

It is worth highlighting the significance of this event: that a system of progress indicators was approved in the plenary, operationalizing article 19 of the Protocol. This launched a new mechanism with significant potential, both for States and for civil society, to jointly advance the Inter-American system's ability to measure compliance with ESCR. And this is a mechanism not limited to measurement. Rather, it questions and motivates reviews of the way in which public policies are implemented in all arenas of state action. And in this mechanism, as described below, access to information is key to promoting the good performance of the monitoring system, and also to accountability.

On the other hand, we are facing a field which is still under construction, because, as has been stated already, while there are valuable precedents of indicator systems taking hold in the universal human rights system, in the European Union (HOHNERLEIN, 2010) and in the Inter-American system the challenge is to empower and flesh out these measurement systems and to incorporate new instruments for measuring rights.

At the same time, it has been established that the reports should be prepared through a participatory dialogue with different sectors of civil society (principle of participation) in a complementary way that does not replicate the reports drafted for other human rights protection mechanisms (principle of complementarity). Meanwhile, information about indicators, rights, and reports should be broadly and publically accessible; information about rights will be assumed to be public (principle of publicity) and should be relevant and accurate, avoiding generalizations or confusion with progress indicators or economic development indicators. These principles are strengthened under the premise of respect to the freedom of sovereign States' to choose the means and policies they will use to comply with the obligations assumed in the Protocol (degree of discretion).

3 Qualitative indicators and signs of progress: new keys to interpretation

A first thing to highlight is that the measurement of the implementation of rights implies a *process*, which begins when States develop goals and objectives for development and for compliance with the ESCR that they have ascribed to, both constitutionally and in the Protocol, together with and with the participation of the intended beneficiaries of the social rights (PAUTASSI, 2010). This process is constantly demanded by civil society organizations, particularly human rights organizations and various organizations that specialize in social rights,⁷ who regularly insist on participatory mechanisms and channels, and seek methodologies to exert citizen control over state action (CECCHINI, 2010). In other cases, indicators are set because of a court ruling, as was the case when the Colombian Constitutional Court, noting that the government had not provided sufficient resources nor generated public policies to defend the rights of forcibly displaced persons, ordered that it present detailed information on the policies developed for that vulnerable group, including the rights to food, health, education, freedom and security (UPRIMNY; SANCHEZ, 2010). The highest court asked that comparable indicators be defined to allow verification of the degree of compliance, and to guarantee a culture of accountability.

In fact, indicators are a useful way to articulate and process complaints and claims against the guarantors of rights, but also to formulate public policies and programs that facilitate the effective realization of human rights (NACIONES UNIDAS, 2012). In that sense, the purpose of indicators is to strengthen processes within the States, and thereby overcome the idea of a simple progress report, so that it becomes a useful methodology for the ongoing design and evaluation of public policies, seeking to ensure compliance with all economic, social and cultural rights. The system recently developed in the IAHRs does not promote comparison between States, nor does it aspire to rank their compliance but rather to evaluate each national process separately.

Therefore, the challenge and the opportunity presented by the indicator system is that it does not represent a mere formality regarding compliance with international commitments, but instead is an extremely useful tool for the implementation of a human rights focus, which is already in place in the region—at least in theory—both in terms of internal public policies and in terms of the effective fulfillment of social rights (ABRAMOVICH, 2006). It is also necessary for States to provide certain guarantees upon starting a political dialogue with civil society organizations in the context of this process. In other words, States must inform the channels they will adopt, the indicators that will be used at the start of the dialogue and its subsequent development. In addition, it is important to clarify how each state that ratified the Protocol will widely publicize the process of defining and calculating indicators.

Indicators are quantitative parameters or units of measure that can be achieved and verified in relation to a criterion; in this case, the criterion is defined in relation to the provisions set forth in the Protocol of San Salvador. Unlike the indicators used in the social sciences, indicators used to measure human rights are able to evaluate and quantify the degree of compliance with those obligations defined by the

regulations and standards that arise from the official interpretation of those standards (ABRAMOVICH, 2007). Specifically, rights indicators respond to the normative content of these regulations and standards and to the correlative obligations of States as derived from international human rights standards.

In turn, the interpretive bodies authorized by the Conventions, in this case the PSS Working Group, define the indicators based on an interpretation of the obligations found in the Protocol. But not exclusively so—they are also based on standards previously set by other bodies, like the Committee of the ICESCR, which are an unavoidable reference as regards the interpretation—and specification—of the scope of the obligations contained in each of the ESCR.

The opportunity and the challenge lies in how the body of human rights material allows for the construction of units of measure—both quantitative and qualitative—that are appropriate for evaluating the fulfillment of social rights. The common temptation is to turn to existing socioeconomic development indicators, which are quite useful for measuring a country's development but do not measure compliance with rights. At the same time, many countries in the region have major shortcomings when it comes to the production of statistical information, both in terms of infrastructure and trained staff and in terms of human rights expertise. This, among other reasons, limits the availability of information that can be used to measure a broad set of state obligations, adding further complexity to an already complex system.

Thus, it is critical that States take seriously the importance of promoting the incorporation of a human rights focus into the production of statistical information, qualitative information, and every other information source recognized by established validation mechanisms. That is how the indicators can operationalize the content of ESCRs. Of course, there is no single simple formula to explicitly reflect those norms and crosscutting principles in the selection of indicators (NACIONES UNIDAS, 2012).

The following section schematically analyzes the indicators and signs of progress proposed by the PSS WG to measure progressive compliance with the rights to health, social security, and education.

3.1 Progress indicators: beyond progressivity

For each right that falls under each of the groupings into which the rights addressed by the Protocol are divided, the WG proposes that States organize the required information under a model composed of three types of quantitative indicators (structural, process, and outcome indicators) and also qualitative signs of progress⁸. The latter are qualitative parameters or units of measure that can be achieved and verified in relation to a criterion. Their distinctive characteristic is that they capture the definition of the situation that the social actor himself creates, and the meaning that he or she gives to the evaluated phenomenon. Signs of progress, therefore, become key to interpreting the facts. Their purpose is precisely to reflect the progressive changes up to the desired point (objective) and keep track of achievements that contribute to that objective (EARL; CARDEN; SMUTYLO, 2002), without being limited to a predetermined category or an existing (statistical) scale

of measurement. They also allow for the participation of rights bearers and the intended beneficiaries of state policies, and bring in a new way to guarantee citizen participation. By combining the two—indicators and signs of progress—one can determine the degree of compliance with each right.

The *structural* indicators identify the mechanisms that the State has in place to implement the rights in the Protocol; in other words, they collect information in order to evaluate how the State's institutional apparatus and legal system are organized to perform the obligations under the Protocol. They also consider whether measures, legal standards, programs or policies exist or have been adopted, or whether public agencies have been created in order to implement those rights.

Process indicators seek to measure the quality and extent of a State's efforts to implement rights, by measuring the coverage and content of specific strategies, programs, or policies aimed at achieving objectives that correspond to the realization of a particular right. These indicators help to directly monitor the application of public policies, and in many cases they can provide information on changes in the quality or coverage of social programs during a given time period, and translate that into figures or percentages, which makes them more dynamic and evolutionary than structural indicators.

Finally, *outcome* indicators seek to measure the impact of government strategies and interventions, indicating how those government activities impact the aspects that define the effectiveness of a right in the Protocol, and provide a quantitatively verifiable and comparable measurement of the state's actions in terms of the progressive realization of rights.

In turn, the WG (ORGANIZACIÓN DE LOS ESTADOS AMERICANOS, 2011) proposes to organize indicators into three conceptual categories:

- a. **Incorporation of the right:** in the legal system, and guarantees established by the States,
- b. **Financial context and budgetary commitment:** referring to the availability of state resources for public social spending, and how it is distributed.
- c. **State or institutional capabilities:** that describe the technical-instrumental and distributive aspects of resources within the State apparatus (administrative, technical, political, and institutional capabilities). In other words, it means analyzing under what parameters the State, through its different local and regional branches, deals with a set of social questions. Using state capacity as a category entails reviewing the rules of play within the state apparatus, interagency relations, financial commitments, the division of tasks, and the staff needed to carry out those tasks. Putting social rights into effect depends, among other things, on the capacity of institutional bodies (judicial branches, public ministries, administrative and executive branch agencies, and legislative bodies) to provide the necessary goods, services, and regulations. This category is key, because rights are only realized through the joint action of the state's institutional framework, with various public agencies making their contributions to the achievement of the desired result (ALONSO, 2007).

These categories in turn are complemented by crosscutting human rights norms that apply to all of the rights in the Protocol, and that seek to determine whether the conditions exist in each of the States for people to effectively exercise social rights through the free operation of institutions and deliberative democratic processes. A crosscutting norm can also be considered a “procedural right” that connects to the fulfillment of a given “substantive right” and is therefore defined as corresponding to that right (NACIONES UNIDAS, 2012). As an example, the right of access to information in the context of the substantive right to health can be measured using an indicator like “percentage of health facilities that have in place confidentiality protocols for health information” (process indicator); or, for the right to education, a crosscutting indicator related to access to information could be “mechanisms established to disseminate and increase access to educational statistics and databases” (ORGANIZACIÓN DE ESTADOS AMERICANOS, 2011).

The three crosscutting issues that were defined for the national reports on compliance with the obligations of the protocol of San Salvador are:

- i. **Equality and non-discrimination:** this is an obligation with “immediate effect” arising from ESCR; States are required to guarantee that all of the rights are exercised in conditions of equality and without discrimination, and do everything they can to prevent differential treatment based on factors that are expressly prohibited in the PSS.
- ii. **Access to justice:** broadly interpreted, this includes the examination of the legal and factual possibility of access to administrative and legal demand and protection mechanisms. It involves ascertaining whether the State has provided necessary and sufficient means and mechanisms for people to lodge complaints and file claims and lawsuits, and whether it has guaranteed the means to monitor the process through to the execution and implementation of the ruling.
- iii. **Access to information and political participation:** understood as a key tool for public participation and democratic safeguards, as well as for accountability (horizontal and vertical responsibility) in public policies that implement the rights enshrined in the Protocol. It has to do with States’ obligation to produce—under internationally validated criteria—a sufficient quantity of high quality information, and to guarantee free and public access to anyone who needs it.

These crosscutting themes and categories will be incorporated into a matrix or a set of tables that includes progress indicators for each right as developed by the PSS WG. In accordance with the OAS General Assembly resolution that approved the indicators for the first grouping of rights, indicators are approved with the “...understanding that these are guidelines and criteria for the States parties, who will be able to adapt them to the sources of information available to them in order to comply with the provisions of the Protocol” (ORGANIZACIÓN DE LOS ESTADOS AMERICANOS, 2012, consid. 2).

Similarly, it ordered the States to submit their first reports two years after the aforementioned document was approved, anticipated in June 2014. Within 90 days

after receiving the report from the State Party, the WG will send its remarks and recommendations to the State Party (preliminary conclusions). Subsequently, the State can comment on those preliminary conclusions, and a date will then be set for a public session between the State representative. Civil society and specialized organizations can submit information to the WG, and may participate in the public hearings that the Group convenes. Later, and within 90 days after the session with the State Party, the WG will issue its final conclusions, which must be adopted by consensus, and shall notify the State Party in writing (ORGANIZACIÓN DE ESTADOS AMERICANOS, 2011).

That is as far as the guidelines go in the WG's Indicators Document. But, in order to start the process described throughout this article, it is critical to immediately begin strengthening the capacity of States to produce and disseminate information.

4 Mainstreaming and access to information

As I have emphasized, one of the special characteristics of how indicators are defined in the IAHRIS is the explicit link made between public policies and instruments for measuring human rights. Institutional categories are defined specifically to untangle potential knots that could impede progress in implementing ESCR, which not only puts attention on the political will of governments, but also examines whether effective conditions are in place to be able to implement a development plan that respects all human rights.

At all times, we seek to relate the standards in the Protocol—as well as those in other human rights instruments—to the interagency relationships that exist within the State, to financial capacity and current budgetary commitments, and to the availability of staff to carry forward the process of incorporating a human rights focus that enables the fulfillment of each social right in the Protocol. For example, a structural indicator of state capacity is the existence of measures and actions such as social policies that aim to eradicate political clientelism, which itself is not just a measure of state corruption and a lack of transparency, but also violates the principles of equality and non-discrimination. Similarly, a process indicator of state capacity is the number of complaints that have been received and resolved regarding corruption in access to social plans and programs. In other words, indicators refer to the standards, and the standards refer to the norms in the Protocol; and once indicators are put into place, they provide information on how much progress has been made—or how much backsliding has occurred—in fulfilling rights.⁹

Thus, it is critical to have adequate, accessible, and high quality information in sufficient quantities so as to supply the essential elements for evaluating and then monitoring compliance with State obligations.¹⁰ But of course, for monitoring as well as for drafting and designing public policies, it is necessary to have data and empirical evidence, because these are key inputs for the design of any policy. In other words, it is impossible to even think about developing a policy without having access to sufficient quality information, because without empirical data, one cannot reliably know what the situation or field of intervention is that the future policy seeks to affect.

But, in addition to the diagnostic stage prior to policy formulation, information is also essential for the entire implementation process, and for the process of evaluating

and measuring impact and progress. The evaluation process may be carried out in technical ways, applying various methodological tools aimed at measuring the impact of public policies (ex ante, ex post, and results assessments, among others) in response to the demands and complaints related to verifying the results of public policies, in the context of citizen oversight and monitoring, and civil society transparency and control processes¹¹. Likewise, it is important to connect the production of information to societal demands for accountability and to any legitimate inquiry about policy outcomes, which requires going beyond averages and indices, and disaggregating information at the levels of populations, territories, gender, and ethnicity, in order to shed light on the impacts of public policies (PAUTASSI, 2010).

Accordingly, the countries in the region have undertaken efforts to develop their statistical systems, which have had diverse and varying levels of development; some are more comprehensive than others, some include gender indicators, and others include data that allowed for review of the living conditions of indigenous communities or communities of African descent, and with relatively less qualitative information. However, it is interesting to note that the States have gradually incorporated some mechanisms to collect and use qualitative information, particularly studies of public perception and social service satisfaction surveys, among other things (CECCHINI, 2010).

Indeed, from a perspective of economic, social, and cultural rights, the right of access to information has been enshrined in the American Convention on Human Rights (ORGANIZACIÓN DE LOS ESTADOS AMERICANOS, 1978, art. 13), in the International Covenant on Civil and Political Rights (NACIONES UNIDAS, 1966, art. 19) and in the Universal Declaration of Human Rights (NACIONES UNIDAS, 1948, art. 19). Furthermore, access to and production of information is part of a standard that takes note of the commitments made by States in terms of carrying out and enforcing the obligations related to each right.

Under the principle of the interdependence of human rights, and to the extent that freedom of expression is an essential prerequisite for every democracy, awareness and dissemination of matters of public interest is critical in order for the citizenry to have the ability to know everything concerning the management of public affairs. The Inter-American Court of Human Rights has said as much, adopting the protection and promotion of a broad concept of freedom of expression, and maintaining that it is a cornerstone for the very existence of a democratic society. It is, in short, a precondition for a community to be sufficiently informed when they exercise their options, and it is indispensable for the formation of public opinion.¹²

The extension of the right to information presupposes the existence of two complementary and inter-dependent factors: i) the right to freely express oneself, and thereby share information, and ii) the right to be informed, which is both the freedom to express ideas and the freedom to receive them. The right to information, as a fundamental right, not only protects the person who shares the information, but rather protects just as strongly the right to receive the information. Only by comprehensively protecting both aspects of communication can the right—and the proper functioning of a democratic system—be guaranteed.

At the same time, the right to receive information can be exercised by citizens in two ways: first, through active behavior, seeking information, investigating, obtaining

access to public or private sources of information; or, second, by acting as a passive subject, waiting for the information, with the right to receive information from those who inform or opine, freely choosing the data and ideas that are of interest.

Meanwhile, the Office of the Special Rapporteur for Freedom of Expression at the Inter-American Commission for Human Rights has determined that Article 13 of the American Convention provides the parameters according to which States should adjust their laws regarding access to information. It establishes that the right to access should be guaranteed by the States, without restriction except in cases that should be examined using strict criteria. Confidentiality is an exception to the rule of publicizing public information, and it should be interpreted strictly. But the interpretation goes even further, by assuming that the state is not only obligated to respect the right by allowing access to archives and databases, but that it also has a positive obligation to produce information under certain circumstances, like in situations where the obligation to produce information is linked to the exercise of rights by persons who have been historically excluded or discriminated against, or in order to be able effectively combat the causes of violations of rights. This is indicated, for example, by the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (Belém do Pará) (COMISIÓN INTERAMERICANA DE DERECHOS HUMANOS, 1995) which established the obligation of States to “ensure research and the gathering of statistics and other relevant information relating to the causes, consequences, and frequency of violence against women, in order to assess the effectiveness of measures to prevent, punish and eliminate violence against women and to formulate and implement the necessary changes” (article 8h). This requirement to produce information is clearly enforceable as a right.

The IACHR has also indicated that States’ obligation to establish legal arrangements that protect the exercise of the right to information should, at a minimum, include the following content: they must (1) always use as a foundation the principle of maximum disclosure; (2) presume openness regarding meetings and key documents; (3) have broad definitions of the type of information that is accessible, short deadlines and reasonable costs; (4) provide for independent review of denials of requests for information and appeals; (5) have penalties for failure to provide the requested information; and, (6) establish an appropriate procedure for determining exceptions to access.¹³

Accordingly, the right to information applies to the production and dissemination of official statistics, whether those are produced with available administrative records or with more complex statistical tools; in any case, the central role of statistics and other databases is vital to guarantee this right (NACIONES UNIDAS, 2012). The Fundamental Principles of Official Statistics adopted in 1994 by the United Nations Statistical Commission highlighted the obligation of official statistical systems to fulfill people’s right to information, an obligation that applies to public institutions which should share specialized information that is of public interest, while citizens have the corresponding right to request that information. Meanwhile, the third principle States that official statistics should also facilitate a correct interpretation of the data and present information according to scientific standards on the sources, methods and procedures used (NACIONES UNIDAS, 2012).

Given how important it is to a country's institutional functioning that its citizenry be duly informed using information of sufficient quality, quantity, and availability, the right to information firmly guarantees the right of an individual to receive the messages that a third party wants to share; the right also implies that the State and third parties are prohibited from unduly interfering in that communication, and that there is a right to obtain the information necessary to assess authorities' performance and the fulfillment of national goals. For this reason, the ability of a citizen to access the information contained in State files, statistics, or records is a sign of the extent to which he or she has the right to participate in government affairs.

Consideration of the right of access to information has not been ignored by the ICESCR Committee, which, through its observations, has clarified States' obligations to effectively monitor or supervise the degree of effectiveness of ESCR in direct connection with the right to information. In this way, it has indicated that the production of information is a prerequisite for such monitoring, and has mandated that States should reveal information and guarantee access to it, in various fields. Finally, it has established the obligation to develop an action plan or a strategy for making progress in realizing rights. The obligations to monitor, gather information, and prepare an action plan for progressive implementation are immediate steps that are extendible to all of the rights in the agreement.¹⁴ Therefore, limited resources cannot be used as an excuse for noncompliance, which again shows the importance of social rights standards for making progress on the enforceability of rights.

In recent years, progress has also been made in creating observatories to disseminate information linked to civil society complaints,¹⁵ or information generated by specialized United Nations bodies.¹⁶ These observatories focus on issues related to gender, poverty, the environment, children's rights, legal decisions, and other topics, and they play an important role in bringing together demands for access to information with activities to audit and verify compliance with government obligations.¹⁷

In sum, and for the measurement purposes promoted by the indicator system in the Protocol of San Salvador, for each right the States will be required to report—always in a crosscutting manner—on how they guarantee access to information and on how they are making progress in developing and providing sources of information. For example, in the health arena, the structural indicator would be the characteristics, coverage (geographic and thematic), budget, and jurisdiction of the health statistics system, and the States would be asked to report on the frequency and ways in which the information is updated. In terms of process indicators, the States would be asked to report on the coverage of information campaigns, actions, and awareness programs about the effects of alcohol, smoking, and other drug use. Finally, for the result indicator, the States would calculate the percentage of children born with congenital defects as a result of alcohol consumption or drug use; and for a qualitative sign of progress, the States would be required to report on the characteristics and coverage of the media that disseminates information about the rights people have with regard to health care (ORGANIZACIÓN DE LOS ESTADOS AMERICANOS, 2011).

Lastly, it should be emphasized again that international monitoring, accountability, and citizen audits alone are insufficient to achieve transformation in how public policies are designed and implemented; rather, it requires effective

transformation in order to fully incorporate a human rights perspective. As Yamin (2010) States, the crucial point for the recognition and guarantee of rights is their legally binding nature—both internationally and domestically—which makes it necessary to translate the strong normative human rights discourse into concrete tools for action and for the provision of rights by all those involved (public decision makers, service providers, and the recipients and users of social services).

5 Indicators, information and monitoring: an unbeatable triad.

Throughout this article, I have presented the primary characteristics of access to information as a crosscutting theme, which, as its name indicates, cuts across the system that monitors compliance—in this case, compliance with the obligations set forth in the Protocol of San Salvador. Since the system is new, with implementation just getting underway, surely during the course of implementation it will be adjusted in order to become more precise, without losing an overarching view of the different themes and categories that should be captured regarding the progressive fulfillment of ESCR. And without prejudice to the possibility—and advisability—of developing indicators for civil and political rights, which, in light of issues surrounding access to and use of information, would complement the broader human rights package.

One of the primary issues that arises in terms of public policies in the region is the need to promote integrated rather than sectoral actions, not just in terms of social policies but also within the broader arena of state action. Many of the piecemeal interventions carried out by different parts of the state apparatus, particularly related to access to and production of information, have led to the development of practices and data that are out of context, and that fail to respect the required comprehensiveness of human rights.

The use and dissemination of human rights indicators as a way to enforce rights has many advantages, some of which have been described in this article; one worth highlighting is that not only will it result in compliance with the reporting requirements to international monitoring mechanisms like the Working Group to Examine the National Reports Envisioned in the PSS, it also has value as a tool for States to “self-assess” their policies, and then begin to transform them, under the principle of reciprocity, so that they are designed in a way that is consistent with a human rights focus. Furthermore, the use of indicators will allow for the creation of new mechanisms for generating and circulating public information among different state agencies, and it will enable the development and dissemination of a new culture of public information.

Developing a new institutional framework within the state apparatus doubtless will require numerous transformative processes, and as yet it is unknown how those will be developed and what course they will take. However, an institutional framework that supports a system of indicators and signs of progress, which will become stronger and more consolidated over time, presents an excellent opportunity to build relationships between the State and civil society, between citizens that support a renewed invigoration of the public sphere, which will certainly be more participatory, more informed, and more democratic.

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NOTES

1. According to the article 5 of the Vienna Declaration and Program of Action (CONFERÊNCIA MUNDIAL DE DIREITOS HUMANOS, 1993, 5).
2. One of the ICESCR Committee's first efforts to develop the indicator system was carried out based on the work of Danilo Türk (1990), then Special Rapporteur of the Commission on Human Rights, who warned of the limitations of the available indicators and said that it was impossible to make global or local comparisons; this suggestion was in turn adopted by the ICESCR Committee.
3. See article 2 of ICESCR.
4. While 19 States signed the Protocol, to date only 16 have deposited an instrument of ratification. It would be a good time for civil society and the different IAHR bodies to promote an active process of ratification of this important instrument.
5. The preparation of this document was led by Commissioner Víctor Abramovich and was approved by the IACHR.
6. The Working Group drafted the second grouping of rights, which was opened for consultation with the States on December 3, 2012 and remained open until September 2013. Once States' comments had been received, the WG analyzed and incorporated the ones that it deemed relevant, and took a new

draft for review and approval by the OAS General Assembly. For more information, or to send comments or concerns to the Working Group, visit <http://www.oas.org/es/sedi/ddse/paginas/index-7_GT.asp>. Last accessed on: May 2013.

7. The input submitted by civil society can be found on the IACHR web page, and the comments on the WG document—including letters of support for the mechanism—can be found on the SEDI-OAS web page (http://www.oas.org/es/sedi/ddse/paginas/index-7_GT.asp). Last accessed on: May 2013.

8. This follows the core concepts of the OEA-GTPSS document (2011).

9. It is worth highlighting the important advances made by civil society in all of the country capitals in terms of indicator development, especially in the field of international transparency; for example, in Colombia, there's the National Integrity System, or accountability and monitoring commitments related to access to information (<http://www.transparenciacolombia.org.co>).

10. It is possible to structure the individual components of each right in a way that links them to the related governmental obligations, and this has been done in the system of the four As: the availability of services, institutions or measures for the enjoyment of the right in question; accessibility, meaning a guarantee that the right can be exercised without discrimination; acceptability, meaning that the State is responsible for guaranteeing adequate quality of the services that it provides; and adaptability, which requires that States provide services that are adapted to the needs of the rights (TOMASEVSKI, 2001). This system 4-A scheme, established a relationships between the content of the right and its very nature with the positive and negative obligations of the States, but it also incorporated the idea of the enforceability of the right by establishing the need to respect these issues when designing a public policy in the social arena. See Abramovich (2006), Vázquez and Delaplace (2011).

11. The accountability tools developed by Global Integrity (<http://www.globalintegrity.org>) and the World Bank's efforts in the area of access to information (<http://datacatalog.worldbank.org/>) feature prominently; see, among others, De Janvry, and Dethier (2012) and Knack and Manning (2002) and World Bank (2007). In the last publication, the World Bank proposes the application and implementation of a human rights focus in social programs, particularly in order

to stimulate the participation of the intended beneficiaries, but without reviewing—from a human rights perspective—the limitations of those programs when it comes to human rights, especially regarding the standard of universality.

12. Advisory Opinion OC-5/85, from 11/13/1985, Series A, N° 5.

13. Cf. Comisión Interamericana de Derechos Humanos. Relatoría para la libertad de expresión. Acceso a la información pública en las Américas. Aportes de la Relatoría para la libertad de expresión de la Comisión Interamericana de Derechos Humanos, p. 12.

14. OG N° 1, points 3 and 4. Cf., cited in Abramovich and Courtis (2002).

15. The Center for Economic and Social Rights (CESR) has developed a framework that is comprised of four steps for analyzing various aspects of the obligation to fulfill economic and social rights. Known as OPERA (Outcomes, Policy Efforts, Results, and Assessment), it incorporates different measures for specific human rights principles and standards (<http://www.cesr.org/>).

16. Many specialized organizations have databases with socioeconomic indicators, and are making progress on human rights indicators. Among others, it is worth highlighting the following: the Office of the United Nations High Commissioner for Human Rights has developed the universal human rights index (<http://uhri.ohchr.org/>); ECLAC's Gender Equality Observatory for Latin America and the Caribbean has a system based on three types of women's autonomy: physical, economic, and decisionmaking autonomy (www.cepal.org/cl/mujer); the UNDP human development indicators (<http://hdrstats.undp.org/en/tables/default.html>); UNICEF's monitoring of the rights of boys, girls, adolescents and women (<http://www.childinfo.org/>); UNESCO's educational statistics (<http://stats.uis.unesco.org/unesco/TableViewer>) and those from the International Labor Organizations's world of work and union rights (<http://www.ilo.org/stat/lang--en/index.htm>).

17. These are some of the many initiatives that have been developed in six countries in the region (Argentina, Bolivia, Chile, Colombia, Ecuador and Peru), starting with the design of an Observatory of Legal Decisions regarding the rights of women, with a database that facilitates access to information to better understand the relationship between litigation and the public provision of social services. Equipo Latinoamericano de Justicia y Género, ELA (www.ela.org.ar).

RESUMO

O artigo analisa de que maneira a produção e o acesso à informação se enquadram no processo de elaboração e utilização de indicadores em matéria de direitos humanos, particularmente em sua integração ao recente mecanismo criado no sistema interamericano de direitos humanos, correspondente às obrigações dos Estados Partes de prestar informações, por exigência do artigo 19 do Protocolo de San Salvador. Desse modo, o artigo analisa os indicadores adotados, as categorias e princípios transversais que complementam o sistema de indicadores, e como funciona nesse contexto o padrão de produção e acesso à informação. Por último, levando em conta os princípios de interdependência, universalidade e indivisibilidade dos direitos humanos, identificam-se aspectos necessários para fortalecer e conseguir uma institucionalidade robusta em direitos econômicos, sociais e culturais (DESC).

PALAVRAS-CHAVE

Acesso à informação – Indicadores – Direitos econômicos, sociais e culturais

RESUMEN

El artículo analiza de qué manera la producción y acceso a la información se enmarca dentro del proceso de elaboración y utilización de indicadores en materia de derechos humanos, particularmente en su integración dentro del reciente mecanismo conformado en el sistema interamericano de derechos humanos, correspondiente a las obligaciones de informar que tienen los Estados Partes en virtud del artículo 19 del Protocolo de San Salvador. En concordancia, el artículo analiza los indicadores que adopta, las categorías y principios transversales que complementan el sistema de indicadores, y cómo opera en dicho contexto el estándar de producción y acceso a la información. Por último, tomando en cuenta los principios de interdependencia, universalidad e indivisibilidad de los derechos humanos se identifican aspectos necesarios para fortalecer y lograr una institucionalidad robusta en materia de derechos económicos, sociales y culturales (DESC).

PALABRAS CLAVE

Acceso a la información – Indicadores – Derechos económicos sociales y culturales



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ABSTRACT

The world has witnessed a dramatic number of laws protecting freedom of information (FOI) in recent years. This paper examines the role of FOI legislation in allowing society to address past atrocities as well as the obstacles they face in doing so. The experience of access to information in Peru is considered, along with recent obstructions to access and the response from investigators, judges, and civil society organizations.

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Access to information – Human rights – Peru – Transitional justice – Accountability



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ACCESS TO INFORMATION, ACCESS TO JUSTICE: THE CHALLENGES TO ACCOUNTABILITY IN PERU

Jo-Marie Burt and Casey Cagley

1 Introduction

In recent years, the world has witnessed a dramatic upsurge in the number of laws protecting freedom of information (FOI) (BANISAR, 2006; MENDEL, 2009; MICHENER, 2010). This explosion of FOI legislation has occurred rapidly and, as a result, scholars have been slow to develop the theoretical implications of this phenomenon. Surprisingly little is known about the factors that lead to the enactment of FOI laws or the variables that affect the levels of State compliance once enacted. Perhaps more importantly, the effects of FOI laws on issues of governance such as corruption and human rights are unsettled.

This article will examine the role of FOI legislation in allowing society to pursue accountability for past atrocities as well as the obstacles faced in so doing. It will focus specifically on the experience of Peru, where access to public information has been a key factor in the pursuit of justice for atrocities committed by State actors during that country's internal armed conflict, but where such access has been restricted, especially in recent years.¹ This has been a key factor in the dismissal of hundreds of cases of human rights violations by legal authorities. We discuss some of the ways in which State actors have hampered access to public information and, perhaps not coincidentally, progress towards exposing and prosecuting heinous acts from Peru's darkest period.

This paper draws on research conducted by the lead author on the status of criminal prosecution of cases of grave human rights violations in Peru since 2009. This research culls data from diverse sources, including from the Public Ministry, the Ombudsman's Office, judicial registers, archives of human rights organizations, and the press. One of the investigation's early findings was that there was no central registry of ongoing human rights prosecutions on the part of any public or private

Notes to this text start on page 93.

entity. As a result, and in close collaboration with human rights organizations that represent victims in these cases, the lead author constructed a registry of human rights prosecutions in process, as well as sentences produced by Peruvian courts in such cases.² In addition, the lead author has observed *in situ* numerous trials, reviewed publications, reports, and news articles relating to these cases and the broader judicial process, and interviewed judges, prosecutors, and other judicial operators, human rights lawyers, survivors and relatives of victims, and external observers.³

What this research shows is that since beginning its democratic transition in 2000-01, while the Peruvian State has made important efforts to provide truth and justice for thousands of victims of State-sponsored human rights violations, significant obstacles to achieving accountability remain. This paper focuses on one such obstacle: the refusal on the part of the Peruvian State to comply with the public's right to access information about historic human rights violations. The paper closes with some broad conclusions and recommendations concerning the free exercise of the right to information.

2 Developments in access to information

In 1990, the right of access to information was hardly a universally accepted concept. At that time, only 13 countries in the world had adopted legislation protecting and institutionalizing a right to access government information; only one of those was in Latin America.⁴ By 2003, this number had more than tripled, to 45 worldwide. This pattern of countries enacting FOI legislation, alternatively labeled an “explosion,” (ACKERMAN; SANDOVAL-BALLESTEROS, 2006) or “revolution,” (MENDEL, 2009)

Image 1



has continued into the second decade of the 21st century. Following enactment of FOI legislation in El Salvador (March 2011) (TORRES, 2011) and Brazil (November 2011) (THE GLOBAL NETWORK OF FREEDOM OF INFORMATION ADVOCATES, 2011) over 90 countries worldwide and 13 countries in Latin America now have laws establishing a right to access government information (see image one).

While Colombia enacted the first Latin American FOI legislation in the mid-1980s, the region's wave of legislation began in earnest in 2002 with enactment in Mexico, Panama, and Peru. Ecuador and the Dominican Republic soon followed suit, enacting laws in 2004. Honduras in 2006, Nicaragua in 2007, Guatemala, Chile, and Uruguay in 2008, and Brazil and El Salvador in 2011 have all joined the club of countries with FOI legislation on the books.

While Argentina has not succeeded in passing FOI legislation, legislative decree law 1172, passed in 2003, establishes access to information for the Executive branch of government.

As national legislatures have moved towards institutionalization of access to information, international law, particularly in the Inter-American system, has produced important jurisprudence supporting this development. In 2006, the Inter-American Court of Human Rights (IACtHR) ruled in the case of *Claude Reyes vs. Chile* that the government of Chile had violated the rights of Fundación Terram, an environmental non-government organization, to access information about a major logging operation in that country.⁶ This ruling represented the first “international tribunal to recognize a basic right of access to government information as an element of the right to freedom of expression” (OPEN SOCIETY FOUNDATIONS, 2009).⁷

Mack Chang vs. Guatemala, a 2003 case decided by the Inter-American Court several years prior to the *Reyes* case, established severe limitations on the ability of the State to restrict access to public information. The Court ruled:

In cases of human rights violations, the State authorities cannot resort to mechanisms such as official secrets or confidentiality of the information, or reasons of public interest or national security, to refuse to supply the information required by the judicial or administrative authorities in charge of the ongoing investigation or proceeding.

(INTER-AMERICAN COURT OF HUMAN RIGHTS, 2006).

In other words, information related to trials of grave human rights abuses may not be withheld on the grounds of national security.

More recently, the IACtHR ruled against Brazil in the 2010 case of *Gomes Lund vs. Brazil* (Guerrilha do Araguaia). In this case, the Court ruled that Brazil’s refusal to provide information on the whereabouts of a large group of leftist guerrillas disappeared during that country’s military dictatorship (1964-1985) violated the right to information enshrined in article 13 of the American Convention on Human Rights. The court went further in this case, writing that Brazil had also violated the “duty to investigate,” to provide “access to court,” and crucially, that Brazil’s amnesty law is “incompatible with the American Convention and void of any legal effects” (OPEN SOCIETY FOUNDATIONS, 2010).⁸

These cases help to illustrate the evolving definitions and concepts behind freedom of information. Toby Mendel argues that the term “freedom of information” is rapidly being replaced by “right to information” among activists and officials alike. As an example, he cites the 2005 FOI law in India, which expresses a “right” to information in its title (The Right to Information Act) (MENDEL, 2008; MENDEL 2009, p. 3). Interestingly, the Inter-American Dialogue report on a 2002 conference on access to information in the Americas argues that access to information is best understood not as an individual “human” right but as a matter of public interest – “a prerequisite for democracy, open debate, and accountability” (INTER-AMERICAN DIALOGUE, 2004, p. 13). Others, (ACKERMAN; SANDOVAL-BALLESTEROS, 2005) recognize an increasing discourse around FOI as positive, rather than negative

freedoms. In other words, rather than understanding FOI as a freedom *from* censorship and control, we should conceptualize it as a freedom *to* achieve some particular end – knowledge of a loved one’s fate or of an ex-army general’s involvement in crimes against humanity, for example.

What this school of thought offers is a conceptualization of a right to information couched in terms of other more established or widely recognized civil and political rights. The *Claude Reyes vs. Chile* and *Gomes Lund vs. Brazil* cases cited above hold that access to information should be guaranteed as a necessary ingredient of other rights that are enshrined in international law: namely, the right to freedom of expression and the right to participation enshrined in the American Convention on Human Rights. Alasdair Roberts furthers this line of thinking by considering the right to access information in light of a spread of “structural pluralism” in government (ROBERTS, 2001). To synthesize his argument, the continued delegation of government functions to corporations and other non-government organizations could pose a challenge to the ability of a “right” to information to result in access to information itself unless it is grounded in other rights: rights to freedom of expression and participation – rights which generally have more legal purchase in laws and constitutions in the Americas. In the case of Peru, as we explain below, the right to access public information is articulated as both a right in and of itself, and as a right implied and inherent in the exercise of other constitutional rights.

3 The fall of Fujimori and creation of Peru’s access to information regime

The question of how to define and operationalize the concept of a right to access public information is of particular relevance in such post-conflict settings as Peru. Between 1980 and 2000, Peru was consumed by a devastating internal armed conflict involving the State and two insurgent groups (the Maoist Shining Path and the more traditional Tupac Amaru Revolutionary Movement or MRTA). That conflict resulted in nearly 70,000 deaths concentrated primarily in rural indigenous communities.⁹ Following the dramatic fall of President Alberto Fujimori’s government in 2000, the country embarked on a process of transition, seeking to reestablish democratic governance and adopting key transitional justice mechanisms to address the legacies of past violence. As we shall see, criminal trials for massive human rights abuses have played an important part in this process.

After ten years of authoritarian rule under Alberto Fujimori, the regime collapsed in November 2000 following a major corruption scandal that prompted Fujimori to flee to Japan, from which he faxed his resignation. In the context of a democratic transition under Valentin Paniagua (November 2000-July 2001) and then Alejandro Toledo (2001-2006), the Peruvian government made a concerted effort to move away from the authoritarian tendencies of the previous ten years and consolidate a nascent democracy. This included, among other measures, reforming Peru’s electoral institutions and the Judiciary (which had been thoroughly politicized during the Fujimori period), reinserting Peru into the Inter-American system of human rights protection (Fujimori removed Peru following a series of unfavorable

rulings on human rights issues), the creation of a truth commission to examine human rights violations committed during the 20-year conflict, and new measures to develop greater transparency in government.

Important among these measures was a commitment to transparency and openness that included development of the Law on Transparency and Access to Public Information (hereafter the Transparency Law). The Transparency Law took great steps to institutionalize and protect the right of access to information, enshrined in the 1993 Constitution. Article two (clause 5) of the Constitution states: “All persons have the right: [...] to solicit information that one needs without disclosing the reason, and to receive that information from any public entity within the period specified by law, at a reasonable cost” (PERÚ, [1993], 2005).

The Transparency Law, passed in 2002, mandates that any documentation funded by the public is considered public information and should therefore be publicly accessible.¹⁰ It also provides for proactive publication on the part of the State, including the publication – via internet – of budget information, procurement records, and information about official activities, among other things. Citizens can petition any government agency or private organization that provides public services or receives public funds. Importantly, article 15 of the Transparency Law specifically exempts information related to human rights abuses from classification on any grounds: “No se considerará como información clasificada, la relacionada a la violación de derechos humanos o de las Convenciones de Ginebra de 1949 realizada en cualquier circunstancia, por cualquier persona.” (PERU, 2003).¹¹ The Peruvian law stipulates that petitioned bodies must respond to requests within seven working days.

The process of appeals for denied requests for information provides for an internal process but not an external one. In other words, while petitioners can appeal to a higher department within the agency where the request was made, the law does not provide for an independent body with the capacity and authority to adjudicate such cases. While the Peruvian Ombudsman does often investigate cases of non-compliance, it has no binding power. These cases must be appealed through the court system based on the right of *habeas data*.

The Peruvian law does not require government bodies to provide assistance to petitioners who need it. This affects disabled or handicapped individuals as well as those whose first language is not Spanish, a sizeable population in Peru. The lack of an independent oversight commission, such as Mexico’s Federal Institute for Access to Information, makes the appeals process even more cumbersome and likely hinders the development of a culture of transparency. This is particularly true considering the broad nature of information exempted by the law, divided into three tiers. First, “secret” information, addressed in article 15, generally includes military and intelligence information. “Reserved” information, addressed in article 16, includes information pertaining to the police and justice systems. Finally, “confidential” information, addressed in article 17, covers a broad range of exemptions, including all information protected by an act of Congress or by the Constitution. In response, in early 2013 the Ombudsman’s Office proposed the creation of an independent oversight commission. This initiative was met with enthusiastic support from civil society.¹²

4 The advent of human rights trials in the aftermath of Fujimori¹³

As with the process of consolidating Peru's democracy, the early criminal prosecutions for human rights violations began on the ruins of the Fujimori regime. In March of 2001, the Inter-American Court of Human Rights ruled that the State was responsible for the 1991 killing of 15 people in the Barrios Altos neighborhood of Lima and ordered an investigation into the crime and prosecution and punishment of those responsible. As part of the Barrios Altos ruling, the Inter-American Court overturned Peru's 1995 amnesty laws, paving the way for some of the first indictments related to human rights abuses during the 20-year internal conflict.

Soon after the Inter-American Court ruling, interim president Valentin Paniagua announced the creation of the Truth and Reconciliation Commission (the "CVR"). The CVR was endowed with a broad mandate to investigate and provide an official memory of the internal conflict. In addition, the CVR established a legal unit to investigate human rights violations and recommend cases to the judicial authorities for criminal prosecution. As part of the final report, released in 2003, the CVR handed over 47 case files to judicial authorities for criminal prosecution. While some of these cases implicated leaders of the two insurgent groups, the bulk involved State agents, who to date had not been prosecuted or punished for these crimes.

As part of its extensive recommendations, the CVR urged the government to create a special system of prosecutorial offices and tribunals to adjudicate human rights cases. Development of this new prosecutorial system was slow, finally taking shape in late 2004 and early 2005. Today, seven special prosecutorial offices operate in key jurisdictions (two in Lima, two in Ayacucho, and one in Huancavelica, Huanuco, and Junín) and several tribunals have also been established, though a Supreme Court directive stating that all cases in which there are two or more defendants should be transferred to Lima has resulted in most cases being adjudicated by the Special Criminal Court (Sala Penal Nacional) in Lima. The first rulings on cases of human rights abuses were handed down in 2006.

In its first years, the special system to investigate and prosecute human rights violations handed down a number of sentences in a handful of emblematic cases. One early verdict – the case of disappeared student Ernesto Castillo Paez – convicted four police officers and recognized the crime of forced disappearance as a crime against humanity. The most well-known case within Peru was undoubtedly the trial of former president Fujimori. Extradited from Chile in September 2007, the former president was put on trial later that year, and in April 2009 was convicted and sentenced to 25 years in prison for a series of grave human rights violations, which according to the sentencing judges, constitute crimes against humanity in international law¹⁴ (BURT, 2009; AMBOS, 2011).

The lead author closely monitored the Fujimori trial and upon its conclusion developed a collaborative research project with local human rights organizations to analyze the status of other pending human rights cases stemming from the 20-year internal armed conflict. The *Defensoría del Pueblo* (Ombudsman's Office) monitors the 47 cases recommended by the CVR for criminal prosecution plus an additional 12 cases, but anecdotal evidence suggested that the case universe was much larger,

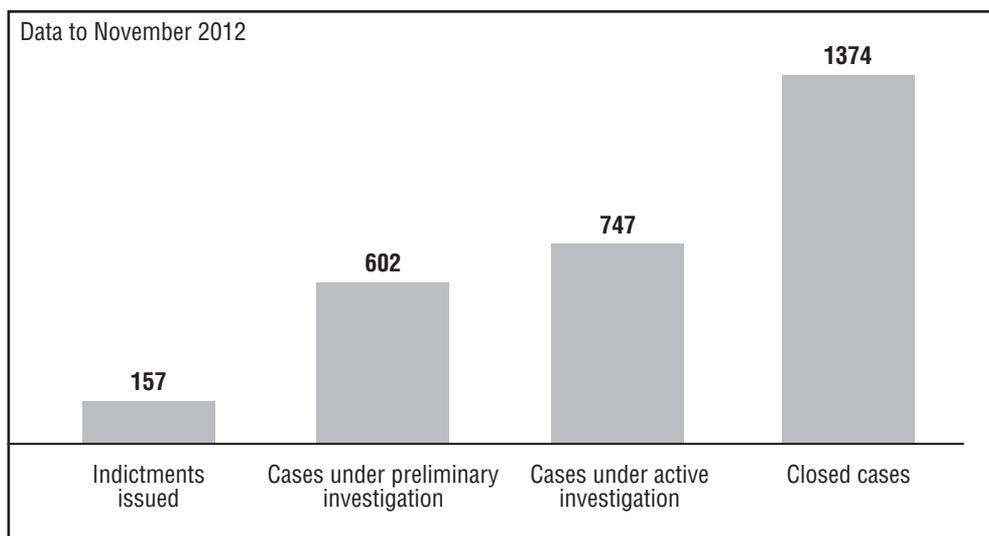
and little was known about the evolving status of ongoing criminal investigations and trials. In partnership with Peruvian human rights NGOs, the lead author developed a database of active cases, drawing on information from the NGOs themselves, the Public Ministry, and the Ombudsman's Office, to get a better grasp of the status of criminal investigations and trials. This became a more urgent task by 2010 after a series of controversial acquittals by the National Criminal Court, sustained efforts to impose a new amnesty law and shut down criminal prosecutions, as well as anecdotal evidence suggesting political interference in the judicial process.

To summarize, the research findings indicate that the case universe is much larger than expected (2,880 complaints filed with the Public Ministry); advancing much more slowly than realized (the Public Ministry has brought charges in only 157 cases, or five percent of the total); a large number of cases remain under preliminary investigation (602) or active investigation (747) (47 percent); and a significant number of cases – 1,374 or 48 percent – have been closed or dismissed, a large number, according to interviews with Public Ministry officials, due to insufficient information about the identity of the perpetrators (See Table 1). Regarding sentences, a significant number of rulings have resulted in acquittals, some of which are highly circumspect (of 50 verdicts identified as of this writing, one or more defendants have been convicted in twenty¹⁵ while all defendants have been acquitted in thirty) – though a significant number of these rulings have been overturned on appeal by the Supreme Court and have gone to retrial.¹⁶ The overall number of individuals acquitted is much higher than those convicted (133 acquitted and 66 convicted to date).¹⁷

Human rights organizations have been sharply critical of several of these sentences, suggesting that judicial authorities are failing to properly weigh key evidence, ignoring international law, and even prior sentences handed down by

Table 1

STATUS OF INVESTIGATIONS OF CASES OF GRAVE HUMAN RIGHTS VIOLATIONS IN THE MINISTERIO PÚBLICO (PUBLIC MINISTRY)



Source: Data provided by Fiscalía Coordinadora del Ministerio Público; table by author.

Peruvian courts (RIVERA, 2009, 2012). For example, while the Fujimori verdict establishes that in human rights cases it is unlikely that written orders exist therefore circumstantial evidence may be used to substantiate convictions, the National Criminal Court has ruled in a number of recent cases that since no written order exists indirect (or intellectual) authorship cannot be established, leading to the acquittal of military officers in command positions. Additionally, while the Fujimori verdict validates the finding of the Peruvian Truth and Reconciliation Commission that there were systematic violations of human rights in certain places and at certain times, in recent rulings the National Criminal Court fails to take into consideration such findings, stating instead that massacres and other violations of human rights were mere “excesses” committed by low-ranking military personnel; this too has served to justify acquittals of commanders in a number of cases.

As of this writing there are more than a dozen cases in public trial. Some of these involve highly emblematic cases, including the 1985 Accomarca massacre of 69 peasants (mostly women, elderly, and over 20 children); the case of arbitrary detention, torture, and forced disappearances that took place in the Los Cabilos military base in Ayacucho; the case against “Agent Carrion,” e.g. intelligence agent Fabio Urquiza Ayma whose personal diary was discovered upon his arrest in 2001 in which he describes his involvement in the murder of 14 people, including journalist Luis Morales Ortega and former mayor of Huamanga Leonor Zamora; and the retrial of the 1991 Santa Barbara massacre of 15 people.

Thus, while some important cases have been successfully prosecuted and important sentences handed down, there are other concerning trends evident in Peru. Ten years after the CVR’s Final Report and its recommendation to prosecute grave human rights violations was made public, the pace and progress of investigations by the Public Ministry is excessively slow and in some cases seem paralyzed, a very small number of indictments against alleged perpetrators have been handed down in light of the total case universe, and nearly half of all denunciations have been dismissed. Once indictments are issued, the Judiciary must conduct its own investigation before moving to the public trial phase; here are often long delays at the stage, sometimes measured in years, and the pace of cases once in public trial is painstakingly slow. For example, the Accomarca trial began in November 2010 and is not expected to culminate until sometime in 2014. Finally, the series of acquittals in recent years has generated severe criticism of the tribunals adjudicating human rights cases.¹⁸

5 Obstructed access to information in human rights trials

While the development of Peru’s transparency law was impressive on paper, the degree of actual transparency in the country – particularly regarding cases involving human rights abuses – is poor. Groups and individuals who track compliance with transparency norms and regulations in Peru paint a worrisome picture. The Peruvian civil society group Instituto de Prensa y Sociedad (Press and Society Institute) cites a mere 17 percent response rate to the over 40,000 requests for information filed (this number tracks all requests to all agencies) in the first year of the law’s existence. Meanwhile, 68 percent of requests were incomplete or failed

to meet the law's timeframe and fully 32 percent of requests met with no response at all (MENDEL, 2008).

The culture of transparency is particularly weak in the Defense Ministry, the Armed Forces, the National Police, and the Ministry of the Interior. This is unfortunate in the case of investigations into past human rights violations since the vast majority of individuals of interest serve or served in one of these agencies.¹⁹

Problems that stem from obstructions within these agencies generally fall into three categories. First, in cases involving members of the Peruvian armed forces (which the vast majority do), prosecutors and researchers lack information critical for identifying those responsible for human rights violations. The Public Ministry typically seeks the following types of information: the names of the heads of the military bases that operated in areas under a state of emergency; the names of the personnel who worked in these military bases, as well as their service records, annual evaluations, and reviews for promotion; documents referring to military operations, dispatches of military patrols, and lists of detainees; and manual, directives, intelligence reports, and other documents produced to guide in the conduct of counterinsurgency operations. Second, where the identity of suspects has been established, judges and prosecutors encounter delays and unnecessary obstructions in receiving statements from the accused. Finally, where responses are received, they are generally "unsatisfactory" in that they are unnecessarily slow in coming, incomplete, or denied on tenuous grounds (DEFENSORÍA DEL PUEBLO, 2005, p. 149).

According to the *Fiscal Coordinador de las Fiscalías Superiores y Penales*, (Chief Public Prosecutor of Superior and Criminal Prosecutorial Units) Víctor Cubas Villanueva, the primary reason for which human rights cases under investigation have been dismissed is because of insufficient information that would permit the identification of the alleged perpetrators. He argued that the lack of sufficient information is the direct result of the persistent refusal on the part of the armed forces and the Ministry of Defense to provide such information to investigators, or their assertion that such information does not exist.²⁰ In an effort to resolve this impasse, on two separate occasions commissions were formed consisting of representatives of the Public Ministry, the Ministry of Defense, and the Ombudsman's Office, but no change in practice resulted.²¹

A series of reports published by the Ombudsman's Office highlights that, in most cases, requests for information on the military or police personnel involved in allegations of human rights violations have not been received in a timely manner or judges have been informed "that...they do not have such information or files or that they have been burned or destroyed" (DEFENSORÍA DEL PUEBLO, 2004, p. 85). Similar claims are used frequently to deny access to information relating to human rights abuses despite several legal barriers to such behavior. This includes the 1972 *Ley de Defensa, Conservación, e Incremento del Patrimonio Documental de la Nación* (Law to Protect, Conserve, and Promote the Documentary Patrimony of the Nation), and the 1991 *Ley de Sistema Nacional de Archivos* (National System of Archives Law).²²

The effects of this obstruction have been confirmed in numerous interviews with state prosecutors investigating human rights cases, principally in Lima and Ayacucho conducted by the lead author over the course of the past several years.

Their inability to access information about who was stationed in what barracks, or to obtain specific information about military operations directives or orders, has seriously hindered the ability of prosecutors to identify alleged perpetrators and resulted in the dismissal of cases. In one interview, a government prosecutor showed the lead author a pile of *fojas de servicio*, or personnel files, of military personnel under investigation for human rights violations. During the Toledo administration, such forms were often provided to investigators who requested them, which allowed them to begin the painstaking task of trying to reconstruct chains of command, identify which military personnel participated in specific operations or were stationed at specific military bases, etc. However, from 2006 onward – coinciding with a general retreat in governmental support for criminal investigations into past human rights violations – even these documents were denied to investigators.

The 1984 case of 123 peasants murdered in Putis, in the Ayacucho region, helps to demonstrate the nature of obstructed access to information and its implications for the prosecution of grave human rights violations in Peru. Judges have been repeatedly informed that information on individuals who served in the army unit of interest does not exist: “no existe documentación alguna que permita identificar al personal militar que prestó servicios en la Base Militar de Putis.” (DEFENSORÍA DEL PUEBLO, 2008, p. 138).²³ As a result – and despite the laborious collection of forensic evidence and testimony from witnesses and families (the Peruvian Forensic Anthropology Team recovered 92 bodies from clandestine graves in Putis) – this case was under preliminary investigation for more than ten years. Though the Public Ministry issued a formal indictment in this case in November 2011, a trial date has yet to be set. The accused are high-ranking military officers who are being charged as the intellectual authors of the crime; the material perpetrators remain unidentified. The Ministry of Defense continues to claim that no information exists about this case or those who may have participated in it. In 2009, then Defense Minister Rafael Rey Rey affirmed that both he and his predecessor, Antero Flores Aráoz, had actively searched for information about the Putis case but had found none; however, he never offered evidence of such a search, how it was conducted, nor any specific conclusions.²⁴

Crucially however, in 2010, the Peruvian Army produced a document titled “In Honor of the Truth,” (*En Honor a la Verdad*) which among other things, included references to documents such as military studies and criteria for counter-subversive operations, annual military records, intelligence reports, and personnel files. In this report, the Standing Committee of Military History cites documents in the Central Archive of the Army such as annual reports, which show the operations and information about the army personnel who worked during that period, whose testimonies are part of the publication. Many of these documents are of the same types that have been requested repeatedly by investigators, human rights lawyers, judges, and prosecutors, and continue to be denied. The citation of such documentation belies repeated claims by the Ministry of Defense that information either did not exist, or had been lost or destroyed (ASOCIACIÓN PRO-DERECHOS HUMANOS, 2012).

Denials claiming non-existence of records are given repeatedly to requests for information from the Peruvian State. However, such responses do not comply with the State’s legal obligations to provide a comprehensive, independent investigation

into any alleged destruction of records, to make its findings public, and to punish those responsible for unlawful destruction of records; to make concrete efforts to recover or reproduce relevant documents; and to provide a detailed account of the measures taken to do so.²⁵

The Ombudsman's Office has documented numerous other cases that have not progressed due to refusal on the part of military officials to provide information and that have not yet come to trial. For example, the disappearance of human rights activists Angel Escobar, which has been under investigation since October 2002, has yet to come to trial. Escobar was detained at a military base in Huancavelica, but no information has been provided to prosecutors about the identity of those stationed at the base; as a result the case has not moved forward (DEFENSORÍA DEL PUEBLO, 2008, p. 160). In the case of the 1990 massacre of 16 peasants in the Chumbivilcas, information requested about the military patrol on duty at the time of the massacre in the area has been denied by military officials; this case has been under investigation since February 2004 (DEFENSORÍA DEL PUEBLO, 2008, p. 156).

Another example illustrates an unfortunate pattern of the dismissal of ongoing cases of human rights violations due to the inability of prosecutors to access necessary information. In June 1988, five men were detained (in individual circumstances) and later found dead by their family members. The bodies showed signs of projectile lesions – gunshot wounds – that indicated execution style killings, that pointed to the involvement of operatives from the local military base at Churcampa. However, in March 2012, the investigators at the Public Ministry decided to dismiss the case, since the failure of the Ministry of Defense to provide information prevented them from determining the identities of the involved individuals (ASOCIACIÓN PRO-DERECHOS HUMANOS, 2012).

Where judges and prosecutors do receive responses to requests for information, responses are typically unsatisfactory. Such responses often refer to requests for communication documents and transcripts as well as procedural and historical documents pertaining to acts, rather than the identity of personnel (though as discussed above, the same excuses are often given for all denials). Many denials for information about specific individuals or patrols are justified by arguing that relevant records were destroyed “in compliance with regulation” (DEFENSORÍA DEL PUEBLO, 2005, p. 149). Beyond leading one to wonder what records indicate the documents in question were indeed destroyed (and why they are never provided), the Ombudsman's Office has outlined the very regulatory framework that expressly prohibits the destruction of such records (DEFENSORÍA DEL PUEBLO, 2005, p. 149). Thus, it is clear that prosecutors must fight for every piece of information – whether it identifies key personnel in a case, is a statement on behalf of the accused, or clarifies activities carried out at by a particular individual or patrol – at all stages of the investigation and trial.

Arguments claiming that all documents were incinerated are demonstrably false. Lawyers and prosecutors have confirmed in interviews with the lead author that on numerous occasions, military officers on trial appear in court with military documents, including their personnel files. A judge explained that in one case she was investigating – the Chillitira case, involving the 1991 extrajudicial execution

of four people who were being transferred to a military base in Puno – the court requested the case file of the military inspector’s office, who had registered the crime in 1992. The military authorities refused to provide the files or names of those who were stationed at the base at that time, saying such information was not available. The judge noted, however, that the defendants in the case presented their service records, as part of their defense, to the court.²⁶

The Peruvian Army itself has made reference to numerous documents that would be of value to investigators in its “In Honor of the Truth” report, including annual military reports, reports of specific military operations, and intelligence notes, among others. Such claims that all records have been destroyed reveal an underlying intention to obstruct access to information in cases of grave human rights violations. Interestingly, rather than citing the prerogative to classify information on national security grounds, the Ministry of Defense frequently argues that requested information does not exist or has been destroyed.

Finally, a further illustration of Peru’s obstruction of access to public information involves a legislative decree adopted in December 2012. Decree Law 1129 contains an article (article 12) denying public access to any information pertaining to national security and defense. This is a worrying development for several reasons. First, while the 2002 Transparency Law provides clauses for exempting certain information related to national security and defense, such exemptions are to be the exception to the rule. The 2012 Decree, however, establishes blanket confidentiality for information related to national security and defense, with no statute of limitations. In other words, secrecy is now the rule, and there are to be no exceptions to this rule.²⁷

The second concern relates to the enforcement of secrecy on issues of national security and defense. According to the Press and Society Institute (*Instituto Prensa y Sociedad*), the decree establishes “an obligation of confidentiality on information that is secret under article 12, for *any person* who accesses this information through the exercise of his or her duties or position” (INSTITUTO PRENSA Y SOCIEDAD, 2012, emphasis added).²⁸ In other words, since there is no indication that such “duties or position” be exercised in the service of the State, anyone, including journalists or civil society, could be charged with revealing national secrets in the exercise of their work. The punishment for such actions could entail up to 15 years in prison.

The norms contained in this troubling decree fly in the face of Peru’s commitment to the Inter-American Convention of Human Rights, jurisprudence from the Inter-American Court, and Peru’s own Constitution and Transparency Law, all of which mandate a posture of openness. The Inter-American Court has articulated the principle of “maximum disclosure,” which establishes a presumption that all information held by public authorities should be accessible, with only limited exceptions (INTER-AMERICAN COURT OF HUMAN RIGHTS, 2006). Further, in the case of *Mack Chang vs. Guatemala*, the Inter-American Court ruled that in cases of grave human rights abuses, information cannot be withheld on the grounds of national security. Decree 1129 clearly violates the both the principle of maximum disclosure and non-exemption for cases of grave human rights abuse.

According to article 15 of Peru’s 2002 Transparency Law, decisions on whether to disclose information pertaining to defense or national security are to be made on

a case by case basis and classified information are subject to a limited period (five years) – the assumption being that if information does not fit under specific guidelines allowing for secrecy, it is to be released. Now, instead of maintaining open access as a default (something Peru has surely struggled to achieve in the first place), the new decree establishes secrecy as the base-line, and eliminates exceptions. This new norm, combined with the threat of prosecution for journalists (and others) seeking access to certain information, clearly seeks to exempt the defense and security sectors from transparency, and provides a pointed illustration of the Peruvian State’s effort to obstruct access to information in cases of human rights abuse as well as in other arenas, such as military sector purchases.

6 Conclusions

While Peru’s Transparency Law has been on the books for a decade, the situation concerning access to information described in this article demonstrates that a “culture of transparency” the Law hoped to establish is far from a reality. And despite impressive progress on some fronts (i.e., the country’s return to democracy, restoration of free and fair elections, and the first-ever domestic prosecution of a democratically elected president for human rights violations), many government agencies and operations still function under a veil of secrecy.

In the case of successful prosecutions, it is important to note that official information is often obtained through other means than official channels. For instance, in the case of the investigations into the Colina Group, a military unit that was responsible for over 50 death-squad style killings during 1991 and 1992, the Armed Forces did not collaborate with the disclosure of documents, even when requested by prosecuting authorities.²⁹ In response, in 2002, Judge Victoria Sanchez, following an anonymous tip about the location of documents pertaining to Colina Group activities, conducted an unannounced visit to the headquarters of the *Comandancia General del Ejército* and the offices of the National Intelligence Service and seized records she deemed essential to her investigation.³⁰

Thanks to these documents, which included orders regarding the transfer of personnel, logistics and payments – as well as information provided by three mid-ranking military officials who participated in the Colina Group operations and who turned State’s evidence³¹ – the legal authorities were able to determine that the Colina Group was part of the formal military structure and that it depended functionally on the SIN; reconstruct its organizational structure; and document its operations over a two-year period. The extensive documentary evidence in this case was crucial in the convictions of several material and intellectual authors of the Barrios Altos massacre and the La Cantuta University disappearances, including, among others, former army chief General Nicolas Hermoza Rios, former spy chief Vladimiro Montesinos, former head of the SIN General Julio Salazar Monroe, and ultimately, former president Fujimori.³² (Notably, the Peruvian Army continued to deny the existence of the Colina Group even after these convictions were handed down.)

Such experiences are not likely to be replicated. They were highly contingent on a particular political moment, when a new transitional government was

committed to investigating the misdeeds of the prior administration. Moreover, as Judge Sanchez noted, the minister of defense was a civilian and was supportive of her actions. In addition, at that historical moment, the military was weakened due to public displeasure over its close affiliation with the Fujimori government and credible allegations of widespread corruption. In some ways, the Armed Forces has found a new motive to regroup and reassert its institutional identity, in order to protect its understanding of itself as the “savior” of the Peruvian nation in the face of the terrorist threat, and to protect certain officials who are currently charged with human rights crimes. Indeed, since 2002, no similar action attempting to seize documentary evidence has been undertaken. Much more commonly, judges request information in the context of ongoing investigations, but interviews by the lead author with judges adjudicating these cases confirms that this information is often not provided, or is not provided in its entirety.

Most importantly, the ability of investigators, judges, and the public to access information suffers from a lack of institutional centralization and enforceability. In this area, Peru could learn from the Mexican FOI system, which was enacted in 2002. Mexico has developed two important advantages in its system. First, the legislation created a streamlined, centralized interface – Infomex.org – where citizens and groups can request information and make appeals to the relevant agencies. Second, the Federal Institute for Access to Information (IFAI, which manages Infomex.org) is an independent agency within the federal public administration that serves to resolve appeals; train public servants and civil society on FOI; monitor compliance; and promote and instruct citizens and groups on how to access information.

IFAI has a good track record for responding to inquiries and appeals to initial denials. IFAI staff and commissioners are generally accessible and seen as committed to fostering an atmosphere of transparency (SOBEL et al., 2006). The institution’s design and budget process vis-à-vis the executive and legislative branches of the government allow for a high degree of autonomy. IFAI also trains public servants on the FOI legislation and regulations for transparency; how to preemptively offer access to information; and how to respond to requests made by citizens and civil society. Additionally, IFAI adjudicates agency denials to provide information and is responsible for ensuring that information covered by the legislation is provided by the responsible agency.

IFAI does not have the ability to enforce its orders of transparency, though it has managed to get agencies to provide the requested information in most cases (SOBEL et al., 2006). Requests for information whose release IFAI cannot compel must refer cases of non-compliance to the Ministry. As of 2005, only five cases had been so referred (OPEN SOCIETY JUSTICE INITIATIVE, 2006). A similar institution in Peru could go a long way in creating a culture of transparency and a default mode of government organs rendering access to public information.

However, even an independent and capable institution along the lines of Mexico’s IFAI would have trouble overcoming the greatest obstacle that has faced access to information in human rights cases in Peru – that of a lack of political will. The challenges to public access to information, as illustrated in this article, are numerous. In addition to obstruction at various levels of government, in key

agencies that hold important information from judges and prosecutors, access to information in Peru is hamstrung by a myriad of bureaucratic and budgetary restraints. Nevertheless, the fundamental challenge resisting the establishment of a culture of transparency broadly, and the use of important government information in human rights cases specifically, relates to political will. In a comparative study on the obstacles to implementing freedom of information schemes in Latin America, the *Centro de Archivo y Acceso a la Información Pública* (CAInfo) noted that while “a good part of the political authorities and public officials in Peru consider transparency a simple part of their duties and not a charge or a bother [...] the implementation of a professional system of archiving is hindered by [...] an atmosphere culturally resistant to this institution within military and police sectors” (CAInfo, 2011, p. 55).

While it is beyond the scope of this paper to examine in full the political dynamics at play, it is important to note that with the 2006 election of Alan García to a second presidential term, an alliance was forged between García, his close associates, and sectors of the armed forces who had a mutual interest in guaranteeing impunity for human rights violations. Massive human rights abuses occurred during García’s first government (1985-1990) and it is not inconceivable that he might one day be held to account for innumerable crimes, such as the 1986 Fronton massacre, the 1988 Cayara massacre, or the string of assassinations of opposition leaders during the late 1980s at the hands of the *Comando Rodrigo Franco*, a paramilitary group that allegedly operated within the Ministry of the Interior and under the auspices of his close political associate, then Interior Minister, Agustín Mantilla.³³ (Members of the APRA party are also alleged to have participated in these operations.) In the 2006 presidential race, García chose as his vice-president retired Navy Admiral Luis Giampettri, who led the efforts to restore government control over the Fronton prison in 1986. Giampettri was a forceful advocate for the military during his term in the vice-presidential office. During the García government, the State established a policy to pay for the defense of military officials accused in human rights violations cases, though oftentimes victims lack representation, putting them at a serious disadvantage.

Additionally, several efforts were made during the García administration to prevent future human rights prosecutions. In 2008, two bills were put forth that would have granted amnesty for State agents accused of human rights violations, though neither passed. In 2010, a presidential decree law (D.L. 1097) was passed which amounted to a blanket amnesty, but it was met with massive domestic and international opposition and was eventually revoked. However, government representatives, from the Executive to the Minister of Defense, frequently and vociferously attacked human rights organizations representing victims in these cases, and charged them as well as judges and prosecutors of engaging in “political persecution” of the armed forces. In such a climate, it is evident that larger forces are at play that undermine the efforts of victims, lawyers, prosecutors, and judges to gain access to public information about past human rights violations.

While the public discourse on these issues has mitigated in tone since the election of Ollanta Humala as president, his own standing as a former military official who once faced charges of human rights violations (charges were dropped after witnesses withdrew their testimony) has led to a great deal of speculation about

what one could expect under his administration. On the one hand, his government has vigorously embraced initiatives such as the Open Government Initiative, which is viewed positively by right to information advocates, but at the same time, decree laws such as 1129, discussed above, reveal that old habits die hard. The culture of secrecy that underlies impunity in Peru and elsewhere in the region remains an enduring challenge for right to information and for the broader set of rights that this right is meant to facilitate, including right to truth and right to justice.

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NOTES

1. This paper focuses on human rights violations committed by State actors, which according to the Peruvian Truth and Reconciliation Commission, constitute approximately 37 percent of the total fatalities during the 20-year internal armed conflict. Prosecutions of members of the two armed insurgent groups, Shining Path and MRTA, are not subject to the same kind of demands regarding access to official information since the perpetrators are non-state actors. Hundreds of Shining Path and MRTA members, including the top leadership of both organization, have been prosecuted and are currently serving prison sentences of varying duration. The leadership received sentences of life imprisonment.

2. This project, which developed alongside and with input from similar projects in Argentina and Chile, is further elaborated in: COLLINS; BALARDINI; BURT, 2013.

3. Reports of trial observations can be viewed on project website, Human Rights Trials in Peru Project, at <www.rightsperu.net> under "Blog/Analysis".

4. Colombia was the first enactor of FOI legislation in Latin America in 1985.

5. Note: Bolivia and Argentina enacted executive decrees relating to access to information in 2005

and 2003, respectively, but have no legislative or constitutional codification.

6. The court ruled that the state's denial violated the victims' rights to freedom of expression under article 13 of the American Convention on Human Rights, to which Chile is a signatory.

7. Available at: <<http://www.opensocietyfoundations.org/litigation/claude-reyes-v-chile>>. Last accessed on: May. 2013.

8. Available at: <<http://www.opensocietyfoundations.org/litigation/gomes-lund-v-brazil>>. Last accessed on: May. 2013

9. Available at: <<http://www.cverdad.org.pe/ingles/ifinal/index.php>>. Last accessed on: May. 2013.

10. Cf. Banisar (2006). Available at: <freedominfo.org/regions/latin-america/peru/>. Last accessed on: May. 2013.

11. "No information related to violations of human rights or of the Geneva Conventions of 1949 shall be considered classified, in any circumstance, by any person." (PERÚ, 2003).

12. Nota de Prensa No.012/2013/DP/OCII, "Organizaciones de la sociedad civil apoyan la creación de una institución garante en materia de transparencia y acceso a la información pública,"

- Lima, 29 de enero de 2013. Available at: <<http://www.larepublica.pe/29-01-2013/apoyan-creacion-de-una-institucion-garante-en-materia-de-transparencia-y-acceso-la-informacion-publi>>. Last accessed on: 01 Mar. 2013.
13. This section draws on a previously published article (BURT, 2009).
14. The affirmation by these courts that forced disappearance constitutes a crime against humanity is of critical importance in Peru's efforts to prosecute human rights cases. The majority of human rights violations, including extrajudicial executions, the forced disappearance of an estimated 15,000 Peruvian citizens, and the widespread use of torture and sexual violence, occurred 25 to 30 years ago, during the peak years of violence in 1983 and 1984, and again between 1987 and 1990, when Peru held the dubitable distinction of having the world record of forced disappearances according to the United Nations Working Group on Forced Disappearances. Defendants have sought to have charges against them dismissed, asserting that the statute of limitation applies in cases that occurred 25 or 30 years ago.
15. Of these 20 guilty verdicts, in nine, all defendants were convicted, while in eleven, at least one defendant was convicted and at least one was acquitted.
16. We refer to sentences since there have been rulings in some human rights cases more than once, either because different defendants were tried separately, or because retrials have been ordered by the Supreme Court. A total of only 38 human rights cases have received sentences. A full listing can be viewed on the Human Rights Trials in Peru Project website: Available at: <http://rightsperu.net/index.php?option=com_content&view=category&layout=blog&id=40&Itemid=58>. Last accessed on: May. 2013.
17. Data compiled by author for Peru Human Rights Trials Project Database. Data up to date as of March 1, 2013.
18. These arguments are more fully developed in: BURT 2014 (forthcoming).
19. In the Defensoría's most recent report in 2008, of the 339 accused facing trial, 264 and 47 hailed from the Army and the National Police, respectively. Data culled from ongoing research have identified over 650 former or actual members of the State security forces under investigation for human rights violations.
20. Lead author interview, Víctor Cubas Villanueva, Fiscal Superior Coordinador de las Fiscalías Penales Supraprovinciales, Ministerio Público, Lima, July 2010.
21. To our knowledge, no public record of the existence of these commissions exists. This information was obtained through interviews by the lead author with functionaries at the Defensoría del Pueblo and human rights organizations who have knowledge of the commissions. A copy of one of the commission's reports is on file with the lead author.
22. Available at: <<http://www.datosperu.org/tb-normas-legales-oficiales-2008-Mayo-21-05-2008-pagina-37.php>> and <<http://www.datosperu.org/tb-normas-legales-oficiales-2000-Marzo-30-03-2000-pagina-35.php>>. Last accessed on: May. 2013.
23. "There exists no documentation that permits identification of military personnel who served at the Putis military base." (DEFENSORÍA DEL PUEBLO, 2008, p. 138).
24. Affirmation of Defense Minister Rafael Rey Rey in response to the Putis case. Radio Programas del Perú (RPP), 28 de setiembre de 2009, <http://www.rpp.com.pe/2009-09-28-rafael-rey-los-militares-no-tienen-una-proteccion-adeuada-noticia_211882.html>. Last accessed on: May 2013.
25. In *Claude Reyes v. Chile*, the Inter-American Court reaffirmed that the right of access to State-held information has both an individual and a collective dimension, and imposes duties on the State: "[Article 13] protects the right of the individual to receive [State-held] information and the positive obligation of the State to provide it. ... The delivery of information to an individual can, in turn, permit it to circulate in society, so that the latter can become acquainted with it, have access to it, and assess it...." (INTER-AMERICAN COURT OF HUMAN RIGHTS, 2006. Series C No. 151, para. 77).
26. Lead author interview, Judge Victoria Sanchez, Sala Penal Nacional, January 18, 2013.
27. The Ombudsman's Office filed a legal petition challenging the constitutionality of article 12 of Decree Law 1129. Personal communication between lead author and Fernando Castañeda of the Ombudsman's Office, 9 April 2013.
28. Instituto Prensa y Sociedad. *Comunicué*, December 10, 2012. Available at: <<http://www.ipys.org/comunicado/1478>>. Last accessed on: May. 2013.
29. "Ejército no apoyó investigación a Colina". *La República*, October 7, 2008.
30. Lead author interview, Judge Victoria Sanchez, Sala Penal Nacional, January 18, 2013.
31. One of the collaborators in the Colina Group case had been in charge of logistics; he provided telephone surveillance records; receipts and expenditure records; and other documents. Interview with lead author, Judge Victoria Sanchez, Sala Penal Nacional, January 19, 2013.
32. For reasons that remain unclear, as of this writing the case against Montesinos and Hermoza Ríos in the case of the La Cantuta disappearances has not moved to oral trial phase. Both were convicted in 2010 as the intellectual authors of the Barrios Altos massacre, the disappearance of nine peasants from Santa, and the murder of journalist Pedro Yauri. The conviction was upheld on appeal in 2013.
33. This case moved to public trial in 2013. A formal indictment has been issued in the case of El Frontón but as of this writing it has not yet moved to public trial.

RESUMO

Nos últimos anos houve um crescimento significativo de leis em todo o mundo que protegem a liberdade de informação (LDI). Este artigo estuda o papel das leis de LDI em possibilitar que as sociedades investiguem atrocidades cometidas no passado e os obstáculos que elas enfrentam para fazê-lo. O foco é a experiência do acesso à informação no Peru, assim como as recentes obstruções ao acesso e a resposta de investigadores, juízes e organizações da sociedade civil.

PALAVRAS-CHAVE

Acesso à informação – Direitos humanos – Peru – Justiça transicional – *Accountability*

RESUMEN

El mundo ha sido testigo en los últimos años de la aprobación de una gran cantidad de leyes que protegen la libertad de información (LDI). Este trabajo examina el rol de la legislación sobre LDI en su capacidad de permitir que las sociedades accedan a la información sobre las atrocidades del pasado, así como los obstáculos que se enfrentan al hacerlo. Se analizará la experiencia de acceso a la información en Perú, así como los recientes obstáculos para acceder a la misma y las respuestas de los investigadores, jueces y organizaciones de la sociedad civil.

PALABRAS CLAVE

Acesso a la información – Derechos humanos – Perú – Justicia transicional – Transparencia



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ABSTRACT

In 2006, the Human Rights Council was established within the United Nations to replace the Commission on Human Rights, which had been in existence since 1946. The creation of the new body was justified by the need to combat some of the weaknesses of the Commission, particularly its excessive “politicization”, and to establish a body that could respond more quickly to situations of human rights violations. This article aims to critically analyze the impact of the changes introduced in these early years of the Council’s work, while also questioning the validity of politicization as an argument for the dissolution of the UN’s main human rights body. The article is based on the conclusions of the author’s doctoral thesis on the same subject, defended in December 2011 at the Carlos III University of Madrid.

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KEYWORDS

UN Human Rights Council – International protection systems – Politicization – Institutional transition



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THE UNITED NATIONS HUMAN RIGHTS COUNCIL: SIX YEARS ON*

Marisa Viegas e Silva

1 Introduction

As is widely known, the United Nations human rights protection system in 2006 underwent major institutional reform: the Commission on Human Rights was dissolved and in its place the Human Rights Council was created.

The Commission on Human Rights had functioned for 60 years as the principal body concerned with the defense of human rights within the universal protection system. It was essentially a political and intergovernmental body, which gained ground and expanded its functions over the years. It was responsible for the creation of the principal human rights treaties (such as the Universal Declaration) and the development of the non-conventional human rights protection mechanisms, including the 1503 complaint procedure and the special procedures (special rapporteurs, working groups, among others).

Despite the recognized achievements of the Commission over the course of its tenure, in its later years the body was the target of numerous criticisms. These were primarily related to the excessive political interference in decision making, which is known in UN lingo as “politicization.” These criticisms culminated in the UN reform process and in the need to establish a body with a greater capacity to react to human rights violations. This was the context that led to the replacement of the Commission with a Council, in 2006.

The first years of the Council’s work involved an initial stage of institution-building, when the mechanisms and procedures of the new system were defined, the subsidiary bodies were dissolved and renewed, the mandates of the special rapporteurs were reviewed and a new procedure was put in place – the Universal Periodic Review, which is frequently described as the major distinction of the new

*This article summarizes the main ideas defended in the doctoral thesis “El Consejo de Derechos Humanos de las Naciones Unidas”, defended at the Carlos III University of Madrid, Spain, in December 2011.

system. The document resulting from this restructuring process was Human Rights Council Resolution A/HRC/5/1 of 2007. This document, together with Resolution 60/251 of 2006, establishes the foundations for the work of the newly-created body.

Observing the provisions of Resolution 60/251, in the first half of 2011 the Council submitted itself to a double review process, which included an internal review of its work and functioning in its first five years of existence and a review by the General Assembly of the pertinence of raising the status of the Council to a subsidiary body of the UN.

The UN Human Rights Council maintained its headquarters in the city of Geneva, in Switzerland (in the same offices as the Commission), and began its activities in the same year it was created. It was tasked with consolidating a system of human rights protection based on the advances of the Commission, while overcoming the problems that hindered its predecessor. Consequently, the Council differs from the Commission in the following ways, among others:

- 1) Concerning its *structure*, the Council was created as a *subsidiary body of the General Assembly*, not of the Economic and Social Council like the Commission. This modification is directly related to the proposal for the Human Rights Council to be a principal organ of the UN;
- 2) The Council began to enjoy a *semi-permanent status*, in the sense that the regular sessions of the body are split up, so the Council can meet several times a year instead of just once, as was the custom for the former body. Therefore, the Council holds three regular sessions per year, with a total duration of at least ten weeks, and it also has the flexibility to hold a special session at any time. This change is related to the need to establish a body that can provide quicker responses to situations of human rights violations;
- 3) The new body also suffered a *slight modification in the number of members and in the selection criteria of its members*. The number of members was reduced from fifty-three at the time of the Commission to the current number of forty-seven. Similarly, a direct, individual and secret ballot system was established to select these members; the number of seats per regional group was modified; the number of reelections was restricted to prevent the existence of *de facto* permanent members, a problem which was common in the Commission; State candidates were encouraged to make voluntary campaign commitments and pledges; the obligation was established for Council members to be the first to submit to the Universal Periodic Review; and the possibility was introduced to suspend member States that commit serious human rights violations;
- 4) The subsidiary bodies that existed at the time of the Commission on Human Rights were either dissolved or renewed, most notable being the dissolution of the Commission's primary technical advisory body: the Sub-Commission on the Promotion and Protection of Human Rights;
- 5) In relation to the non-conventional mechanisms, General Assembly Resolution

60/251 that created the Council provided for a review and improvement of the system of Special Procedures and of Procedure 1503 (complaint procedure);

- 6) Concerning the functions of the Council, the new body has basically the same mandate as the Commission, which consisted of activities related to drafting resolutions, promotion and protection, with the addition of the Universal Periodic Review;
- 7) Finally, a mechanism was introduced called the Universal Periodic Review, to examine the human rights situation of all UN Member States. This universal examination was conducted over a four-year period in the first cycle and, for the second cycle, it is expected to take four and a half years. The objective of the review is to permit all States to be treated equally and to avoid partiality when it comes to deciding which countries will have their human rights situations evaluated by the Council, a matter directly related to the debate on combating politicization.

In this article, we shall not revisit the details of the already much-debated institutional transition from Commission to Council. Instead, we shall move directly to a reflection on the impact of the modifications introduced by the Council in its early years of activity, in order to demonstrate both *the weakness of the politicization argument as a justification to dissolve the Commission and the inadequacy of the remedies used to achieve the proposed objective to combat politicization*. Let us, then, analyze these modifications.

2 On the status as a subsidiary body of the General Assembly

Although the Human Rights Council has maintained the same subsidiary nature as the Commission on Human Rights, it was created as a subsidiary body of the General Assembly instead of the Economic and Social Council in order to increase its legitimacy and importance. Even though this did not represent a major change in the status of the new body from a purely formal point of view, it was significant from a political perspective (BOYLE, 2009, p. 12).

This is due to the authority of the General Assembly as the primary UN forum, as well as being the only one where all member nations are represented, which gives human rights a new visibility, an essential requirement for the international protection of these rights. In this sense, the change of name from Commission to Council was a political strategy, and not simply nominal, to bring the Human Rights Council closer to the Security Council and the Economic and Social Council.

It is important to put into context the debate that called for the Human Rights Council to be a principal organ of the United Nations. A central part of what prompted the reform of the human rights institutions in the UN can be attributed to the growing importance that these rights had been acquiring in the organization over the decades, until they were recognized as one of the pillars of the UN system, together with development and security. According to this logic, if the other two pillars have their own councils (Security Council and Economic and Social Council) recognized in the United Nations Charter as principal organs, then human rights should likewise have their own council, also with the status of a principal organ.

In formal terms, it is worth noting that Resolution 60/251, which created the Human Rights Council, stipulated that the subsidiary status was to be reviewed after five years, in order to decide whether to elevate its status to a principal organ of the UN. The difficulty of such an upgrade lies not only in the political consequences of the decision, but also in formal issues, such as the difficulty of modifying the United Nations Charter, a fundamental condition for creating a new principal organ.

In its 2011 review, *the General Assembly decided to retain the Council as a subsidiary body, while providing for a new debate in the future*, which shall occur between 10 and 15 years after this first review. Therefore, despite the unquestionable consistency of the claims that human rights, just like development and security, should have their own principal organ within the UN system, it can be concluded based on the 2011 review process that the outlook of the various different UN Member States has not evolved substantially in recent years. In this respect, without overlooking the importance of giving human rights the institutional status they deserve in the UN, we do not believe, from a practical point of view, that raising the status of the Council to a principal organ is either crucial for the effective functioning of the body or to correct the weaknesses that affected its predecessor.

This is because if we look at the work of the Commission on Human Rights, in its role as a subsidiary body of the Economic and Social Council, there is little denying that it was an operative and functional body that achieved many important results over its sixty-year existence. Indeed, the Commission amassed so many positive results over the years that a movement emerged to weaken it as a system. In this context, its status as a subsidiary body of a principal organ of the UN does not appear to have posed a serious obstacle to the performance of its functions. Neither can it be said that elevating the status of the Council to a principal organ would help achieve the declared objective of the reform: to combat politicization.

As Alston argues, in the first decades of its existence, a period when it exerted a more technical function and avoided taking major political decisions, the Commission could work without being criticized for being overly political. With time, as it expanded its functions, its number of members increased and thus it started to reflect in a more realistic manner the international tensions and struggles for power, the attacks began (ALSTON, 1992, p. 129-130). Also Humphrey points out that the politicization argument began to be used only when States started taking the work of the Commission more seriously (HUMPHREY, 1989, p. 203). In addition, the concept of politicization varied depending on the group employing the term (CHETAIL, 2007, p. 140). These reasons, among others, indicate that the argument of politicization has been used to weaken the Commission.

3 The semi-permanence of the Human Rights Council

The second aspect of the Council that was considered an improvement in its legal and institutional nature was the duration of the sessions and their distribution over the course of the year. The Commission on Human Rights only met once a year for a period of six weeks, meaning that all the important issues were concentrated in one session, which resulted in that these issues were often left aside for the rest of the year (KALĪN; JIMENEZ, 2003, p. 14).

In addition to the difficulties of time management due to the concentration of its activities in a single session, there were also difficulties in reacting to serious situations that occurred in the period between the sessions as well as shortcomings when it came to following up on existing situations (SCANNELA; SPLINTER, 2007, p. 46).

With this concern in mind, Resolution 60/251 stipulated that the Council would meet at least three times over the course of the year, including a main session, for a total duration of no less than ten weeks. Moreover, the new body was given the flexibility to hold special sessions at any time, so it can quickly address issues related to imminent and particularly serious crises. Although the structure of the new body was intended to be semi-permanent, *in practice it functions like a permanent body*, due to the frequency with which it meets.

During the review process in the first half of 2011, although proposals were made to reduce the number of regular sessions to two a year instead of the originally stipulated three, no such change was made.

The fact is that the semi-permanent nature of the body has effectively resulted in an *important increase in its activity* compared to the Commission, enabling *a more immediate response to emergency human rights situations*, as we can observe in the resolutions approved by the Council on matters such as the coup in Honduras, the earthquake in Haiti, and the human rights situations in Libya and Syria.

Among the downsides of the new semi-permanent status, we can highlight the dilution of the publicity and attention that used to surround the single session, which brought together numerous actors from different parts of the world to exchange ideas and lodge complaints. Another important factor is the increased costs for the participants – whether non-governmental organizations, national human rights institutions or small and medium States – that come mainly from other parts of the world and find it difficult to regularly attend the sessions of the Council. (INTERNATIONAL SERVICE FOR HUMAN RIGHTS, 2010, 2011)

4 The composition of the Human Rights Council

As we have already mentioned, one of the most criticized aspects of the former Commission was its composition, since one of the main justifications for dissolving the Commission was the alleged “bad quality” of some of its members that had a track record of bad conduct in the application of human rights (ALMQVIST, GOMEZ ISA, 2006, p. 42).

It is important to note that the debates on the composition of the Council centered in large part on quantitative aspects. More specifically, they focused on the number of members and the geographical distribution of the seats. However, the debates also concerned qualitative aspects of the Council.

In relation to the *quantitative aspects*, the two main suggestions on the matter (to universalize the composition of the Council, on one hand, and to reduce the number of members considerably, on the other) were disregarded, and the Council was created with practically the same number of seats as the Commission, with a slight reduction to 47 members.

In relation to the *qualitative aspects*, the dilemma revolved around whether the Human Rights Council should be comprised of members selected based on

their genuine commitment to the work of the body or, in contrast, on the principle of sovereign equality of States. This issue was first raised during the times of the Commission and it became more pronounced in the debate over the new body.

In the first place, it is interesting to mention that this dilemma is the result of the implicit recognition of the value and evolution of the work of the Commission on Human Rights, since such a concern did not exist beforehand (ALSTON, 2006, p. 191). At the start of its activities, the Commission limited itself to drafting international human rights instruments, avoiding for many years any political review of internal human rights situations or similar topics. Over time, however, the Commission extended its field of action and gradually incorporated new activities, such as the non-conventional protection mechanisms and the analysis of human rights situations in individual countries, which led some States to attempt to weaken the work and the authority of the body. One way of doing this was for States to use their participation on the Commission as protection from criticism, exploiting their member status and weakening the credibility of the body (NACIONES UNIDAS, 2005, para. 182).

The final outcome of this debate on the structure of the Council was, as we have seen, the approval of eligibility criteria for membership, the establishment of commitments for elected Member States, a restriction on the number of reelections (to prevent the existence of *de facto* permanent members) and the possibility of suspending members based on serious human rights violations (NACIONES UNIDAS, 2006, para. 7, 8 e 9).

Although the establishment of a firm commitment to cooperate was a positive sign, the legal provision is too abstract and vague. In order to make the formulation more objective, Member States were required to participate in the Universal Periodic Review during their mandate and the possibility was created to suspend members of the Council that commit gross and systematic human rights violations during the time they serve as members, a possibility that was used in the case of Libya (NAÇÕES UNIDAS, 2011).

To suspend a member of the Council, a two-third majority of the members present and voting in the General Assembly is required, while the election of members requires a two-third majority. The denounced human rights situation must be truly serious and a large margin of votes is required for the suspension to occur. Moreover, there is no provision, under any circumstances, for the expulsion of members, only their suspension. Nevertheless, the mere recognition of this possibility by Resolution 60/251 should be viewed as something positive.

5 The Advisory Committee as the technical assistance body of the Human Rights Council

As we mentioned earlier, Resolution 60/251 determined that the Human Rights Council assume and review the mandates and responsibilities of the Council's subsidiary and technical assistance bodies. As we have seen, this provision resulted in the dissolution of the Sub-Commission on the Promotion and Protection of Human Rights and in the creation of the Human Rights Council Advisory Committee.

The Committee was created with a smaller number of members – just 18, a significant reduction compared to the 26 members that existed at the time of the Commission – and with the authority to hold two sessions per year, with a maximum of

10 days each – instead of the single three-week annual session of the Sub-Commission. As far as the selection of the members is concerned, the process is still exclusively intergovernmental, despite several proposals to include other actors in this system.

Concerning its functions, the Advisory Committee maintained the mandate to generate knowledge for the Council through studies and reports. As such, in its first six years of activity, the Committee has examined a wide range of issues, resulting in an extensive normative production that includes the preparation of draft declarations and guidelines, final studies, as well as analysis of a variety of other topics of a substantive nature.

It is essential to recall that Resolution A/HRC/RES/5/1 of 2007 (NACIONES UNIDAS, 2007) explicitly limited the role of the Committee, requiring it to work exclusively on cases requested by the Human Rights Council. In other words, it eliminated the right of initiative that was created and consolidated within the Sub-Commission and that, as is commonly known, contributed so much to the evolution of international human rights protection.

Another important modification was the ban on the establishment of subsidiary bodies (those that existed at the time of the Sub-Commission were dissolved or transformed into subsidiary bodies of the new Human Rights Council) and the adoption of its own resolutions or decisions (NACIONES UNIDAS, 2007, para. 77, 81). Therefore, we can conclude that, at least in the case of the Advisory Committee, the transition from Commission to Council resulted in a significant reduction of the body's prerogatives and capacity for action, influencing the production of an independent and high quality academic reflection within the UN's main human rights body.

6 The special procedures in the early years of the Council's activity

As we have already mentioned, and as was to be expected given the importance of these mechanisms in the Commission on Human Rights, the resolution that created the Council maintained the special procedures, and also provided for a review and improvement of the system.

As such, a process of review, creation and extinction of mandates marked the initial stage of the special procedures in the Council. Concerning the review of the mandates, this did not involve a real reflection of the content and effectiveness of the mandates, since in general terms the system remained largely the same, with the extinction of some mandates, such as the mandate of the Democratic Republic of Congo, and the creation of others, such as the mandate on the right to safe drinking water and sanitation and the mandate on contemporary forms of slavery.

The review of the *thematic mandates* ran relatively smoothly, with the exception of some issues, such as freedom of religion and belief, the situation of human rights defenders, freedom of opinion and expression, torture and other cruel, inhuman or degrading treatment or punishment and extrajudicial, summary or arbitrary executions, in which there was tension and hostility against the experts. The case of the country mandates, one of the most controversial topics since the time of the Commission, was also fraught with tension, as was to be expected.

In relation to the *country situations*, it is worth noting that these were also addressed at the special sessions of the Council, which were frequent in these early years. In this period, therefore, the Council examined the human rights situation in Palestine and Other Occupied Arab Territories, in Sudan, in the Democratic Republic of Congo, in Ivory Coast, in Libya and in Syria, among others. Of these, the issue that most occupied the attention of the Council in this period, just like during the times of the Commission, was Palestine and Other Occupied Arab Territories, which was the subject of the majority of the special sessions and of a large number of resolutions, decisions and studies.

In relation to the special procedures' *protection* tasks, they consisted of continuing the practice of establishing interactive dialogue with mandate holders, defining and establishing a new process for nominating and selecting the experts, as well drafting and approving a Code of Conduct for them. In this respect, the new nomination process has the advantage of being more transparent compared to the process used by the Commission, and of permitting both greater State participation and greater political control over the decision of the President of the Council. However, as is to be expected in a body of eminently political nature, as is the Council's case, political negotiations play an undeniable role in the nomination process.

With respect to the Code of Conduct for the special procedures, the drafting of this document generated, from the outset, a great deal of controversy, particularly given the concern that it would be used as a means to weaken the system. As experience has shown, despite the advantage of lending predictability to the performance of the special procedures, taking a step forward in their institutionalization, the document also runs the risk of serving as a means to restrict the independence of the special procedures mandate holders. As a result, in the work of the Council, all the renewed mandates started to include a reference to the Code, and in its second year of activities the Council established a formal instrument for vetoing the automatic re-nomination of a mandate holder in the event of suspected non-compliance with the Code of Conduct. Similarly, in its 11th session, the Council once again approved a resolution reminding mandate holders of the obligation to perform their functions in strict compliance with this document. Moreover, in these early years of the Council's work, reference to the Code of Conduct was practically obligatory in resolutions to create or renew mandates and it has been used as a means to criticize the work of the experts, in cases of disagreement with the content of a study or with a particular practice adopted by a mandate holder.

7 The complaint procedure in the early years of the Council's activity

Just as occurred with the special procedures, the Human Rights Council maintained a complaints procedure albeit under a "new" guise. However, that procedure is quite similar to the previous system, principally because it maintains the questionable principle confidentiality. Confidentiality meant that only the names of the countries that were being examined or ceased being investigated through procedure 1503 were made public, meaning that not even the author of a denunciation could follow the process. With the institutional transition to a Council, in addition to the name change to "new" complaint procedure, definitively leaving out any

reference to “procedure 1503”, the new developments that have been introduced to the system include the easing of admissibility requirements, the greater frequency of meetings of the working groups responsible for analyzing the cases, the amount of information that must be provided to the complainant (slightly more, despite the limits of confidentiality), the possibility for the complainant to request that their identity not be revealed to the State, the establishment of time frames (both for the State to present information and for the Council to review the case) and the possibility for the Council to recommend, as a final solution, that the Office of the High Commissioner for Human Rights provide technical assistance to the State concerned.

In relation to the complaint procedure *in practice*, after an initial structuring period, the Council was relatively productive in analyzing and deciding on the situations presented through this mechanism. Given the lack of public data to evaluate whether the modifications introduced through the “new” procedure have effectively improved the complaint mechanism (for example, whether the more flexible admissibility requirements have in fact resulted in an increase in the number of complaints submitted, or whether the fact that the complainants are being informed more frequently about the steps of the procedure has resulted in a greater degree of satisfaction with the system), based on the information available in the annual reports of the Council, we can only affirm that most of the cases it examined were discontinued.

Generally speaking, it can be concluded that the lack of public data – a direct consequence of confidentiality – has resulted in a general disinterest in the procedure, which can be clearly observed in what little NGO and academic research is available on the topic. During the first six years of the Council, it was virtually impossible to find any reference to procedure 1503 going beyond a mere description of the general character of the transition. This is true not only of reports written by organizations such as Human Rights Watch, International Service for Human Rights and Conectas, all of whom regularly follow the work of the Commission, but also of numerous scholars who studied the issue and even of the Council’s own annual reports. Even though the new complaint procedure has addressed – at least partially – two important problems of procedure 1503 (namely the lengthiness of the complaint process and the lack of information for the complainant), from our point of view a real improvement in the procedure must necessarily involve relaxing the confidentiality, a change that does not seem very likely at the moment, given the lost opportunity during the review of the work and functioning of the Council, completed in March 2011, which kept the complaint procedure intact.

8 The Universal Periodic Review

The Universal Periodic Review (UPR) is considered a new development because it did not exist at the time of the Commission. For this reason, and also because it was proposed as one of the main mechanisms to combat politicization – if not the main one – its introduction into the UN human rights protection system was widely celebrated. Among its most important characteristics, we can highlight: the analysis

of the human rights situation of all UN Member States in cycles of four years (first cycle) and four and a half years (from the second cycle onwards), the cooperative and strongly intergovernmental nature of the review, the full participation in the review by the State under examination and the non-binding nature of the recommendations, among others.

In relation to the practical application of the UPR during the first cycle, it was marked by the indefiniteness that typically accompanies newly-established mechanisms of a body that itself is equally young. Concerning the formulated recommendations, which are individual in nature, these were characterized by heterogeneity (recommendations of all kinds were presented: objective, overly general, empty and even some that conflicted with human rights norms)¹ and abundance (the number of recommendations was quite high).² Equally varied were the responses to the recommendations by States that, besides either rejecting or accepting each one, also frequently used the tactic of postponing their assessment of a recommendation until a later date or subtly rejecting it. This means that the aspects supposedly presented as positive (such as the large number of formulated recommendations and the high percentage of accepted recommendations) are only relative indicators of the effectiveness of the procedure.

Concerning the development of the UPR, in the interactive dialogue that occurs during the review process, the following trends, among others, have been observed: the presence of “friendly States” to issue favorable comments during the review, thereby avoiding a more in-depth debate on the other issues of real interest; the shortage of truly critical comments and the predominance of complimentary comments;³ and the tendency among States to concentrate on topics of their own interest instead of concentrating on the human rights problems of the State under examination.

It is worth noting that the purpose of the UPR is not to duplicate the work already performed by the human rights treaty bodies and by the special procedures, but to complement it. In this sense, the UPR differs from these other mechanisms in a number of ways, such as its essentially inter-State character, i.e. the recommendations are issued by States individually and not by the Council as a body; the possibility for the State under review to accept or reject each recommendation, with the consequence that only accepted recommendations need to be implemented; and, the universality of the review and of the rights under review. Moreover, during these early years of activity, there have been instances of positive exchanges of information between the UPR and the other mechanisms – for example, some recommendations formulated during the UPR have been used by the human rights treaty bodies or by the special procedures and, conversely, several States have used their participation in the UPR to comment on their activities before these mechanisms, or to make recommendations to other countries related to these mechanisms.⁴ We can also affirm that the Universal Periodic Review has, to some extent, served as an incentive to implement the obligations of the special procedures and the treaty bodies.⁵

As positive aspects of these early years of the UPR, we would highlight, among other things, the possibility of reviewing the human rights situation in all

UN Member States; the broad participation of States in the process; the possibility of establishing dialogue between States and NGOs; and, the creation of a sense of connection with the UN human rights protection system. As shortcomings, we would emphasize the insufficiency and misdistribution of time for the review; the excessive number of recommendations and their heterogeneity; the lack of assistance from human rights experts during the process (TARDU, 2007, p. 975); the limited opportunity for participation by such non-State actors as NGOs; and, the questionable financial sustainability of the mechanism (INTERNATIONAL SERVICE FOR HUMAN RIGHTS, 2009, p. 7-8).

In relation to the first issue, if one observes the time offered to member states and observers during the review process, one can see that demand exceeded opportunities to intervene. In China's review during the first cycle, for example, 115 delegations registered to speak during the interactive dialogue; in Cuba's case, there were 110 requests to speak; and, in the case of the Russian Federation, there were 73. The participation of all those who enrolled to speak was clearly unfeasible, taking into account that the procedure allowed for two hours of debate. In relation to the excessive number of recommendations, until the 8th UPR session, in May 2010, 12.384 recommendations had been made, an average of 1.548 recommendations per session.

Concerning the reduced room for participation of other non-state actors, it is worth noting that ONGs cannot intervene directly in the UPR interactive dialogue. Their contribution is restricted to the option of presenting a report of up to five pages, whose content may be used to support the OHCHR when it writes a document which will serve as a basis for the examined state. The other opportunity for collaboration occurs during 20 minutes in the debate about the final report in the Council. The limited opportunities for NGO participation makes direct lobby the most obvious work strategy, especially with "friendly delegations", so as to achieve that they intervene in other States reviews regarding themes that the organizations work on.

The second cycle of the UPR began in May 2012 and included some new procedures introduced after the 2011 review of the work and functioning of the Council. As a result, the length of the sessions increased by half an hour (with an extra 10 minutes for the State under examination and an additional 20 minutes for the other States) and new rules were put in place for the list of speakers. The number of recommendations remained high throughout the first and second cycle, without this resulting in greater precision or clarity of the recommendations.

Finally, as the main challenge for the mechanism's future, we would point to the need to strike a balance between the notion of cooperative dialogue and the application of constructive criticism and, more importantly, the imperative to eliminate the practice employed by a large number of States to use the Universal Periodic Review as a political instrument to defend their own interests and not as an instrument to promote and protect human rights, which is the function for which it was created. Another crucial issue, and in our opinion decisive for assessing the real success of the UPR in the future, is the need to ensure effective follow-up to the recommendations formulated during the previous review cycle.

9 Some thoughts on politicization as a justification for dissolving the Commission and creating the Council

We appreciate that a proper analysis of the results of the modifications introduced by the Council is not possible without addressing the matter of politicization, which was the reason (at least the alleged reason) for making the change. In this respect, we consider it questionable that combating politicization was one of the main justifications given for dissolving the Commission and creating the Council, and we also argue that the remedies created to mitigate the problem are inadequate.

On this point, it is essential to recall that both the Commission and the Council were created as intergovernmental political bodies comprised of representatives of various UN Member States. This confers an essentially political nature on their activities, which cannot be eliminated merely with formal modifications to the structure.

Therefore, it is no coincidence that the same criticisms that were leveled at the Commission are now being leveled at its successor (“business as usual”). The accusation of politicization is due, in essence, to the political nature of the body and this cannot be automatically resolved by a few essentially formal institutional fixes. Even though, when the Commission was dissolved, there was a unanimous agreement that the political influence on its work was excessive, the same unanimity did not apply to the reasons why each group reached this diagnosis, with opinions varying between those that believed that politicization was due to excessive interference and selective involvement by the Commission in countries and those that, in contrast, defended that the Commission ought to have a more active inspection role. In a context such as this, any attempt to end politicization in a body like the Human Rights Council is unrealistic, if not naïve or fallacious.

This political option has been obvious from the initial decision in 1946 to establish the Commission on Human Rights as an intergovernmental body through to the decision of the UN General Assembly in 2006 to maintain this same structure for the Human Rights Council. On this point, it is worth noting that the fact that the Council is an intergovernmental body is not necessarily bad. As we know, the decisions adopted by a body comprised by State representatives has the advantage of being already equipped with an important dose of political realism, and they have more chance of being implemented than decisions adopted by bodies comprised exclusively by experts. Indeed, the Commission on Human Rights serves as a good example, since it was an intergovernmental body that, despite all the criticism it received and the restrictions of its mandate, played an important part in the evolution of International Human Rights Law. There is nothing to stop the same thing from happening with the Council, although any such assertion at this stage would be premature.

If the objective of the reform had really been to lessen the impact of political influence on the work of the new body, the approach should have been to introduce more participation by experts in the work of the Council, through measures to strengthen the activities of the Advisory Committee or the special procedures system, which did not happen. Instead, what actually occurred, in the case of the Advisory Committee, was a significant reduction of its prerogatives and capacity for action,

and, in the case of the special procedures, the fear of a possible restriction of its independence through the newly approved code of conduct.

Another example of the persistence of the excessive political influence on the work of the Council is the Universal Periodic Review. Considered the major innovation of the new body and the primary mechanism created to combat politicization, one of the main characteristics of the UPR is its excessively intergovernmental nature and the near absence of human rights experts. Moreover, as we have mentioned, during the first cycle of the new procedure, the practice emerged of avoiding criticism of the States under review through an alliance with friendly States, which were urged to participate in the review with favorable comments. In other words, political negotiations predominate in the UPR, a mechanism that is supposedly intended to reduce them. This is one of the reasons why it is difficult to defend with any conviction that the institutional transition served the political ends it claimed to pursue.

10 Conclusions

This brief analysis gives us a general overview of the impact of the main modifications that occurred on account of the dissolution of the Commission on Human Rights and the creation of the Human Rights Council to replace it. Without discrediting the importance of some truly positive aspects and bearing in mind that it is still too early to conclusively assess the Human Rights Council (taking into account that the Commission took six decades to develop its mechanisms for the promotion and protection of human rights), we contend that the impact of the modifications introduced in these early years of the Council's activity leave a good deal to be desired.

On the one hand, the Council embodies changes that we consider positive, such as its semi-permanent status, the adjustments to the process of selecting members and the possibility of suspending them, the UPR itself and the possibility of reviewing the human rights situation of all UN Member States. On the other hand, as we have already mentioned, it is repeating the same problems that existed under the Commission and that justified the reform – namely politicization and the use of double standards. Furthermore, and most importantly, the intergovernmental nature of the body was strengthened and a tendency to restrict the role of civil society can be observed.

In relation to the politicization and the use of double standards, as we have already indicated, these are political problems that are largely associated with the intergovernmental nature of the body, but also with the same fundamental paradox that has accompanied international human rights protection since the outset: it involves asking States to monitor the human rights violations they themselves have committed, by action or omission.

These considerations allow us to affirm that the argument of ending politicization as the primary justification for extinguishing the Commission on Human Rights is an empty one. It is a product of the political interests that prevailed in the Commission at the time of the approval of the reform.

In these early years of activity, the occasions when the Council has adopted a decisive and active posture, such the suspension of Libya's membership of the body, have been a consequence of the political will and the work of some State

delegations to achieve a Human Rights Council that is more committed to the implementation of its mandate.

Based on the long evolution of the Commission on Human Rights, the short history of the Human Rights Council, the fact that the political environment in the Council corresponds to the reality of international relations in recent years and that the formal and structural conditions of the body, while relevant, may be molded to fit the dominant political will of the time, it is natural to conclude that the way in which the Council will be remembered in history will depend, ultimately, on the evolution of politics and international relations in the years to come.

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NOTES

1. See Naciones Unidas (2009a), paragraph 95; A/HRC/8/48, of June 5, 2008, paragraph 58.
2. Until the 13th session, 2,479 recommendations had been proposed. Cfr. <http://www.upr-info.org/database/statistics/>, consulted on May 7, 2013.
3. See: Naciones Unidas (2008), paragraphs 19 (Palestine), 20 (India), 21 (Pakistan), 22 (Qatar), 23 (Tunisia), 24 (United Arab Emirates), 25 (Saudi Arabia), 26 (Turkey), 27 (Malaysia) and 30 (Libya), among others.
4. See Naciones Unidas (2009b), paragraph 81, recommendation 33.
5. See the final document of the 17th meeting of special rapporteurs/representatives, experts and chairs of working groups of the special procedures with the chairs and members of treaty bodies, (Naciones Unidas, 2010, Annex II, paragraph 41)

RESUMO

No ano de 2006, estabeleceu-se no seio da ONU um Conselho de Direitos Humanos, em substituição à Comissão de Direitos Humanos, que existia desde 1946. A criação do novo órgão justificou-se pela necessidade de combater algumas debilidades existentes na época da Comissão, em especial a excessiva “politização”, e de contar com um órgão que respondesse mais ágilmente às situações de violação de direitos humanos. O artigo busca analisar de forma crítica o impacto das mudanças introduzidas nesses primeiros anos de atuação, questionando também a validade da politização como argumento para a extinção do principal órgão de defesa dos direitos humanos na ONU. O artigo se baseia nas conclusões da tese de doutorado da autora sobre este mesmo tema, defendida em dezembro de 2011 na Universidade Carlos III de Madri.

PALAVRAS-CHAVE

Conselho de Direitos Humanos da ONU – Sistemas Internacionais de Proteção – Politização – Transição institucional

RESUMEN

En 2006, se estableció en el seno de la ONU un Consejo de Derechos Humanos, en lugar de la Comisión de Derechos Humanos, que existía desde 1946. La creación de este nuevo órgano se justificó por la necesidad de combatir algunas debilidades que existían en la época de la Comisión, especialmente la excesiva “politización”, y por la necesidad de contar con un órgano que respondiera más ágilmente a las situaciones de violación de los derechos humanos. Este artículo busca analizar de forma crítica el impacto de los cambios incorporados en estos primeros años de funcionamiento, cuestionando también la validez de la politización como argumento para la extinción del principal órgano de defensa de los derechos humanos de la ONU. Este artículo se basa en las conclusiones de la tesis de doctorado de la autora sobre el mismo tema, defendida en diciembre de 2011 en la Universidad Carlos III de Madrid.

PALABRAS CLAVE

Consejo de Derechos Humanos de la ONU – Sistemas Internacionales de Protección – Politización – Transición Institucional



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ABSTRACT

Land rights have received some attention as an issue concerning property rights and have been considered a specifically important right for indigenous peoples and women, but a right to land is absent from all international human rights instruments. This article reviews how land rights have been approached from five different angles under international human rights law: as an issue of property right, as a specifically important right for indigenous peoples; as an ingredient for gender equality; and as a rallying slogan against unequal access to food and housing. By examining these different approaches, the article proposes to identify the place of land rights within the international human rights instruments and jurisprudence as well as to examine why they have not been – and whether they should be – included in such documents as a stand-alone and specific right to land.

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Land Rights – Women – Indigenous peoples – Right to food – Right to housing



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LAND RIGHTS AS HUMAN RIGHTS: THE CASE FOR A SPECIFIC RIGHT TO LAND

Jérémie Gilbert

1 Introduction: Why land rights?

Land rights are not typically perceived to be a human rights issue. These rights broadly refer to rights to use, control, and transfer a parcel of land. They include rights to: occupy, enjoy and use land and resources; restrict or exclude others from land; transfer, sell, purchase, grant or loan; inherit and bequeath; develop or improve; rent or sublet; and benefit from improved land values or rental income (FOOD AND AGRICULTURAL ORGANISATION OF THE UNITED NATIONS, 2002). Legally, land rights usually fall within the categories of land laws, land tenure agreements, or planning regulations; but they are rarely associated with human rights law. Internationally, no treaty or declaration specifically refers to a human right to land. In fact, strictly speaking there is no human right to land under international law.

However, behind this *façade*, land rights are a key human rights issue. Land rights constitute the basis for access to food, housing and development, and without access to land many peoples find themselves in a situation of great economical insecurity.

In many countries, access and rights over lands are often stratified and based on hierarchical and segregated systems where the poorest and less educated do not hold security of land tenure. Control of rights to land has historically been an instrument of oppression and colonisation. One of the strongest illustrations of this is apartheid South Africa, where land rights were used as a central piece of the apartheid regime. Although less extreme, the extensive social movements of landless peasants throughout Latin and Central America are also a reaction to the control of lands by wealthy and dominant elites.

In the worst situations, stratification in land access has been an ingredient

Notes to this text start on page 134.

in violent conflicts. The situation in the Occupied Palestinian Territories and Israel is a vivid illustration on the use of land rights as a means of oppression (HUSSEIN; MCKAY, 2003). This is not particular to the Middle East, as in most conflict situations control of the land is a critical element of the conflict (DAUDELIN, 2003).

Access, redistribution, and guarantees of land rights are also crucial issues in post-conflict situations (LECKIE, 2008). Redistribution of land remains a critical issue in countries that have recently been through serious conflicts, such as Colombia, Bangladesh, or East Timor. In these post-conflict situations, the issue of land restitution is a factor that, if not properly addressed, could retrigger violence.

Outside violent and conflict situations, regulations and policies governing land rights are often at the heart of any major economic and social reform. Land rights play a catalytic role in economic growth, social development, and poverty alleviation (INTERNATIONAL LAND COALITION, 2003). Recent figures are pointing out that almost fifty per cent of the world's rural population do not enjoy secure property rights in land and up to one quarter of the world's population is estimated to be landless, making insecurity of land title and lack of access to land clear ingredients of poverty (UNITED NATIONS HUMAN SETTLEMENTS PROGRAMME, 2008).

In the past few decades, several countries have adopted drastic land reforms to deal with such issues as poverty, equity, restitution for past expropriation, investment, and innovation in agriculture or sustainability. Arable lands are becoming extremely valuable due to greater investors' interest, changes in agricultural production systems, population growth, migration, and environmental change. This includes large-scale foreign agricultural investments in developing countries that have been labeled *land-grabs*. This has raised new issues regarding the respect of the right to land of local populations by depriving them of essential lands to sustain their access to food. The recent focus on climate change-offsetting measures, which has generated the acquisition of large tracts of lands to plant palm oil or other sources of bio-fuels, is likewise creating a pattern of acquisition of land for economic gains to the detriment of the local populations who are losing their lands to international investors.

In turn, this has created several *land rights* movements claiming the recognition and affirmation of the fundamental right to lands. The claim that land rights are human rights has been a common denominator to movements based in India, South Africa, Brazil, Mexico, Malaysia, Indonesia, the Philippines, and many other countries throughout the world. For these land rights movements, the articulation of a right to land is perceived as a way to push for the protection and the promotion of a key social issue: the recognition that local people do have a right to use, own and control the developments undertaken on their own lands. Land rights are not only directly impacting individual property rights, but are also at the heart of social justice.

Despite being such a central issue for social justice and equality, land rights are largely absent from the human rights lexicon. There have been several calls for the recognition of a right to land under international human rights law

(PLANT, 1993). Despite these initiatives, however, no human rights treaty has recognised land rights as being a core human rights issue. Out of the nine core international human rights treaties, land rights are only marginally mentioned once, in the context of women's rights in rural areas.¹ Nonetheless, despite the absence of a clear reference to land rights within the main international human rights instruments, there has been an increased focus within international jurisprudence on land rights as a human rights issue.

This article reviews how land rights have been addressed despite not being formally proclaimed in the main human rights instruments. To undertake such a journey, the article argues that land rights have been approached from five different angles under international human rights law. As will be examined, claims for land rights have emerged either as an issue of property right (Section 1), as a specifically important right for indigenous peoples (Section 2); as an ingredient for gender equality (Section 3); and as a rallying slogan against unequal access to food and housing (Sections 4 & 5). By examining these three different approaches to land rights, the article proposes not only to identify the place of land rights within the international human rights framework but also to examine why they have not been and whether they should be included in such instruments as a stand-alone and specific right to land (conclusion).

2 Land rights as property rights: Protecting the 'landed'?

Property generally refers to the *ownership over a thing or things*, but the word is also often associated with the idea of property in land. The right to property is a common denominator throughout most of the legal systems of the world, which usually frame it as one of the fundamental liberties of the individual. Most constitutions have a strong entrenched guarantee of this right (ALLEN, 2007), which has played a tremendous role in the development of human norms and values.

Historically, the guarantee of property rights in land was one of the central issues that triggered the development of an emergent human rights system. Property rights have commonly been a central feature of the affirmation of individual liberties against State authority in many Western liberal democracies (WALDRON, 1988). Both the 18th century US Bill of Rights and the French Declaration of the Rights of Man and of the Citizen put the protection of property rights at the same level as the right to life. In this context, private property meant the protection, guarantee, and security of tenures of the *landed*, as only the people who have official title to such land would be protected. Historically, only the wealthy and powerful landlords had such official title.

From such a historical perspective, therefore, the right to property in land could be perceived as a very conservative right; it protects the right of the *landed*. In other words, the right to property applies only to existing possessions and does not address the right to acquire possessions in land. The pre-eminence of property rights in some of the first human rights declarations of the eighteenth century, or even earlier documents, is explained by the will of the *landed* to get protection of their property rights against the power of the monarchs. Property

in land was seen as one of the key elements of freedom to be enjoyed against the governments' will.

The Western origins of the right to property have largely influenced the way property rights have been framed under international human rights law. Its importance is reflected in the international contemporary system of human rights protection, where the right to property is, at the same time, one of the system's quintessential principles and a very controversial issue. Article 17 of the Universal Declaration of Human Rights (UDHR) states:

1. *Everyone has the right to own property alone as well as in association with others.*
2. *No one shall be arbitrarily deprived of his property.*

(UNITED NATIONS, 1948, art. 17)

The inclusion of such a right in the UDHR was controversial and its drafting process gave rise to some serious debates and negotiations. The controversy notably concerned whether there was a need to include such a right and the extent to which the right to property should be limited by national laws (CASSIN, 1972). While the particular issue of land property was not itself a particular focus of the discussion, the divide between individual and more social and collective approaches to property was also going to mark later debates on land rights. The reference to the right to property was dropped in the two Covenants adopted in 1966, making property rights one of the only human rights affirmed in the UDHR which was not integrated into one of the legally binding Covenants. Several arguments have been advanced to explain the absence of the right to property from the two Covenants, notably the divide between the West and Eastern blocs, which made the drafting of a right to property a too complex and ideologically controversial a task (SCHABAS, 1991).

Parallel to these debates, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) adopted in 1965, stipulates a general undertaking of State Parties to eliminate racial discrimination and to guarantee "the right to own property alone as well as in association with others" (UNITED NATIONS, 1965, art. 5, v)

The right to property was also perceived to be an important issue in the fight to eliminate discrimination against women. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) affirms in its article 16 that States should ensure "[T]he same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration" (UNITED NATIONS, 1979, art. 16).

Despite these mentions of the right to property, the main international human rights treaties do not integrate a specific mention of land property rights. And when property rights have been integrated, it is mainly in the context of non-discrimination (ICERD and CEDAW). Ultimately, property rights are only strongly affirmed in the UDHR, and the connection to land rights in this context remains tenuous since it was not originally envisaged.

3 Land rights as cultural rights: Indigenous peoples

From the most diverse and often remote places of the globe, from the frozen Arctic to the tropical rainforests, indigenous peoples have argued that their culture will disappear without a strong protection of their right to land. While indigenous communities are most diverse, most of them share a similar deep-rooted relationship between cultural identity and land. Many indigenous communities, as we shall see below, have stressed that territories and lands are the basis not only of economic livelihood but are also the source of spiritual, cultural and social identity.

The connection between cultural rights and land rights has been acknowledged by the Human Rights Committee (HRC) in its interpretation of article 27 of the ICCPR, which concerns cultural rights for minorities. Article 27 does not allude to land rights per se, but puts an emphasis on the connection between cultural rights and land rights. The HRC has thus developed a specific protection for indigenous peoples' land rights by acknowledging the evidence that, for indigenous communities, a particular way of life is associated with the use of their lands. In an often-quoted general comment on article 27 the HRC stated:

With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of Indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law.

(HUMAN RIGHTS COMMITTEE, 1994)

The connection between cultural protection and land rights for indigenous peoples has been reiterated in several concluding observations on States' reports and in individual communications (SCHEININ, 2000). The approach is that, where land is of central significance to the sustenance of a culture, the right to enjoy one's culture requires the protection of land.

This approach linking land rights and cultural rights for indigenous peoples has also been at the core of the recent jurisprudence of the Inter-American Court of Human Rights (IACtHR). In the 2001 case of the Awas Tingni community against Nicaragua, the court stated:

Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.

(INTER-AMERICAN COURT OF HUMAN RIGHTS,
2001, para. 149)

Since then, the IACtHR has developed a larger jurisprudence on land rights by integrating them as part of the right to property, the right to life, and right to health (ANAYA; WILLIAMS, 2001). This approach to land rights is often referred to as a *right to cultural integrity*. While the *right to cultural integrity* does not appear in any of the international human rights treaties, it refers to a bundle of different human rights such as rights to culture, subsistence, livelihood, religion and heritage which all support the protection of land rights.

This reference to cultural integrity found some echoes in the recent decision from the African Commission on Human and Peoples' Rights (ACHPR) in the case concerning the Endorois community in Kenya. This case concerned the forced displacement of the Endorois community from their ancestral land in the heart of the Great Rift Valley to create a wildlife reserve, plunging a community of traditional cattle-herders into poverty and pushing them to the brink of cultural extinction. In this case, the indigenous community claimed that access to their ancestral territory "in addition to securing subsistence and livelihood, is seen as sacred, being inextricably linked to the cultural integrity of the community and its traditional way of life" (AFRICAN COMMISSION ON HUMAN AND PEOPLES RIGHTS, 2010, para. 16). In its decision, the African Commission received the claim to cultural integrity by acknowledging that the removal of the indigenous community from its ancestral land was a violation of their right to cultural integrity based on freedom of religion (article 8), right to culture (article 17), and access to natural resources (article 21) of the African Charter.

The emergence of an indigenous peoples' right to *cultural integrity* marks the establishment of a connection between access to ancestral territories and freedom of religion, cultural rights, and right to access natural resources. Whilst land rights are not as such affirmed in either the American Convention or the African Charter, the regional human rights bodies have acknowledged the protection of land rights as a crucial human rights issue for indigenous peoples as part of a larger bundle of rights which include property rights, cultural rights, and social rights. This approach is one of the most developed recognitions of land rights as human rights.

A parallel law-making effort that culminated with the adoption of the UN Declaration on the Rights of Indigenous Peoples in 2007 has amplified this jurisprudential evolution. The declaration dedicates several of its articles to land rights, making land rights an essential human rights issue for indigenous peoples (GILBERT; DOYLE, 2011). Article 25 of the Declaration affirms that:

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

(UNITED NATIONS, 2007, art. 25).

While the Declaration is not a treaty, the rights articulated in it are reflective of contemporary international law as it pertains to indigenous peoples, and

indicates a clear international recognition of the importance of a human rights-based approach to land rights for indigenous peoples.

The International Labour Convention No. 169 on the Rights of Indigenous and Tribal Peoples also integrates a human rights-based approach to land rights. It notably affirms that, in applying the Convention,

governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship

(INTERNATIONAL LABOUR ORGANIZATION, 1989, art. 13).

While arguably only a relatively small number of States are party to the Convention, these States are nonetheless representative of States with the largest indigenous populations. Further, because more and more States are ratifying it, the Convention has become an important legal instrument when it comes to land rights for indigenous peoples.

Overall, within the larger perspective of a human rights approach to land rights, the affirmation of land rights as a key human rights issue for indigenous peoples shows that the traditionally individualistic approach to property rights can be challenged and that individualistic approaches to property rights are not sufficient for indigenous peoples as they do not integrate their specific cultural attachment to their traditional territories.

4 Land rights as an issue of gender equality

Land rights have been recognised as a central point within the issue of gender equality. Women's land rights are often dependent on marital status, which makes their security of tenure dependent on relations with their husband. Under national legislations regulating property rights within the family, land rights are often restricted to men as the household head who holds exclusive administration rights over family property. As highlighted in a report from the former UN Special Rapporteur on Adequate Housing:

In almost all countries, whether 'developed' or 'developing', legal security of tenure for women is almost entirely dependent on the men they are associated with. Women headed households and women in general are far less secure than men. Very few women own land. A separated or divorced woman with no land and a family to care for often ends up in an urban slum, where her security of tenure is at best questionable.

(UNITED NATIONS, 2003, p. 9)

Under its focus on *rural women*, CEDAW makes specific mention of land rights in its article 14. In inviting States Parties to take all appropriate measures to eliminate discrimination against women in rural areas, article 14 calls on States to ensure

that women “have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes” (FOOD AND AGRICULTURAL ORGANISATION OF THE UNITED NATIONS. 1979). As highlighted earlier, this article contains the only specific mention of land rights in the nine core international human rights treaties. However, the reference to land rights remains marginal, as the main objective of the article is to ensure that women are not discriminated in land reforms; it does not call for a general reform of unequal land laws.

Article 16 of CEDAW, focusing on elimination of discrimination within the family, invites State Parties to take all necessary measures to ensure that both spouses have equal rights in the “ownership, acquisition, management, administration, enjoyment and disposition of property” (FOOD AND AGRICULTURAL ORGANISATION OF THE UNITED NATIONS. 1979). While not directly mentioning land rights, the reference to ownership and property could be seen as implicitly relevant to property in lands. The Committee on the Elimination of Discrimination against Women (hereinafter the “CEDAW Committee”) has specifically highlighted such a connection in its General Recommendation No. 21 on “Equality in marriage and family relations”, which largely focuses on article 16. The General Recommendation states:

In countries that are undergoing a programme of agrarian reform or redistribution of land among groups of different ethnic origins, the right of women, regardless of marital status, to share such redistributed land on equal terms with men should be carefully observed.

(UNITED NATIONS, 1994, par. 27).

Despite the reference to land rights in both articles 14 (explicit) and 16 (implicit), it is apparent that land rights nonetheless remain marginal within the Convention. The CEDAW Committee, however, has adopted an active approach to the issue of land rights for women. In particular, in its concluding observations, the Committee has demonstrated the centrality of land rights to the fulfilment of women’s human rights by citing land rights as an issue in nearly all of the Committee’s observations. By analysing recent concluding observations of the Committee, one can identify several key issues relating to land rights for women. One of them is the guarantee of non-discrimination in access to land in customary legal systems as well as in formal ones. In its recent concluding observations on Zimbabwe, for instance, the Committee has expressed concern “at the prevalence of discriminatory customs and traditional practices, which particularly prevent rural women from inheriting or acquiring ownership of land and other property” (UNITED NATIONS, 2012, para. 35).

This is not particular to the situation of Zimbabwe; the Committee has made similar comments to the recent reports on Jordan, Chad, and the Republic of the Congo. In all instances, the Committee has highlighted that governments have a positive obligation to ensure that informal legal systems and family practices do not discriminate against women in their access to land

rights. The Committee has also identified de facto inequality in formal systems of land registration that provide some form of recognition to customary systems and either directly or indirectly support practices which favour males and put women in a disadvantaged position by perpetuating tenure regimes based on the assumption of household and community unity.

Another recurring theme in the concluding observations of the CEDAW Committee is thus the close relationship between access to land rights and means of livelihoods such as food and water. In the case of Nepal, for example, the Committee has invited the government to “ensure equal access by women to resources and nutritious food by eliminating discriminatory practices, guaranteeing land ownership rights for women and facilitating women’s access to safe drinking water and fuel” (UNITED NATIONS, 2011, para. 38). Women, especially in rural communities, have often highlighted how land rights have to be seen as central to their access to water, food, and health, and how as such land rights are a central element to support not only their livelihoods but also their children and families. The Committee’s works illustrates how land rights and security of land tenure for women is an essential element to women’s living conditions and economic empowerment.

The connection between access to livelihoods and land rights is also echoed in the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa adopted in 2003. The Protocol to the African Charter twice references land rights as a women’s rights issue twice.. The first concerns access to adequate food. Article 15 declares that:

States Parties shall ensure that women have the right to nutritious and adequate food. In this regard, they shall take appropriate measures to provide women with access to clean drinking water, sources of domestic fuel, land, and the means of producing nutritious food.

(AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS, 2003, para. a a).

The second reference comes in the context of the right to sustainable development. Article 19, which is dedicated to the rights of women to fully enjoy their right to sustainable development, invites States to “promote women’s access to and control over productive resources such as land and guarantee their right to property” (AFRICAN COMMISSION ON HUMAN AND PEOPLES’ RIGHTS, 2003, para. c). The women’s rights approach to land rights links access to land not only to non-discrimination but also to poverty alleviation and economic empowerment. As captured by a recent report produced for the National Human Rights Commission of India:

Land, apart from being a productive resource also provides a great degree of socio-economic security and stability. The control and ownership of land by women also serves as an empowering resource and helps to balance gender dynamics, especially in historically patriarchal societies

(KOTHARI; KARMALI; CHAUDHRY, 2006, p. 28).

This is reflected in the work of several international institutions and non-governmental organisations that have increasingly focused their work on land rights as part of their strategies on poverty reduction and women's empowerment (BUDLENDER; ALMA, 2011).

5 Land rights as housing

The right to housing is inscribed in several key international human rights instruments. These include the ICESCR (article 11, para. 1), the Convention on the Rights of the Child (article 27, para. 3), and the non-discrimination provisions found in article 14, paragraph 2 (h) of CEDAW, and article 5 (e) of ICERD. Article 25 of the UDHR includes the right to housing as part of the larger right to an adequate standard of living. Hence, the right to housing is often qualified as a right to *adequate* housing.

The Committee on Economic, Social and Cultural Rights (hereinafter CESCR Committee) has dedicated a large part of its work to the right to adequate housing. In its General Comment No. 4 on the right to adequate housing, the CESCR Committee highlighted that while adequacy is “determined in part by social, economic, cultural, climatic, ecological and other factors” (UNITED NATIONS, 1991, par. 8), there are nonetheless some key universal factors to determine the content of such right. The Committee has identified seven common factors, the first one being the legal security of tenure.² While security of tenure takes a variety of forms, including rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal settlements, it also refers to security of rights over lands.

The Committee has notably focused on the situation of landless persons highlighting how the lack of access to land fundamentally impinges on the realisation of their right to adequate housing. The CESCR Committee noted that “discernible governmental obligations need to be developed aiming to substantiate the right of all to a secure place to live in peace and dignity, including access to land as an entitlement” (UNITED NATIONS, 1991, para. 8 (e)). The Committee added that “[W]ithin many States Parties increasing access to land by landless or impoverished segments of the society should constitute a central policy goal.” (UNITED NATIONS, 1991, para. 8 (e)) This approach highlights how the realisation of the right to adequate housing necessarily implicates the guarantee by governments of both access to land and security of land tenure for the landless.

The focus on security of tenure and access to land as essential elements of the right to adequate housing is also a central feature in the work of the UN Special Rapporteur on Adequate Housing. Miloon Kothari, the former UN Special Rapporteur, has put particular emphasis on the importance of recognizing that land rights do constitute a central aspect of the right to housing. He identified a normative gap regarding land rights within international human rights instruments dealing with the protection of the right to adequate housing. As noted in the 2007 report: “Throughout his work, the Special Rapporteur has tried to identify elements that positively or negatively affect the realization of the right to adequate housing.

Land as an entitlement is often an essential element necessary to understand the degree of violation and the extent of realization of the right to adequate housing” (UNITED NATIONS, 2007b, para. 25). The Special Rapporteur has called upon the Human Rights Council to recognise the right to land as a human right and strengthen its protection in international human rights law.

The connection between housing and land rights has been particularly central to the work of the Special Rapporteur in the area of women’s rights to housing. Following a resolution adopted by the former Commission on Human Rights, the Special Rapporteur undertook a larger study on women’s rights to own property and to adequate housing. highlights One of the central conclusions of the report was that the lack of recognition of land rights of women directly affects their right to adequate housing. The Special Rapporteur has also highlighted the close link between violence against women and the right to adequate housing, and how the recognition of land rights for women could potentially play a positive role against domestic violence.

Housing and land rights are also connected in the human rights approach to forced eviction. The General Comment No. 7 of the Committee on ESCR defines forced eviction as the, “permanent or temporary removal against the will of individuals, families or communities from their homes or land, which they occupy, without the provision of, and access to, appropriate forms of legal or other protection” (UNITED NATIONS, 1997, para. 3).

Forced evictions are often linked to the absence of legally secure tenure, which, as we said above, constitutes an essential element of the right to adequate housing. Forced evictions are, therefore, *prima facie* violations of the human right to adequate housing. Both the UN Comprehensive Human Rights Guidelines on Development-based Displacement and the Basic Principles and Guidelines on Development-based Evictions and Displacement adopt a similar definition of forced eviction, which includes loss of lands.

The connection between forced eviction and violation of land rights played an important role in the decision of the ACHPR in the case of the Endorois community against Kenya. The Commission highlighted how the non-recognition and respect of the land rights of the indigenous community in their displacement led to their forced eviction in violation to article 14 of the African Charter (AFRICAN COMMISSION ON HUMAN AND PEOPLES RIGHTS, 2010, para. 200). In reaching such a decision, the Commission made direct reference to standards outlined by the UN CESC in its General Comment 4 on the right to housing and to General Comment 7, on evictions and the right to housing, highlighting how land rights are directly related to both the right to housing and the prohibition of forced evictions. Civil society has also put emphasis on the connection between housing and land rights with the establishment of the Housing and Land Rights Network.³

Overall, the connection between housing and land rights seems to be a strong feature of human rights law, and it involves both a positive and a negative aspect. It has a positive aspect in the sense that land rights are considered to be an essential element for the achievement of the right to housing; and a negative

aspect as land dispossession could qualify as forced eviction in direct violation of the right to housing. While such an approach is clearly logical it remains nonetheless limited to one particular aspect of land rights, which is to support housing; but the other crucial aspects of land rights, notably the cultural, social, and spiritual ones, are not captured here.

6 Land rights as access to adequate food

Unlike land rights, the right to food is strongly affirmed under international human rights law. Article 25 of the UDHR reads that everyone has the right to an adequate standard of living, “including food”. Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) makes special reference to the right to food by expressly affirming the right of everyone to an adequate standard of living “including adequate food”. Article 11(2) proclaims the “fundamental right of everyone to be free from hunger”, with article 11(2)(a) requiring States “to improve methods of production, conservation and distribution of food”, in particular reforming agrarian systems to achieve the most efficient use of natural resources; and Article 11(2)(b) requiring the implementation of “an equitable distribution of world food supplies”.

Probably the most direct connection with land rights in the Covenant comes from the reference to the need to “improve methods of production, conservation and distribution of food . . . by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources” (UNITED NATIONS, 1966, art. 11).

Several references to land rights can be found in the General Comment 12 of the UN CESCR on the right to food. In its General Comment, the Committee stated: “the right to adequate food is realized when every man, woman and child, alone and in community with others, has physical and economic access at all times to adequate food or means for its procurement” (UNITED NATIONS, 1999, art. 11, para. 6).

In considering that the “roots of the problem of hunger and malnutrition are not lack of food but lack of access to available food” (UNITED NATIONS, 1999, art. 11, para. 5), General Comment 12 on the right to adequate food states that availability “refers to the possibilities either for feeding oneself directly from productive land or other natural resources” (UNITED NATIONS, 1999, art. 11, para. 12), or from functioning market systems making food available. The General Comment further states that ensuring access to “food or resources for food” requires States to implement full and equal access to economic resources, including the right to inheritance and ownership of land for all people, and particularly for women.

The connection between the right to food and land rights is also an important part of the mandate of the UN Special Rapporteur on the Right to Food (both current and former). The former Special Rapporteur, Jean Ziegler, highlighted that “access to land is one of the key elements necessary for eradicating hunger in the world”, and noted that “many rural people suffer

from hunger because either they are landless, they do not hold secure tenure or their properties are so small that they cannot grow enough food to feed themselves” (UNITED NATIONS, 2002, para. 22). Several of his reports have shown how discrimination in the access to land rights can have a direct impact on the realization of the right to food. In his report on the situation in India, Ziegler noted that:

Widespread discrimination prevents Dalits from owning land, as they are seen as the ‘worker class’, and even if they receive land (as a result of redistribution and agrarian reform programmes in some states), such land is frequently taken by force by higher caste people in the area.

(UNITED NATIONS, 2006c, para. 11).

Landlessness among the Dalits is a common feature in the rural economy, as higher caste and rich landlords control lands, and this directly affects the realization of their right to food.

More recently, the connection between land rights and the right to food has been made even more clear in the context of large-scale land-acquisitions, also known as *land-grabs* (TAYLOR, 2009). Following the 2008 global food crisis, several major food-importing and capital-exporting states, having lost confidence in the global market as a stable and reliable source of food, accelerated the process of large-scale acquisition of suitable agricultural lands (COTULA et al., 2009). In other words, these “food insecure” governments that rely on imports of agricultural produces have started a policy of acquisition of vast areas of agricultural lands abroad for their own offshore food production and also for augmenting their investments in increasingly valuable agricultural foreign lands. In this context, land rights came to be perceived by some as a key tool to ensure local people’s right to food. The current UN Special Rapporteur on the Right to Food, Olivier de Schutter, for example, has directly connected the right to food to the question of large-scale land acquisitions through a recent report:

The human right to food would be violated if people depending on land for their livelihoods, including pastoralists, were cut off from access to land, without suitable alternatives; if local incomes were insufficient to compensate for the price effects resulting from the shift towards the production of food for exports; or if the revenues of local smallholders were to fall following the arrival on domestic markets of cheaply-priced food, produced on the more competitive large-scale plantations developed thanks to the arrival of the investor.

(UNITED NATIONS, 2009, para. 4)

Moreover, the Special Rapporteur urges all stakeholders (governments, investors and local communities) to adopt a more structured approach placing human rights standards at the centre of negotiations. The Special Rapporteur has proposed eleven minimum principles addressed to investors, home States, host States, local peoples, indigenous peoples and civil society. Two of the proposed principles are directly concerned with land rights:

Principle 2 Transfer of land-use or ownership can only take place with the free, prior and informed consent of the local communities. This is particularly relevant to indigenous communities given their historical experience of dispossession.

Principle 3 States should adopt legislation protecting land rights including individual titles or collective registration of land use in order to ensure full judicial protection.

(UNITED NATIONS, 2009)

Hence, the Special Rapporteur has argued that, in the name of the protection of the right to food of the most destitute, States should ensure the security of the land tenure of their farmers and local communities as well as put in place policies aimed at ensuring more equitable access to land (DE SCHUTTER, 2011). While such an interaction between access to land and the right to food is particularly acute within the current *land-grab* phenomenon, this movement of large-scale investment in agricultural lands is only highlighting how the realization of the right to food necessarily implies the protection of land rights.

Recently, more direct references to land rights have started to appear in the work of other international organisations concerned with food security. For example, in 2004, the Food and Agricultural Organisation (FAO) issued its Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security (FOOD AND AGRICULTURAL ORGANISATION OF THE UNITED NATIONS, 2004). The guidelines are based on all the relevant international instruments relating to the right to food, and propose 19 guiding principles to help States ensure the progressive realization of the right to food. Guideline 8 (B) specifically focuses on land rights of women and indigenous peoples as an important element to ensure the realization of the right to food. More generally, several organisations working on issues relating to food security have started to acknowledge the need to focus their work and campaigns on the protection of land rights as part of the realization of the right to food (MIGGIANO; TAYLOR; MAURO, 2010).

7 Conclusion

A human rights-based approach to land rights is essential to address pre-conflict, conflict, and post-conflict situations. As illustrated by the situations in South Africa, Uganda, Guatemala, and Zimbabwe, land issues and agrarian reform are often at the centre of violent conflicts and, as such, are key elements in the transition from conflict to peace. Land conflicts have recently erupted also in Indonesia, and recent large-scale land acquisitions are threatening the stability of Cambodia.

In many ways, these tensions around land rights are not new: the history of mankind has evolved around such conflicts, as arguably wars have always involved some form of territorial dispute. There is also a strong link between use, access to, and ownership of land on the one hand, and development and poverty reduction on the other. The growing agrarian crises, fuelled by the failure of land reform measures, corporate takeover of lands, privatisation of basic services, increase in development-induced displacement, and the usurpation of agricultural land of

small farmers, are all contributing to land rights gradually becoming a central social justice and human rights issue.

While land is increasingly commodified as an exclusively commercial good, a human rights-based approach to land rights brings another perspective to the value of land, as a social and cultural asset and, more importantly, a fundamental right. As traditional access and ownership rights for women, minorities, migrants and pastoralists are ignored or reduced within the current context, these populations are increasingly claiming that their land rights are part of their fundamental human rights. Under the banner *land rights are human rights*, they are claiming that land represent not only a very valuable economic asset but is also a source of identity and culture.

With the notable exceptions of women's rights and indigenous peoples' rights, however, land rights are not to be found under human rights treaties. As explored in the article, land rights are seen to be essential elements for the realisation of other human rights. The connection between land rights and the right to food seems to be gaining some prominence, based on a view of land rights as an essential element for the realization of the right to food. A very similar approach to land rights has developed under the banner of housing rights. In both situations, land rights have been identified as a portal for the realization of other fundamental rights.

The examples above certainly represent an important development within international human rights law. It is paradoxical, however, that notwithstanding the increasingly accepted perception that the realization of two fundamental human rights (food and housing) rely on the protection of the right to land, this right is not considered fundamental, as it is not to be found anywhere in international treaties, despite calls from activists, however, international non-governmental organisations and other civil society actors⁴. One might wonder if human rights law is not putting the cart before the horse with the affirmation that land rights are essential without first clearly embedding it and entrenching it within the legal framework.

Arguably, land rights are inherently contentious, as land is such an important source of wealth, culture, and social life. The distribution and access to land is not politically neutral, and land rights affect the overall economic and social basis of societies. Additionally, the different economical, social and cultural facets of land rights create tensions between different interests, notably between the need to protect the *landed* while also providing rights to the *landless*. Finally, land rights are an essential element of economic growth and, as such, involve a range of stakeholders that includes powerful foreign investors.

Ultimately, land registration and land management will remain within the remit of the national legislation of each country, but an international instrument on the human right to land would influence land legislation and land reforms at the national level. A human rights approach might be an important tool to ensure that both the cultural and economic value of land are recognized, and that thus the right of people over their lands are respected as a fundamental right. Indigenous peoples have succeeded in claiming their fundamental land rights and managed to include land rights within the human rights lexicon. This extremely positive development might be an indication that it is time for the human rights community to claim back land rights has a fundamental human rights for all, landed and landless.

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NOTES

1. Article 14 of CEDAW dedicated to the rights of rural women states that women should "have access to agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement scheme." The nine core human rights treaties are: the International Convention on the Elimination of All Forms of Racial Discrimination; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; the International Convention for the Protection

of All Persons from Enforced Disappearance; the Convention on the Rights of Persons with Disabilities.

2. The other ones are: availability of services, materials, facilities and infrastructure; Affordability; Habitability; Accessibility for disadvantaged groups; Location and Cultural Adequacy.

3. See: <<http://www.hlrn.org/>>. Last accessed on: May 2013.

4. See for examples: Kathmandu Declaration: Securing Rights to Land for Peace and Food Security (2009); Bali Declaration on Human Rights and Agribusiness in Southeast Asia (2011) and also: Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari, UN Doc. A/HRC/4/18 (Feb. 5, 2007), at para, 31-33.

RESUMO

O direito à terra tem atraído certa atenção como uma questão relacionada ao direito à propriedade e tem sido considerado um direito especificamente importante dos povos indígenas e das mulheres, mas o direito à terra está ausente dos instrumentos internacionais de direitos humanos. Este artigo analisa como o direito à terra tem sido abordado desde cinco ângulos diferentes na legislação internacional dos direitos humanos: como uma questão de direito à propriedade, como um direito especificamente importante para os povos indígenas; como um aspecto da igualdade de gênero, como um slogan na campanha contra o acesso desigual à alimentos e moradia. Ao analisar estas diferentes abordagens, o artigo propõe identificar o lugar do direito à terra nos instrumentos e jurisprudência internacional de direitos humanos assim como analisar por que não tem sido – e se deveria ser – incluído como direito específico e independente.

PALAVRAS-CHAVE

Direito à terra – Mulheres – Povos indígenas – Direito à alimentação – Direito à moradia

RESUMEN

El derecho a la tierra ha recibido una cierta atención en cuanto problema de derechos de propiedad y como un derecho particularmente importante para los pueblos indígenas y las mujeres, pero este derecho se encuentra ausente de todos los instrumentos internacionales de derechos humanos. Este artículo analiza como el derecho a la tierra ha sido abordado desde cinco ángulos diferentes en la legislación internacional de derechos humanos: como una cuestión de derecho de propiedad, como un derecho específicamente importante para los pueblos indígenas; como un ingrediente para la igualdad de género; y como una llamada para unirse contra la desigualdad en el acceso a la alimentación y a la vivienda. Al analizar estos diferentes enfoques, este artículo propone identificar el lugar del derecho a la tierra en los instrumentos y jurisprudencia internacional de derechos humanos así como analizar por qué ese derecho no ha sido incluido -y si debería ser incluido- como derecho específico e independiente.

PALABRAS CLAVE

Derechos sobre la tierra – Mujeres – Pueblos indígenas – Derecho a la alimentación – Derecho a la vivienda



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ABSTRACT

This article offers an overview of the human rights violations that have been taking place in Brazil as a result of the implementation of mega development projects. Using the emblematic cases of the 2014 World Cup and the Belo Monte hydroelectric complex as a backdrop, it aims to demonstrate that there is a pattern of violations that is being repeated, whether in the forests, the countryside or in the cities. The article also looks at where the responsibilities lie in this context. It proposes, therefore, to promote a reflection on what kind of development model is truly desirable for Brazilian society and for the country.

Original in Portuguese. Translated by Barney Whiteoat.

KEYWORDS

Megaprojects – Development – Human rights violations



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DEVELOPMENT AT THE COST OF VIOLATIONS: THE IMPACT OF MEGA-PROJECTS ON HUMAN RIGHTS IN BRAZIL *

Pétalla Brandão Timo

1 Introduction

In December 2011, the Brazilian President, Dilma Rousseff, said in a speech that respect for human rights is an essential condition for Brazil's development. She also recognized that social inclusion and distribution of wealth are important parts of development, since growth in a country of 190 million should not benefit only some.¹ These statements by President Rousseff at the time reflected a view that has been increasingly defended internationally, particularly since the 1990s, namely that development is not limited to economic growth. Development and human rights are, or at least they should be, intrinsically linked, being impossible to consider one without the other. This is because they both share the same goal: guarantee and uphold human freedom, well-being and dignity. From this point of view, the principles of social justice and democratic participation constitute an inseparable part of the development process.

Drawing on this rhetoric, Brazil has gained prominence on the international stage over the past decade as the great promise for development: a country with robust economic growth, a consolidated democracy, a guarantor of human rights and where each year significant portions of its population are rising out of poverty. However, the words of President Rousseff contrast sharply with how the Brazilian development model has been devised and, more importantly, put into practice in the country.

In the current Brazilian context, what prevails is the so-called “predatory

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model of development” (LISBOA; BARROS, 2009). This model prioritizes large-scale infrastructure projects that reinforce the prominence of the country on the world market, whether through the intensive exploration of natural and energy resources or through the transformation of urban areas into “staged cities”.² Therefore, in the name of “accelerating growth”, mega development projects are being executed in the country at an unbridled pace and in disregard for the basic principles of the democratic rule of law. This supposed development, which brings enormous benefits to small privileged groups, has also occurred at the cost of violating the human rights of the Brazilian population, in particular of its most vulnerable minorities – primarily traditional populations, such as indigenous, riverside and quilombo communities, but also slum residents and street people, among others.

To offer a brief definition, mega development projects are ventures that are enormous in scale, technically complex and that require extremely high investments. This type of project tends to attract significant public attention and political interest on account of the massive impacts they have, both directly and indirectly, on society, the environment and public and private spending. Similarly, mega-events are large-scale ventures that require substantial investments and that leave physical legacies for the host city.

This reality of development at the cost of human rights violations, which Brazil is trying to hide from the eyes of the international community, as well as within its own borders through hegemonic – and nationalist – discourse which recriminates anyone who questions the mega-projects or opposes the way they are being executed. Supported by the country’s major media outlets the image prevails, therefore, that these projects produce only benefits, employment and income for the Brazilian population as a whole.

In contrast, reports and complaints produced by numerous non-governmental organizations and social movements reveal the following: whether in the countryside, the forests or the cities, the established model of implementing mega development projects has repeatedly caused “serious human rights violations, whose consequences end up aggravating already severe social inequalities, resulting in situations of poverty and social, family and individual breakdown” (CONSELHO DE DEFESA DOS DIREITOS DA PESSOAS HUMANA, 2010: 12). Together, the massive popular demonstrations that have mushroomed in several Brazilian cities, especially during the month of June 2013, are evidence of the importance that this subject matter has assumed in social debates.

Two examples of this problem stand out in Brazil’s contemporary context. These are the projects to implement hydroelectric complexes in the Amazon, in particular the case that has received the most international attention, Belo Monte; and the urban construction and revitalization projects associated with the 2014 World Cup. Each of these cases has produced specific incidents, taking place in various Brazilian cities and regions. There is, however, one common denominator: in all the cases, the people who suffer the most are always the most vulnerable, the poorest, who can only stand watching as their rights – protected by the Constitution and recognized by international treaties to which Brazil is party – are sacrificed for the good of the projects.

Against this backdrop, this article provides an analysis of the human rights violations caused by the impacts of mega development projects in Brazil. Although the aforementioned cases of Belo Monte and the World Cup shall feature prominently, this is not intended as a case study. The article presents a broad overview, in order to expose the existence of a pattern of violations that is repeated in the forests, the countryside and in the cities. By doing so, it aims to promote a critical reflection on what development model would be truly desirable for Brazilian society, taking into account a human rights approach.

The article is organized into three main parts, besides this introduction and the final considerations. The first part provides some context on the problem. Starting with theoretical considerations on the relationship between human rights and development, it then gives a brief presentation of the Belo Monte and World Cup cases, placing them in a domestic and international context. The second part of the article covers, more specifically, four of the main types of violations that the Brazilian State has committed by executing mega-projects: violations of the right to dignified housing, the right to health and environment, the right to information and democratic participation and, finally, violations of the human rights of defenders and activists. This section draws on the legal basis of the rights that are constitutionally guaranteed and established in international treaties ratified by Brazil. The third part reflects on the responsibility of the State for human rights violations, from a perspective of reparation and access to justice, as well as prevention. This section also presents a brief discussion of the role of the State in relation to the abuses committed by companies or by private transnational organizations. Lastly, in the final considerations, the article explains what a human rights approach means for development.

2 Context

The main underlying concern of this article can be summed up in the words of Wamala: “would it be possible to establish the foundations for economic and social development at the same time that the foundations are being established for the realization of individual and collective rights and freedoms?” (WAMALA, 2002, p. 102). Although at first glance it may appear simple to reconcile the interests of modernization and economic growth with the guarantee of human rights, Wamala points out that an empirical study of history reveals that, both in the past and in the present day, the freedoms of individuals and groups have repeatedly been infringed in the name of development.

According to the author, ‘developing’ countries such as those in Africa and Latin America face a different, more complex situation than Western countries, where the peak of economic and industrial development occurred in the 18th and 19th centuries. This is because, while Europe structured the economic foundations of its societies during the mercantilist era, i.e. before they had to cope with calls for individual and collective rights, the countries of the Global South have to pursue economic growth while also responding to the demands for human rights. In previous centuries, it was possible, according to the doctrine of nationalism, to

justify restrictions on individual freedoms in favor of the greater common good of the homeland. Terrible working conditions, for example, were considered desirable within the limits of the nation's demands for growth. Nowadays, constitutional guarantees make it unacceptable from an ethical and legal point of view for governments to collude with rights violations on the pretext of economic benefits – at least in theory.

In practice, however, the needs for economic growth continue to serve as a license for numerous human rights violations around the world. In Brazil, for example, the mentality prevails that certain segments of the population can, or indeed should, bear the burden in favor of an alleged common good. The main message conveyed by the country's mainstream media creates a context in which criticism is unwelcome. It reinforces the argument that the benefits of development generate improvements in the quality of life for the entire population. Opposing large-scale ventures or mega-projects, therefore, is to oppose Brazil. According to Maybury-Lewis (1992, p. 49), “even inhabiting the regions earmarked for the implementation of these plans can be considered ‘blocking the road to development’, and the punishment of those who stand in the way is generally severe, as the indigenous peoples themselves discovered”.

The authorities – spokespeople of development – then insist, based on very often biased statistics, that the rights of the minority cannot take priority over the potential benefits for the majority. However, again in the words of Maybury-Lewis (1992, p. 52),

This argument obscures the real question. There are morally unacceptable sacrifices that should not be imposed on any peoples. [...] If the sacrifices demanded are not morally inconceivable, their imposition on the minority in the name of the majority is only justified if this results in an effective redistribution of wealth for society at large. And this is not the case in Brazil.

It is important, here, to add a disclaimer: this article is not blindly opposed to development projects per se, since it should be recognized that they do indeed offer opportunities for improvements. It is, instead, intended to shed some light on the real social and environmental costs of these projects and identify whose interests they serve and who really benefits from them.

Brazil is currently living through one of those periods in which the country is “governed like an immense construction site and the idea of progress revolves around one objective: the modernization of infrastructure” (ATTUCH, 2008, s/p.). Indeed, the federal government's Growth Acceleration Program (PAC) is the largest package of construction projects in the country's history. A critical debate of this situation is essential to find ways for Brazil to reconcile sustainable development with the guarantee of social inclusion and the enlargement of rights.

2.1 World Cup

When, in 2007, Brazilians celebrated being chosen to host the international soccer competition in 2014, few could foresee the perverse impact that the preparations for the mega-event would have on the lives of ordinary citizens. The celebrations

of the national sport concealed the tragedy that was bound to unfold, particularly after the experience in South Africa, or based on the experiences in other developing countries that hosted similar events, such as the Olympics in China. Moreover, looking back the legacy of the Pan-American Games in Rio de Janeiro, in 2007, it was possible to foresee that the violations would be accompanied by corruption, lack of transparency or dialogue, as well as the passage of “emergency” legal instruments to facilitate the construction work and public biddings, with little or no observance of social and environmental requirements (SOUZA, 2011).

According to information from *Transparência Brasil* (Transparency Brazil),³ of all the planned projects for the World Cup – including stadiums, urban mobility improvements, ports, airports, tourism development and security – only the work on stadiums, until the end of 2013, has been more than 50% completed. Data from December 2013 reveal that in all the other areas, less than 25% has been completed so far, with less than a year to go before the event, calling into question the viability of these projects being ready on time. In the rush to keep to a timetable that is already behind schedule and without the proper planning, the transformations legitimized by the World Cup have paved the way for disrespect of the principles of the democratic rule of law (PRADO, 2011).

The fact is that very little or nothing has been done for the World Cup that can be converted into real gains for the local communities; not to mention the potential diversion of funds from other areas, such as health and education, to pay for the construction of luxury stadiums. According to Pillay and Bass (2008), as well as Greene (2003), critical studies on the legacy of mega-events demonstrate that the benefits of these events for developing countries are overestimated, including in terms of generating employment and driving investment. In many cities, the mega-stadiums have become “white elephants”, since their functionality and use after the World Cup is questionable. Besides, only a very small portion of the Brazilian population will have access to them.

In addition to this, none of the interventions so far have been part of a participatory urban planning strategy, as determined by Brazil’s Cities Statute. In most cases, the government has prioritized the interests of the companies sponsoring the event over the preservation of the local culture. One example of this is the renovation of Rio de Janeiro’s Maracanã stadium, whose plans included the demolition of an historic building that from 1953 to 1977 housed the Indian Museum and that today serves as housing and an integration center for dozens of indigenous people from different ethnicities who come to the city.

It should be noted that mega-events involve more than just a series of construction works, but also an urban design project that leads to a restructuring of the social dynamics of the city. This, in turn, introduces a process that geographers call the “commercialization of the city” (ARANTES et al., 2000), which consists of forced evictions and the “gentrification” or cleansing of urban spaces. In other words, the removal of the “undesirable aspects” of a city that wants to present itself as a showcase for the world, namely people living on the streets and everything else that is related to poverty.

As a result of these abuses, a resistance movement has emerged. Slowly but

surely, in all the event's host cities, opposition began to mobilize in what have been called "People's World Cup Committees", a pioneer initiative never before seen in countries staging the event. Through their National Coalition (ANCPC), these Committees have organized to denounce abuses and violations, hold public hearings, demand transparency and information, and defend the affected communities, i.e. stand up for a World Cup that is truly 'ours'. Finally, it is worth highlighting that the discussions around this theme were at the heart of the June 2013 protests.

2.2 Belo Monte

Ever since its initial conception, dating back to the 1980s, Belo Monte has been an extremely controversial project. Today, Belo Monte, which will be the world's third largest hydroelectric dam, is considered the centerpiece of the Growth Acceleration Program (PAC). The controversy surrounding the project never died, but instead intensified starting in 2010, when the provisional environmental license for its construction was granted.

The controversy involves complex issues, concerning not only the scale of the social and environmental impacts of the project, but also the sustainability of energy generation by the dam, given the seasonable fluctuations of the Xingu river, as well as the cost and the destination of the energy produced, among others (SEVÁ FILHO, 2005). This explains the amount of legal and institutional back-and-forth over the granting of authorization for its construction, which included suspected irregularities and corruption at the heart of the bodies involved in this process. In the midst of legal battles, however, the construction work began in March 2011.

This article does not propose to dwell on how energy mega-projects such as Belo Monte are neither necessary nor viable for a country that claims to be sustainable (BERMANN, 2003). However, even if the construction of the dam were essential for the country, it is undeniable that the way the project has been developed and, above all, how it is being executed, has resulted in countless rights violations in the affected communities.

The situation gets even worse considering that the so-called "conditions", based on which the project was approved, are not being observed by Norte Energia, the company responsible for its construction. These conditions consist of 40 requirements established by Brazil's Environmental Regulatory Agency (Ibama) that are intended to mitigate the social and environmental impacts through infrastructure investments in education, health, sanitation and in other areas in the region affected by the project. In theory, it should not be possible to go ahead with the construction of the dam without these investments, but this is not what has happened. The construction work continues despite the lack of compliance with the conditions.

Without additional infrastructure to cope with the population increase of more than 100% as a result of the construction work, the surrounding towns are directly impacted by the growing demand for services and the deterioration of existing social problems. After the completion of the construction work, the swollen population will expose yet another problem: when all the work is

done, the dam will employ only a very small portion of these people, drastically increasing the unemployment rate in a region that cannot absorb everyone in the job market, even though some workers will leave when the construction is over. This situation contradicts the official discourse on the benefits of the project in terms of employment generation.

None of these problems are new to Brazil. Indeed, Belo Monte is far from an isolated case, as it presents all the same issues encountered during the construction of hydroelectric dams in the past, such as the Tucuruí and Balbina dams, or even the construction of the Madeira river complex. Although these types of conflicts are concentrated in northern Brazil, it is important to point out that rights violations caused by the construction of dams are not limited to this region. The problems faced by the affected populations in northern Brazil are similar to those encountered in the rest of the country, as confirmed in the report produced by the Council for the Defense of the Rights of the Human Person (CONSELHO DE DEFESA DOS DIREITOS DA PESSOAS HUMANAS, 2008). This is why the Movement of People Affected by Dams (MAB) has, for years, been fighting for the recognition and a legal definition of “affected population”, as well as for the guarantee of the right to financial compensation and the realization of prior consultations.

One dangerous facet of this model of “development at any cost” adopted by Brazil is reflected in the policy of retaliation that the Brazilian State assumed in April 2011, when the Inter-American Commission on Human Rights (IACHR) issued a Precautionary Measure (PM) requesting that the Brazilian government immediately suspend the licensing process and the construction work on the Belo Monte hydroelectric complex until the minimum conditions guaranteeing the rights of the affected indigenous peoples were observed.⁴ The Brazilian reaction was unforgiving in its dismissal of the IACHR’s decision. Not only did Brazil refuse to comply with the PM, but in retaliation it also refused, for the first time in history, to attend a meeting of the Organization of American States (OAS) to address the case, and it also temporarily recalled the Brazilian ambassador to the OAS, withheld payment of its annual budget quota and withdrew the candidacy of Brazil’s former human rights minister to the IACHR. This reaction by Brazil can be considered unprecedented, since in the past the country has been the recipient of other precautionary measures from the IACHR and even condemned in four cases by the Inter-American Court, but it has never before responded in such a manner. Quite to the contrary, in the past it has actually demonstrated a willingness to comply with the recommendations and decisions of the Inter-American System.

The pressure was such that in May 2011, the Secretary General of the OAS said publicly that the decision would be reviewed and, in September of the same year, the Commission officially announced a substantial modification to the PM on Belo Monte, alleging that the issue is outside the scope of precautionary measures. This political climate of threats, therefore, put the very credibility and efficiency of one of the oldest human rights protection systems at risk. It also exposed the weaknesses of international mechanisms when faced with the political and economic interests of countries and corporations. In this context, we should not lose sight of the fact that, given Brazil’s strong influence in the region, its position is considered crucial to the

definition of the future direction of such a fundamentally important system, and also to the maintenance of democratic constitutional orders in the region (VENTURA, 2012).

3 Human rights violations

It would be impossible, given the limits imposed by this article, to address the full range of human rights violations caused by all the various mega development projects. The list of violations includes everything from labor rights – in relation to the very often undignified and degrading working conditions on construction sites – to gender perspective, for example in relation to the increased rates of child prostitution and rape of women in the areas around the sites. And even less obvious violations, such as the right to food of the affected populations – for example, through the contamination of rivers that affects fishing, grazing and the people who use this water for subsistence.

In order to limit the scope, this article will focus on four specific issues that are generally considered the main types of human rights violations in this context. It is important to note, however, that this division is merely instructive, since the interdependence and indivisibility of human rights implies that a single situation can produce several rights violations at the same time. The presented cases do indeed reveal that the violations are invariably interrelated.

3.1 *Right to housing*

The forced evictions underway in Brazil, as well as other violations associated with the right to housing, are possibly the most documented type of violation when it comes to mega development projects.

The right to housing covers the right to an adequate standard of living and is not limited to housing, but should also include: legal security of tenure, availability of services, facilities and infrastructure, affordability, habitability, non-discrimination and prioritization of vulnerable groups, adequate location and cultural adequacy (NAÇÕES UNIDAS, 2011). From the full application of this right derives the protection against forced evictions, which should be avoided to the maximum extent possible, since they constitute one of the worst existing types of human rights violations, as the UN has recognized since 1993.

Regardless of the deed or the legal form of residency, everyone has the right to receive protection from forced evictions, which may only occur in order to promote the general public interest, observing the principles of reasonableness and proportionality, and be regulated in order to guarantee fair compensation and social reintegration. The legitimacy of evictions may only be determined through a democratic and participative process, based on transparent information, and after alternatives have been considered and communities have been given sufficient warning (NAÇÕES UNIDAS, 2011).

But everything that “should be” contrasts dramatically with what has actually happened in places like Comunidade do Trilho, in Fortaleza, or Comunidade da Vila do Autódromo, in Rio de Janeiro. Both these decades-old communities are

located in areas that, as the cities have expanded, have become coveted by the real estate industry. Recently, opportunistic arguments have been put forward that evictions are essential for the construction projects, even though in fact everything indicates that viable alternatives exist that do not involve the removal of these people. In the case of Vila do Autódromo, for example, residents and universities partnered to develop a Grassroots Plan, presenting an urbanization proposal which demonstrates that there is no incompatibility between the construction of the future Olympic Park and the continued existence of the community and environmental preservation.

In addition to the complete lack of information and the exclusion of citizens from the decision-making processes, intimidation and ruthlessness in the treatment of residents is commonplace. Similar cases can be found in all the cities that are preparing to receive the World Cup, as has been extensively documented. It is estimated that between 150,000 and 170,000 people may be evicted from their homes to make way for this mega-event (ARTICULAÇÃO NACIONAL DOS COMITÊS POPULARES DA COPA, 2011).

The evictions occur not only because the residents are forced from their homes by tractors and the police, and without proper warning, but also due to the lack of guarantees against real estate speculation and the appreciation of properties in certain regions, since artificial price increases can also result in eviction. The explosive rise in property prices and rents has restricted the enjoyment of the right to housing by pushing low-income families into even more insecure situations, exposing them to the risk of becoming homeless.

Judging by the way they are being handled, forced evictions also reveal a discriminatory approach. In the first place, they are discriminatory against poor, historically marginalized communities. The deference with which the mayor of Rio de Janeiro said he would deal with the matter of compensations in one of the few “upper middle class” neighborhoods affected by the construction work, for example, shows the absolute lack of fairness by the authorities in the treatment of citizens. For residents of poor neighborhoods, the government has used different forms of intimidation, such as the marking of houses and warrantless home invasions. In the second place, there is also an element of racism and prejudice against traditional communities. In Porto Alegre, for example, construction work for the World Cup is being used as a pretext for the dispossession of dozens of “terreiro”⁵ Afro-Brazilian religious sites, including what is believed to be the oldest terreiro in the state of Rio Grande do Sul, in the same location for more than 40 years.

The struggle by Brazilian grassroots movements in this area has produced some results. Pressure has reached international spheres, and complaints have been submitted to the UN Human Rights Council (HRC). This has led to important recommendations by the UN Special Rapporteur on the Right to Housing, and also to questions on the matter being raised by countries during Brazil’s Universal Periodic Review in the HRC. In response, the Council for the Defense of the Rights of the Human Person (CDDPH), of the Human Rights Secretariat, created a Working Group on Adequate Housing in 2012 with the mandate to gather information on the housing problems faced by the population, with a focus on the

impacts of mega-projects and mega-events, and to forward the recommendations to States and municipalities.

A very similar situation can be observed in rural areas, where countless violations of the right to housing are taking place, with affected populations being forcibly displaced (JERONYMO et al., 2012). In a context already marked by intense conflicts over land, the situation is further complicated by the fact that most of the affected populations in the countryside are traditional populations – such as indigenous, riverside and quilombo communities – whose rights as minorities are safeguarded by specific legislation (NETO, 2007). In addition, mega-projects have an even greater impact on populations with an inseparable bond to land that is considered traditional territory, even though the proper documentation supporting this status may not yet exist. This sphere, therefore, includes violations of the territorial rights of traditional peoples.

3.2 Right to Health and Environment

Inevitably, all mega development projects have serious impacts on the ecosystems where they are implemented. Even though prior environmental impact studies are conducted and offsetting measures are adopted and put into practice to mitigate their effects, there is no doubt that the pollution and damage caused to the water resources and the biodiversity of the ecosystems have negative consequences on the living conditions of the residents of these regions.

In the case of mining complexes, for example, numerous health problems can be caused by the emission of pollutants into the air, as well as the contamination of soils, rivers and groundwater. In the case of hydroelectric dams, another example, the fragmentation of the landscape and the predatory exploration of natural resources lead to a deterioration in the quality of life and income of indigenous populations, the loss of biodiversity, the propagation of endemic diseases and a reduction in the quality and availability of drinking water. Complaints also reveal that numerous serious accidents are not documented, among other irregularities in the environmental licensing processes related to the activities of these industries.

The case of Belo Monte involves the examples of both mining and hydroelectric companies. Late in 2012, an alarming situation was revealed after the announcement that the largest gold mining project in Brazil, and one of the largest in the world, would be built on a stretch of the Xingu river, which will lose 80% of its water flow as a result of the implementation of the hydroelectric plant, where two indigenous lands and hundreds of riverside families are located. The project, for the extraction of minerals and storage of toxic waste, is already in the environmental licensing stage, despite the fact that the studies presented so far ignore the accumulated impact of the two projects together. This demonstrates how these impacts can be underestimated, especially when a mega-project draws other subsequent projects.

Negative impacts like these are aggravated when the affected populations do not know who to approach to solve the problems. There is a lack of information on the mechanisms of access to justice and to basic health services that can monitor

and provide treatment to the affected populations – for example, by tracking cases of illnesses typically related to mining areas, such as cancer.

In this context, we must not lose sight of the importance of the principle of prevention as a way of avoiding serious damage to the environment or to people's health. Access to justice should not be discussed merely in terms of compensation, after the damage, probably irreversible, has already been done. It is also worth pointing out the seriousness of this type of violation for indigenous peoples, whose cosmology is closely linked to the preservation of the environment. The degradation of the environment, in this case, is an assault on the right to life of these peoples.

Another problem derives from the indifference with which the affected populations are identified. Generally speaking, the government leaves it up to the companies to define 'who is affected' and deal with the resulting compensation claims. As the MAB has been defending for years, a restrictive or limited definition of 'affected population' is one of the key factors causing human rights violations, since this ends up disqualifying certain groups that should also be considered eligible for some kind of compensation (MOVIMENTO DOS ATINGIDOS POR BARRAGENS, 2011, p. 97-99). After all, 'affected' includes everyone whose way of life and, more importantly, whose source of income and sustenance is affected by the planning, implementation and operation of the mega-project, namely land squatters, small traders, prospectors, fishermen and other groups whose survival depends on access to natural resources.

3.3 Right to information and participation in the decision-making process

Public participation by citizens in the monitoring, assessment and control of government acts is, unquestionably, one of the main instruments of democracy. The right to information is a basic prerequisite for the maintenance of a democratic order, without which full citizen participation and control of public policies would not be possible. According to Principle 10 of the Rio Declaration on Environment and Development (1992), the processes of development should take place in an environment conducive to freedom of expression, in which access to information is guaranteed and the affected groups have the opportunity to express their opinions, which should be considered in the decision-making processes.

Specifically in relation to indigenous peoples, the right to Free, Prior and Informed Consultation (FPIC) has been recognized in relation to the actions of the State that could affect their possessions and lands. According to Convention 169 of the International Labour Organization (ILO) on the Rights of Indigenous and Tribal Peoples, ratified by Brazil in 2002, the government must consult with indigenous peoples and seek their consent before undertaking or permitting any program for the exploration of resources on their lands. The right to FPIC involves basic requirements to ensure that the process is not merely informative, but instead a legitimate dialogue between the State and the affected populations to work towards the reconciliation of interests.

In contrast, however, what is generally seen in mega-projects in Brazil is

the absence of informed public debate. According to Lisboa and Barros (2009), the instruments of participation and social control are always neglected, and the decision-making processes are ignored, giving preference to interests outside the local population. In many cases, the public hearings and consultations with indigenous communities simply do not take place or, if they do, they are only held as a formality to fulfill a requirement. According to reports of the public hearing ahead of the Candonga hydroelectric dam, in the state of Minas Gerais, the overly technical nature of the presentation created an atmosphere of hostility and intimidation, leaving little room for people to ask questions and express opinions. The silence was then conveniently used by the companies to indicate the community's acceptance and approval of the project (BARROS; SYLVESTER, 2004).

According to a report by the non-governmental organization Terra de Direitos (2011), the processes of debate are not participative, since the information available is insufficient and does not create awareness, and it only reaches the interested parties after the relevant decision-making and planning processes have already been completed. Furthermore, the public hearings generally present what is convenient for the companies, i.e. a one sided view of 'progress for the region', and omit information on the true scale of the social and environmental changes.

In the consultations with indigenous communities, there is a complete disrespect for the principle of cultural adequacy, which would require translation into local languages. It is important to point out that this entire process, since it constitutes a stage of public interest, ought to be conducted by the authorities, which may not delegate the task to third-party companies, like it has been doing.

A policy of concealing information, in which decisions are made without any social control, is also present in the various cities across Brazil that are preparing to host the World Cup (ARTICULAÇÃO NACIONAL DOS COMITÊS POPULARES DA COPA, 2011). Public authorities ignore the social uproar, refusing to discuss alternatives presented by society – such as the case of the Mercado Distrital do Cruzeiro market, in the Minas Gerais state capital of Belo Horizonte, which is being threatened with demolition as a result of the World Cup construction projects, even though local residents and businessmen have presented the government, in partnership with the Brazilian Institute of Architects (IAB), with a project for its revitalization.

3.4 Violations of the human rights of defenders and activists

In various parts of Brazil, citizens who organize to defend affected communities and/or the environment have been the target of constant threats, intimidation, attacks, aggression and even killings. In most of the cases, the authorities not only fail to conduct full investigations, but they do not offer proper protection to the victims and their families. Furthermore, they stand in the way of prosecuting the perpetrators and punishing those responsible under the full extent of the law. This situation constitutes, therefore, multiple violations against the freedoms of expression and association, the right to physical integrity and the right to life, among other rights.

In Brazil, conflicts over land and natural resources every year leave dozens of fatal victims. The countless documented cases reveal the extent to which ‘development’ processes are marred by violence, with the tacit authorization of the State through impunity. One example of victims of social and environmental conflicts caused by mega infrastructure projects overseen by large companies, with the support of public funding, can be found in the case of the fishermen of Guanabara Bay, in Rio de Janeiro. Four members of the Association of Men and Women of the Sea were killed in less than four years, while countless threats have been received, and all the cases remain unsolved (CRP-RJ, 2012).

More often than not, acts of intimidation against activists are perpetrated by groups whose interests are closely linked to the mega-projects. In some cases, the repression may come from agents of the State. In the case of Belo Monte, for example, in June 2012 the civil police of the state of Pará sought the arrest of 11 people accused of taking part in protests against the construction of the dam – among the accused, in the investigation, were members of the Xingu Alive Forever Movement, a missionary priest, a nun and a documentary filmmaker from São Paulo.

Considering the weakness of the State to protect defenders and activists against violent actions by groups whose interests are threatened, there have been calls to create a legal framework in the country that effectively guarantees the protection of these people. One such bill is pending in Congress to enact the federal government’s Program for the Protection of Human Rights Defenders. This aims to overcome the barriers of lack of resources and difficulties dealing with state-level governments, among other problems, such as the slow analysis of requests.

There is a concern that violence against human rights defenders is encouraged by the existence of a process to criminalize and make these people invisible, which views them as ‘defenders of criminals’ instead of as people who provide a service for wider society and who contribute to the strengthening of democracy in the country. The few community leaders who do receive some kind of protection ask the same important question that baffles their police escorts: what is the point of providing security so community leaders can continue to expose crimes that the State does not punish?

4 Responsibilities

In accordance with the parameters established by international law, States have the obligation to respect, protect and promote the human rights norms they have committed to in international treaties. Rules of customary law establish that any violation of these obligations, by action or omission, is the responsibility of the State. Taking responsibility implies the duties of immediately ceasing the unlawful act and redressing the damage caused, while also guaranteeing that it will not be repeated. For the purposes of international law, the administrative division of a country into States is irrelevant, since the duties fall on the federal government, which should function as a guarantor of respect for human rights at all levels.

In Brazil's domestic legal system, the civil responsibility of the State corresponds to the obligation of the government to make reparation for damage caused to third parties by its agents during the performance of their duties. Public agents are broadly considered to include not only elected officials and public servants, but also private individuals working in collaboration with the State, such as public companies and foundations, and private companies operating public service concessions. Brazilian jurisprudence has also determined, according to the principle of isonomy, that the duty to redress or compensate exists even when the damage was caused by a lawful act, provided that the damage is considered serious. The doctrine of objective responsibility dispenses with the need to prove fault, and requires just three elements: State action, damage and a causal link. It is, therefore, the defense mechanism that individuals and groups have before the State, i.e. how citizens assure that reparation is made for any of their rights that have been violated by public action.

Even though it can be difficult to quantify all the damage caused as a result of violations by mega-projects and, consequently, the establishment of adequate compensation for all the affected people, it is essential that this is done. The process involves not only identifying all the individuals, families and groups that could have been directly or indirectly affected, but also calculating and paying reparations for the material and moral damage suffered.

Although compensation does not always have to be strictly financial, the costs of compensation should be incorporated into the price of the project. If this were done, the costs of a project like Belo Monte could turn out to be simply unaffordable or so exorbitant as to be unjustifiable given the profit it would generate. In general, these costs are overlooked because everyone knows that, at the end of the day, they will never be paid. The anticipation of the impacts together with adequate compensation would finally prevent these violations from happening.

It is the responsibility of the Brazilian State, therefore, not only to respect the human rights norms established in the Constitution and in international treaties, but also to make private agents respect them. This is a key point, since a strong link has developed between large corporations and national governments, through which the authorities become accomplices in the abuses committed by businesses. Furthermore, in many cases, the abuses are committed by state-run companies and/or by companies financed by public institutions, such as the Brazilian Development Bank (BNDES) or the Banco do Brasil. On this matter, De Paula points out:

Big contractors play a significant role in political strategy today. Several projects implemented over the past 10 years have prominently featured four construction giants: Andrade Gutierrez, Camargo Corrêa, Odebrecht and Queiroz Galvão. From World Cup stadiums to the construction of the Belo Monte hydroelectric dam, on the Xingu river, these 'four sisters' are major recipients of public investments. [...] According to a study by American researchers on the relationship between government contracts and campaign donations, for each R\$1 donated by contractors to political campaigns, R\$8.5 is received in the form of projects.

(DE PAULA, 2012, p. 102).

Concerning non-state actors more specifically, there is already a consensus that companies should at least comply with the observance of human rights norms, i.e. they should respect these rules and not violate them (RUGGIE, 2011). The notion of ‘corporate social responsibility’, for example, expresses the idea that companies should be committed to the well-being of the populations impacted by their operations. The emergence of a broad ethical and normative consensus on this matter is reflected not only on a domestic level, but also internationally.

It must be pointed out, however, that companies may start to exploit these mechanisms as ‘false solutions’, i.e. use them strategically only to improve or clean-up their image and, in doing so, conceal the real impact of their operations. Although Brazil has instruments, particularly in the civil and administrative spheres, but not in the criminal sphere, to hold companies accountable for human rights abuses, there are still barriers in the way of access to justice and affective remedies (COMISSÃO INTERNACIONAL DE JURISTAS, 2011).

Additional complications in the assignment of responsibilities arise from the fact that most mega development projects in Brazil and elsewhere in the world also involve the participation of other actors that may be transnational. This is the case, for example, of projects financed by international organisms such as the World Bank, or projects that have to observe rules imposed by international organizations such as the International Federation of Association Football (FIFA) or the International Olympic Committee (IOC). It becomes difficult, in these cases, to assign the proper responsibilities to each of the actors, especially because there are no international organisms with unified mandates to operate in this way.

Nevertheless, some innovations have emerged over the past decade. One is the World Bank’s Inspection Panel, an independent administrative mechanism that victims of projects financed by the bank can use to seek reparation for any damages they have suffered. Another example are the lawsuits in the United States, in which the Alien Tort Statute (ATS) was invoked before the country’s Supreme Court to demand that companies be held accountable for human rights violations committed in other countries.

It must be admitted that this is a rather recent discussion, and there are still many issues and uncertainties over how to deal with the accountability, on various levels, of all the transnational actors involved. The State, however, remains the primary actor in its obligation to ensure the observance of human rights in its jurisdiction.

The question remains, then, of how to enforce the guarantees of law. The sluggishness of the legal system in Brazil and the inefficiency with which it has dealt with these types of cases, together with the position that the Brazilian government has taken before international bodies, makes for a fairly hopeless scenario. This is why it is essential that, in cases of violations by mega development projects, the discussion should not be limited to responsibilities over compensation – even though this is an extremely important aspect of the debate, since most of the affected populations in the past have never received any type of compensation for damages suffered. From a perspective of future planning, however, the discussion needs to be expanded to include the crucial aspects of prevention. In other words, how to

develop and promote a model of development that does the most to minimize the potential for violations? How to develop of model of development that genuinely serves the interests of human rights?

5 Final Considerations

If the slogan of the current Brazilian government – “Brazil, a rich country is a country without poverty” – really does convey its commitment, then it should be possible to reconcile the development goals of the government with those of human rights defenders. If they do indeed share the goal of ending poverty and building a more inclusive, prosperous and fair society, then they should also be interested in working together more closely. This is because the role of human rights defenders is not only to denounce violations and embarrass the authorities, but primarily to provide information and guidance for the decision-making processes. There is, therefore, a window of opportunity for dialogue that must not be wasted.

The so-called “human rights approach to development” represents the application of the complementary nature of human rights as the means and ends of development. This approach integrates norms, standards and principles of the international human rights system into local development plans, policies and processes. The law confers legal status to the processes of development that should, then, be guided by the principles of participation, empowerment, transparency and non-discrimination (ROBINSON, 2005). The main merit of the human rights approach lies precisely in the attention it draws to discrimination and exclusion. A refusal to let macro-scale gains and results be inadvertently based on violations of the rights of those people who do not benefit from these projects.

On this point, there is a positive answer to the initial question posed by Wamala (2002). Yes, it is possible to reconcile economic and social development with the realization of individual and collective rights and freedoms. This convergence is established in the very concept of “human development”, according to which development is seen as a process of expansion of an individual’s opportunities to choose, so they can have access knowledge and resources, and therefore lead a healthier life (PROGRAMA DAS NAÇÕES UNIDAS PARA O DESENVOLVIMENTO, 2000). The idea that development should serve the interests of human rights, in that there can be no development without respect for these rights, has become increasingly more widespread and has even been incorporated into the rhetoric of the authorities. In practice, however, there is still a long way to go before it can be implemented.

What this article proposed to do was demonstrate that the current development model in place in Brazil has not necessarily freed Brazilians from poverty, but instead accentuated the inequalities and aggravated the situation faced by historically marginalized groups. It has shown that Brazil does not guarantee all the principles that should govern the processes of development, namely participation, empowerment, transparency and non-discrimination. The development model adopted in Brazil today is not liberating and it does not promote the expansion of opportunities and capabilities for individuals and their communities. The choice made by Brazil is a catalyst of social and environmental

conflicts and really only benefits a few privileged groups.

The time is ripe for Brazilian society to broadly discuss alternatives and critically demand from the authorities a model of development that truly benefits all Brazilians. Human rights, in this context, serve as a parameter. Statistics offer good numerical indicators – on housing, income etc. – and they are useful for measuring inequalities. But mere statistics do not account for non-material aspects and, as a result, they do not convey what is most important. That is, the humiliation and loss of dignity suffered by those who are excluded from development. Human rights, therefore, must serve as fundamental criteria for the planning of public policies and the assessment of their potential results.

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NOTES

1. On this point cf. the article published on Portal Brasil on 12/09/2011 entitled "Respeito aos direitos humanos é condição para desenvolvimento, diz presidenta" (Respect for human rights is condition for development, says president), available at: <<http://www.brasil.gov.br/noticias/arquivos/2011/12/9/respeito-aos-direitos-humanos-e-condicao-para-desenvolvimento-diz-presidenta>>. Last accessed on: 02/05/2013.

2. The concept of "staged cities" is used to characterize urban areas that have been transformed in order to serve as a world stage for mega-events. Due to the visibility that these events generate for the city, appearance becomes an essential part of the renovation projects. The development of these cities, therefore, does not serve the needs of their residents, but instead obeys a market logic that offers few long-term solutions for the real urban problems and quickly eliminates aspects of the landscape that are considered "undesirable" (GREENE, 2003).

3. Available at: <<http://www.portaltransparencia.gov.br/copa2014/dados/download.seam>> or in easy visual interface at <<http://openropa.com/>>. Last accessed on: May 2013.

4. The conditions included: the realization of prior consultation processes that are free, informed, of good faith and culturally appropriate; and the adoption of strict measures to protect the life, health and personal integrity of the affected indigenous peoples. On this matter cf. Decision MC-382-10 of 04/01/2011 of the IACHR-OAS, available at: <http://www.xinguvivo.org.br/wp-content/uploads/2010/10/Carta_otorgamiento_corregida_peticionario1.pdf>. Last accessed on: May 2013.

5. Editor's note: sacred sites where religious followers of Umbanda and/or Candomblé meet to worship their deities, more commonly known as Orixás.

RESUMO

O artigo oferece um panorama sobre o quadro de violações dos direitos humanos que vem ocorrendo no Brasil a partir da implementação de megaprojetos de desenvolvimento. Usando como pano de fundo os casos emblemáticos da Copa do Mundo de 2014 e do Complexo Hidroelétrico de Belo Monte, objetiva-se demonstrar que há um padrão de violações que se repetem, seja nas matas, no campo ou nas cidades. O artigo aporta ainda um estudo sobre a quem incumbem as responsabilidades nesse contexto. Almeja-se, com isso, incitar uma reflexão sobre que tipo de modelo de desenvolvimento, enquanto sociedade brasileira, deseje-se verdadeiramente para o país.

PALAVRAS-CHAVE

Megaprojetos – Desenvolvimento – Violações de direitos humanos

RESUMEN

El artículo presenta un panorama sobre las violaciones de derechos humanos que han venido ocurriendo en Brasil a partir de la implementación de megaproyectos de desarrollo. Teniendo como telón de fondo los casos emblemáticos del Mundial de Fútbol de 2014 y del Complejo Hidroeléctrico de Belo Monte, el texto tiene como objetivo demostrar que existe un patrón de violaciones que se repiten, tanto en regiones selváticas, como en el campo o en las ciudades. El artículo también aporta un estudio sobre a quién le corresponden las responsabilidades en ese contexto. Con este trabajo, se pretende incitar una reflexión sobre qué tipo de modelo de desarrollo, como sociedad brasileña, realmente se desea para el país.

PALABRAS CLAVE

Megaproyectos – Desarrollo – Violaciones de derechos humanos



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ABSTRACT

Right to health litigation in Brazil raises a debate regarding its distributive effects in a resource-constrained setting. Several studies have found that a significant proportion of litigation features individual claimants who live in the most affluent states, cities and districts of Brazil and are usually represented by private lawyers, whose fees are beyond the reach of most of the poor population. For some, this is an indication that the distributive effects of litigation are very likely negative because litigation tends to benefit a privileged socio-economic group and may force health authorities to divert to them resources from comprehensive health programs that benefit the majority of the population. Others, however, argue that courts can nonetheless provide an important institutional voice for the poor and promote health equity when they manage to access them. The main problem for this “pro-litigation camp” is thus to enhance access to Justice. Our aim is to analyze lawsuits in which litigants are represented by public attorneys in right to health litigation in the city of São Paulo to inquire if at least this type of litigation is reaching out to the neediest citizens. This study analyzes three indicators: the income of litigants, the Human Development Index and the Health Need Index of the areas where they live. Our conclusion is that although public attorneys seem to represent mostly low income people, other indicators suggest that there are still important obstacles for public attorneys to reach the neediest.

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KEYWORDS

Right to health – Access to justice – Public attorneys – Poverty – Brazil



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REACHING OUT TO THE NEEDY? ACCESS TO JUSTICE AND PUBLIC ATTORNEYS' ROLE IN RIGHT TO HEALTH LITIGATION IN THE CITY OF SÃO PAULO*

Daniel W. Liang Wang and Octavio Luiz Motta Ferraz

1 Introduction

Since the recognition of the right to health in the 1988 Brazilian constitution, and more intensely from the 2000s onwards, hundreds of thousands of lawsuits have reached the Brazilian courts asking the judiciary to enforce that right against government.¹ There is a growing interest in academia in studying the characteristics of this phenomenon and also its impact in the actual enjoyment of the right to health by the Brazilian population.

The more general picture in Brazil so far (FERRAZ, 2011a, 2011b) has shown that litigation is overwhelmingly concentrated in states, municipalities and districts where socio-economic indicators, and health conditions as a consequence, are comparatively better. There is also evidence from some studies that the bulk of expenditure incurred by government through litigation concentrates on individual treatments, often imported and mostly expensive drugs for conditions that are arguably not a priority for the majority of the population served by the public health system (VIEIRA; ZUCCHI, 2007; CHIEFFI; BARATA, 2009; MAESTADT; RAKNER; FERRAZ, 2011; NORHEIM; GLOPPEN, 2011). Furthermore, there is strong empirical evidence that in most localities litigants claiming health treatments come mostly from privileged backgrounds (VIEIRA; ZUCCHI, 2007; SILVA; TERRAZAS, 2011, CHIEFFI; BARATA, 2009;

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MACHADO et al., 2010; MACEDO; LOPES; BARBERATO-FILHO, 2011; PEREIRA et al, 2010; SANTOS, 2006).

According to these studies, therefore, the judicialization of health in Brazil tends to benefit a privileged socio-economic minority who have easier access to information, to legal assistance and to courts, likely forcing health policy authorities to divert scarce resources from comprehensive and rationally devised health programs that benefit the majority of the population to health services (often new and expensive drugs) that are neither cost-effective nor a priority for a public health system that aims to serve a large and needy population with limited resources (VIEIRA; ZUCCHI, 2007; CHIEFFI; BARATA, 2009; FERRAZ, 2009, 2011a, 2011b; MAESTADT; RAKNER; FERRAZ, 2011; NORHEIM; GLOPPEN, 2011).

This “Brazilian model” of health litigation (FERRAZ, 2009, 2011a) has divided commentators into two opposite camps. On one side, there is the pro-litigation camp, which believes that litigation plays a legitimate and positive role in forcing a recalcitrant executive to comply with the right to health included in the 1988 constitution. Others, however, claim that the kind of litigation that is prevalent in Brazil (the “Brazilian model”), rather than make the right to health effective, might represent a hindrance in the implementation of that right.²

We want to assess more thoroughly in this article one of the claims of what we call the “pro-litigation camp” which seems to us, at least in principle, plausible. Before that, however, we must first distinguish between two main strands within the pro-litigation camp that are significantly different (our article engages only with one of these strands). One position (defended mostly by lawyers, judges and some health rights activists) simply overlooks or ignores as irrelevant the picture emerging from the empirical studies above cited. For them, the “Brazilian model” of litigation is not at all problematic in that, even if benefiting mostly a comparatively privileged socio-economic minority, it is still, in their view, enforcing the right to health recognized in the constitution, which doesn't distinguish between poor or rich, i.e. is a universal right. We find that position untenable for reasons that we can only briefly indicate here. Given that resources for health are necessarily scarce (i.e. resources available in the Brazilian public health system are not sufficient to satisfy all health needs of the whole population), the right to health recognized in the Brazilian constitution cannot be plausibly interpreted as an unlimited right to the satisfaction of every health need of the whole of the Brazilian population (FERRAZ; VIEIRA, 2009). Moreover, in highly unequal countries like Brazil, where there are huge historical inequalities in health and all other social goods which the constitutions aims to reduce (article 3), the right to health cannot be interpreted in a way that is neutral to the needs of the poorest. Such “neutral” interpretation would either perpetuate these huge health inequalities or, worse, increase them, as the Brazilian model of litigation is probably doing, although perhaps not, or not yet, on a massive scale (FERRAZ, 2009).

The other main position within the pro-litigation camp is much more

plausible. It accepts all the premises of the anti-litigation camp, i.e. that resources are scarce, that they need to be allocated in a non-neutral way so as to improve the health conditions of the poorest, and that the Brazilian model of litigation is not ideal. Yet they believe that the model is not entirely negative, and have an optimistic view about the possibility of changing it for the better.

One of their arguments is that courts can (potentially at least) provide an important institutional voice for the poor provided that access to them is extended to the least advantaged. The solution, thus, should not be to stop litigation, as some critics of the judicialization of health seem to suggest, but rather to *extend* it to those who need it most. In other words, the problem is not with litigation itself, but rather with access to Justice. Thus, if significant improvement in access to Justice occurred, litigation could in principle have a positive impact.

This is the hypothesis we test in this article. Access to Justice has indeed improved to some extent in Brazil since the 1988 constitution. Regarding right to health litigation, there are two states where litigants represented by public attorneys surpass those with private representation: Rio de Janeiro and Rio Grande do Sul (PEPE et al., 2010; SANT'ANNA, 2009; MESSEDER; OSORIO-DE-CASTRO; LUIZA, 2005; BIEHL et al., 2012).³ In the case of the city of São Paulo, between 25-30% (SILVA; TERRAZAS, 2011; CHIEFFI; BARATA, 2009) of the claimants are represented by public attorneys of the Public Defender's Office (Defensoria Publica, hereafter "DP") and Public Prosecutors' Office (Ministerio Publico, hereafter "MP"), whose remit is exclusively (DP) or in part (MP) to represent the most disadvantaged.

We use empirical data collected in 2009 at the DP and MP in the city of São Paulo on the socio-economic profile of litigants and the types of health benefits claimed through litigation. Our aim is to determine whether these public attorneys are capable of effecting the changes that the more plausible position within the pro-litigation camp claims to be feasible. If there are any actors who are capable of using litigation to improve healthcare policies for the needy, they will probably be these public attorneys.⁴ Assuming as correct our non-neutral interpretation of the right to health, our questions are these: i. have public attorneys so far represented those who to be most in need? ii. have they focused on the health issues that are most urgent in order to improve the health of the poorest groups of the population?

The city of São Paulo was chosen as the case study in this paper for several reasons. Firstly, due to the availability and accessibility of data. Secondly, because São Paulo is one of the cities where health litigation is most rampant, partly because it is the biggest city in Brazil in terms of population and wealth, and has also a reasonably well developed public health system. Lastly, most empirical research showing a strong relationship between socio-economic status and volume of litigation was carried out in São Paulo. Hence, it is possible to use São Paulo to compare health litigation initiated by private lawyers on behalf of comparatively advantaged individuals with that initiated by public attorneys in order to gauge if the claims of the pro-litigation camp stand or not.

2 The Data

2.1 Public Defender's Office (*Defensoria Pública*, "DP")

The DP is the institution responsible for providing free legal assistance to low income citizens who have no economic resources to pay for private lawyers. In the state of São Paulo, specifically, this institution was created only in 2006⁵ and offers legal assistance to citizens whose monthly household income is not more than three times the national minimum wage.

When the data collection was concluded, in the end of February of 2009, the national minimum monthly wage was R\$ 465 (Brazilian reais), so the threshold for qualifying for free legal assistance from the DP was R\$1,395,00 per month the equivalent of around US\$580 then. However, this threshold is flexible and people above this it can still qualify for legal assistance depending on their family situation (assets and number of members), the economic value involved in litigation and the type of litigation. Particularly in cases involving medication, the threshold can be (and often is) set aside when the price of the medication litigated is high.

The DP has many units spread around São Paulo City, but right to health cases are centralized in one unit (*Unidade Fazenda Pública*) at the heart of the city center. In this unit there were in 2009 five Public Defenders and cases were randomly distributed to each of them, which means that they were responsible for approximately the same number of cases. Given this distribution, analyzing the cases for which one particular Public Defender was responsible provided us with a random sample of 20% of all right to health cases in the DP.

We selected right to health cases from 2006, the year when the Public Defender's Office went into operation in São Paulo, until February of 2009, when the research was concluded. In total, 340 cases were analyzed.

2.2 Public Prosecutors' Office (*Ministério Público*, MP)

The MP is the institution responsible for, among other tasks, ensuring respect by public authorities for the rights guaranteed in the constitution and for protecting and representing collective and public interests.⁶ Although both the DP and the MP have standing to bring individual and collective lawsuits, an informal agreement between them established that, in São Paulo, the DP would be mainly responsible for individual lawsuits, whereas the MP would be mostly focused on class actions (*Ações Civis Públicas*).⁷

In the MP, at that time, there was a special department responsible for right to health cases: the Group for Special Action in Public Health (*Grupo de Ação Especial à Saúde Pública*, acronym GAESP).

GAESP was created in 1999 and until the date when the research was concluded, February of 2009, it had lodged 62 class actions. Among these actions, we chose only those in which litigation was against public authorities and demanded some sort of public provision of health care or other health related measures (32 cases fit this description and were thus analysed).

3 Overview of the cases

3.1 Public Defender's Office

In the cases represented by the Public Defender's Office, most cases (47%) involved a claim for drugs for the following health problems: Diabetes (25,24%), Cerebral Palsy (6,65%), Arterial Hypertension (5,48%), Glaucoma (3,32%), Cerebrovascular Accidents (3,33%), Heart Diseases (3,33%), Cancer (2,35%). There was also a significant volume of cases demanding health products for Diabetes measurement and control, and diapers for people who suffered from Cerebrovascular Accidents and Cerebral Palsy.

In most cases the DP had a successful result. Among the 293 cases in which this information was available, in 84.64% of them the Public Defender got an interim decision in favour of the claimant. In 78% of the cases the final judgment was in favour of the claimant. The data also show that there were 187 appeals lodged by the government of the State of São Paulo in the Court of Appeal against unfavorable final judgments. The result of the appeals was available in 63 cases and were unsuccessful (i.e. against the State) in 76% of them. According to the DP's records, in only 27 cases the first instance decision went against the claimant, but after these cases were appealed, the result was reversed in favor of the claimant in 21 cases, i.e. almost 80%. Thus, according to the data available, patients' total rate of success in the Court of Appeal was around 78%.

3.2 Public Prosecutors' Office

The Public Prosecutor's Office Group for Actions in Public Health (GAESP) lodged exclusively class actions (*Ações Cíveis Públicas*). Among the 32 cases analyzed, 22 (69%) were complaints about the bad conditions of public health hospitals, basic health units and clinics. The causes of the litigation are lack of materials, instruments, medicines,⁸ ambulances, equipment, professionals (doctors and nurses) and problems with the buildings' hygiene, safety and maintenance.

In 9 cases (28%) the Public Prosecutors' Office demanded specific medicines and treatment for the following diseases: Hepatitis C (2 lawsuits), Malignant Hyperthermia, Chronic Renal Failure, Epilepsy, Chronic Obstructive Lung Disease, Autism and Adrenoleukodystrophy. In one case it demanded free public transportation to medical facilities for low income pregnant women.

The information about the cases' rate of success was not available for the whole dataset. For the first instance, this information was available in 66% for interim decisions, 76% for final decisions and 63% for appeals. The result was that, according to the data available, 64% of the interim decisions were decided in favour of the claimant and 36% against. Concerning final decisions, 80% were decided in favour of the claimant and 20% against. Regarding appeal decisions, the rate of success for claimants falls to 52%.

The comparison between the rate of success shows therefore that the MP is significantly less successful than the DP both in interim decisions in the lower

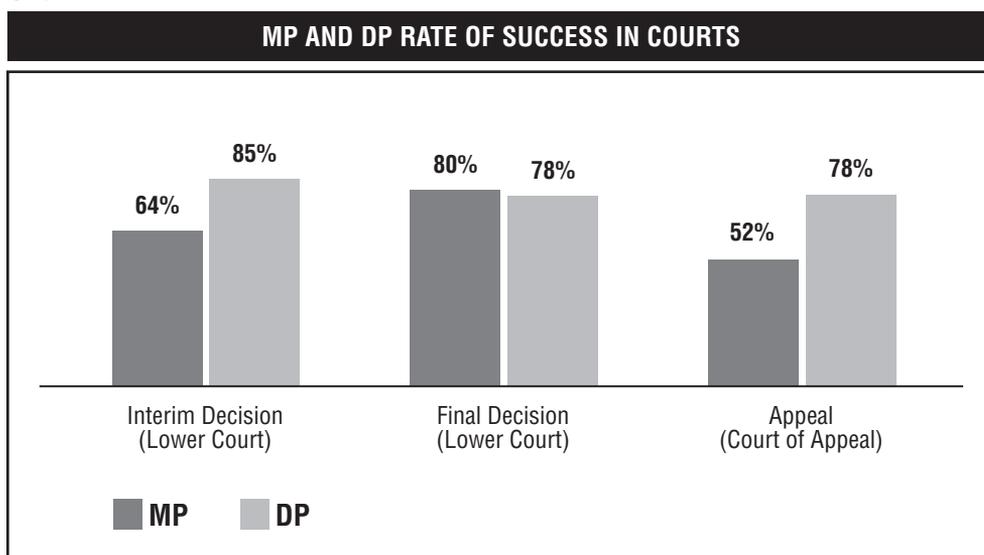
courts and on appeal of final decisions in the Court of Appeal, yet slightly more successful in final first instance decisions (See Chart 1).

The higher reversal on appeal and the lesser success in interim decisions for MP cases could be explained by the fact that these cases are collective and therefore more structural than those lodged by the DP. They are structural in the sense that they aim to promote significant changes in the public health policies that will affect a larger number of people and will have significant economic and budgetary impact, whereas the DP cases in our sample are all individual claims.

As a general rule, it is possible to affirm that the higher the political and economic impact the more cautious courts (especially high courts) will be in reviewing administrative and political decisions (see TAYLOR, 2006, p. 275). This could be explained by the fact that in these cases courts are less certain about the consequences of the decision or because judicial activism in these cases could bring them into serious conflict with political branches. That is probably the reason why small scale demands – for example, the individual claims lodged by the DP – are more prone to success than structural cases, as are also the individual cases lodged by private lawyers. It is true, of course, that individual cases can in the aggregate have significant impact on policy and budgets as well, especially when there are thousands of them, but this potential indirect effect does not seem to concern judges.

The Brazilian Federal Supreme Court (the highest court in the Brazilian judicial branch) seems to confirm this general rule, at least in right to health litigation. In two recent decisions – STA 424 and SL256 – the Federal Supreme Court rejected collective complaints on the grounds that they may affect the public budget and be an “obstacle to the adequate provision of public services by the Public Administration”. This court also affirmed that a healthcare claim should be granted only if the need is proved individually. Even though the Federal

Chart 1



Source: Defensoria Pública do Estado de São Paulo and Ministério Público do Estado de São Paulo, 2009.

Supreme Court interpretation does not bind lower Courts (save few exceptions), these decisions can be used as an example of a certain behaviour in Courts that may explain why lawsuits lodged by the MP are, in general, less successful than those lodged by the DP.

4 Profile of litigants represented by the Public Defender's Office

Poverty is not an easy phenomenon to assess. Different interpretations of reality translate into different poverty measures. Hence the question whether a certain group is poor and how poor it is will allow many answers depending on the understanding of poverty and the “space of concern” that is being measured (LADERCHI; SAITH; STEWART, 2003, p. 244). The data available in the files at the DP offer us two indicators that can be used to assess the socioeconomic status of those represented by this institution: household income and the district where litigants live.

Because the DP services are in principle restricted to those below a certain household income threshold, all citizens who wish to receive free legal assistance have to declare and, at least in principle, bring evidence of their *household* income (as opposed to individual (per capita) income).⁹

Since the number of family members was not widely available, we decided to use the average number of family members in the metropolitan area of São Paulo – 3.2 persons per family (DIEESE, 2009) – as the best (though not perfect) proxy to define our sample's income per capita. This was important because income per capita is one of the most widely used indicators of poverty allowing us to compare the socioeconomic status of our sample with the population as a whole.

We are aware that even though the monetary approach is the most frequently used, it has some important limitations. There are other aspects of human deprivation that do not depend exclusively on the amount of money someone owns (SEN, 1992). For example, citizens with a lower income may have better health outcomes than those with higher incomes if the former have access to good public health services whereas the latter have to pay for it or have to travel long distances to receive health care.

For this reason, we will also use the Human Development Index (HDI) and the Health Need Index (HNI)¹⁰ of the districts where the claimants in our sample live to shed some light on aspects that the purely income based analysis cannot show.¹¹

4.1 Profile according to income

4.1.1 Poverty and extreme poverty thresholds in the city of São Paulo

The poverty and extreme poverty threshold we use in this paper were developed by Rocha (2009) for the urban area of the city of São Paulo. She defines the extreme poverty threshold as the amount of money needed by a person to purchase a minimum quantity of food. The poverty threshold is in turn calculated as the amount of money

a person needs to fulfill her basic needs, such as food, transport, leisure, health, education and hygiene.

The thresholds' values in Brazilian Reais for the city of São Paulo are described in table 1.

Chart 2 shows the distribution of litigants' socio-economic status according to the year of the lawsuit. As stated above, the individual income was calculated by dividing the declared household income by the average number of persons per family in the metropolitan area of São Paulo, which is 3.2:

Table 1

POVERTY AND EXTREME POVERTY THRESHOLD IN SÃO PAULO CITY			
	2006	2007	2008
Poverty	266,15	280,14	300,78
Extreme Poverty	66,35	73,26	83,52

Source: Rocha (2009)

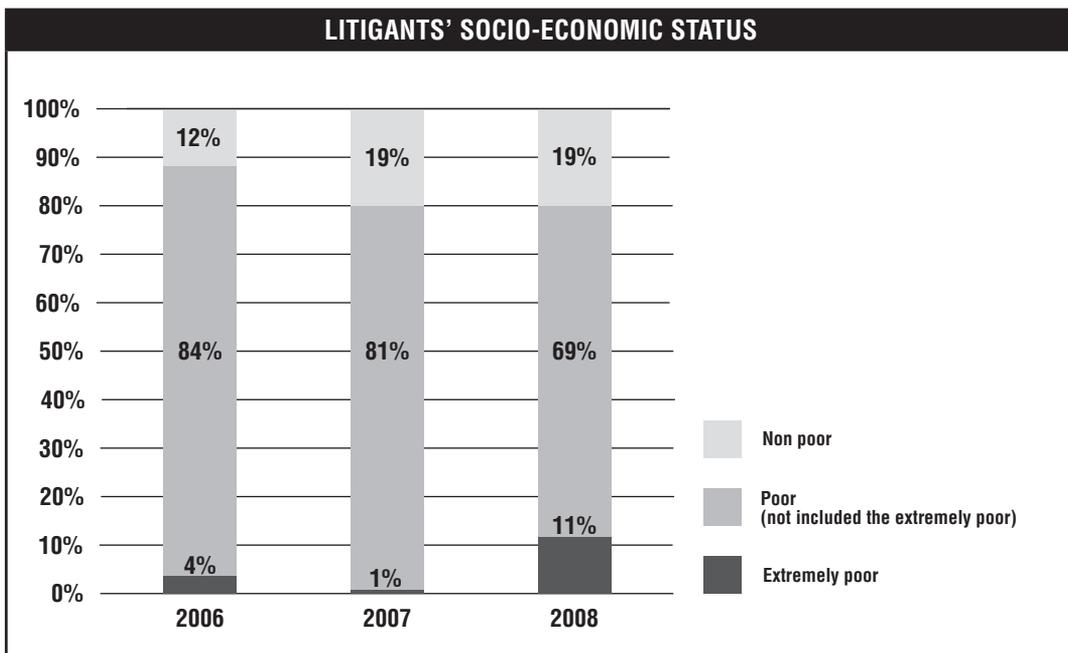
This chart shows that most of those represented by the DP are below the poverty threshold line if we assume that their self-declared income is accurate (see however the comment below). Considering the proportion of people below this threshold (including the extremely poor and the poor) in São Paulo City's whole population – 2006 (22%); 2007

(20%); 2008 (19%) – (ROCHA, 2009), it could be affirmed that the DP services are reaching significantly the lowest income quintile of the metropolitan area of São Paulo. Around 80% of those represented by the DP belong to the 20% poorest people in the city of São Paulo.

It is also true, however, that only a small number of cases feature individuals below the extreme poverty threshold. Although their proportion in the population is also low - 2006 (3%); 2007 (3%) and 2008 (2,9%) (ROCHA, 2009).

As already mentioned, however, income alone is not necessarily an accurate

Chart 2



Source: Defensoria Pública do Estado de São Paulo, 2009

indicator of deprivation. Moreover, even though applicants for free legal assistance need in principle to take documents to prove their low income (e.g. employment contract or social insurance benefit slips) the data on income available from the lawsuits are mostly based on self-declaration and, as we will see, might thus not reflect the real income of those represented by the DP. In the following sections we use two other indicators to test the results reached through income alone.¹²

4.2 Profile according to district of residence

4.2.1 Human development index (HDI)

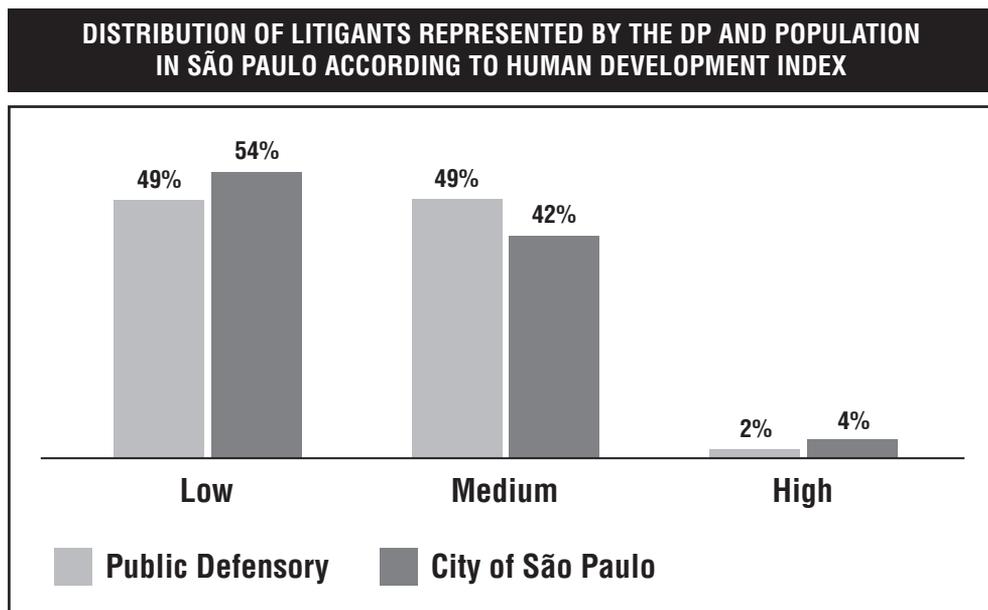
The human development index aims to measure a population's quality of life in a comprehensive way, including GDP per capita, life expectancy and educational attainment.

In the city of São Paulo, 4% of the population lives in districts with high HDI (above 0.8), 42% in districts with medium HDI (between 0.5 and 0.8) and 58% in districts with low HDI (below 0.5). In our litigants represented by the DP, people who live in areas with low HDI are slightly underrepresented whereas those who live in districts where the HDI is medium are considerably better represented (See Chart 3).

4.2.2 Health Need Index (HNI)

The Health Need Index (Índice de Necessidade em Saúde) was developed in order to identify which areas of the city of São Paulo should be prioritized in the distribution of health care services. It is calculated using data related to

Chart 3



Sources: Defensoria Pública do Estado de São Paulo, 2009 and SÃO PAULO (2008)

demographic, epidemiologic and social conditions in each district. The districts are distributed according to the level of their health needs. The higher the HNI, the more urgent are the population health needs (SÃO PAULO, 2008).

In our sample, only 42% of litigants represented by the DP live in areas in which health needs are high, and thus where implementation of the right to health is arguably more deficient (Chart 4). The majority of cases (58%) feature litigants who live in areas regarded as of medium or low HNI.

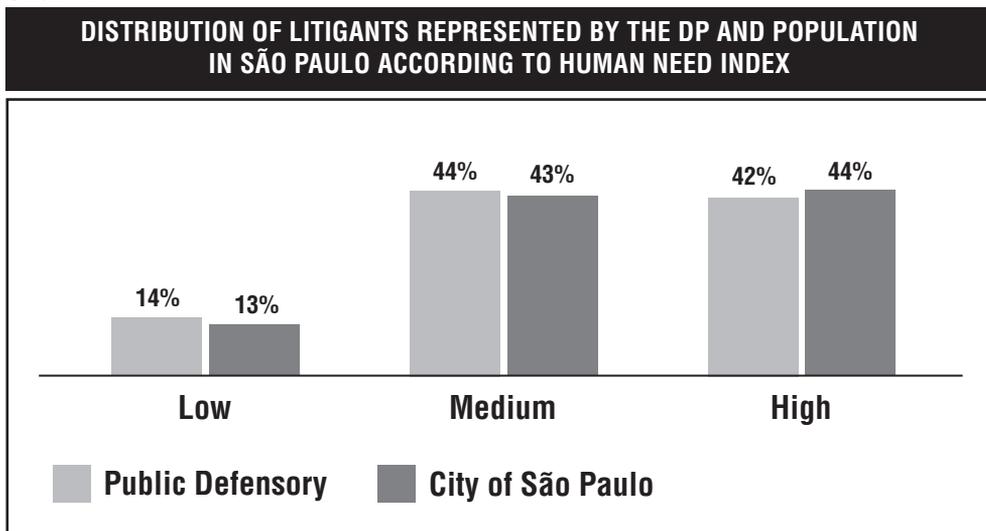
4.2.3 Analysis of data

The data presented above brings up interesting but at points contradictory aspects of right to health litigation sponsored by the DP. If we take into account the self-declared income of litigants, it would seem that the vast majority of lawsuits brought by the DP (more than 80%) feature individuals who are below the poverty threshold of the city of São Paulo and belong to the lowest quintile of income in that city. When we use district of residence coupled with a broader indicator of deprivation (HDI) and a specific indicator for health deprivation (HNI), however, the picture changes significantly and the pro-neediest bias disappears. The percentage of individuals represented by the DP living in the lowest HDI districts and the highest HNI districts, arguably those whose need for healthcare is more urgent, falls to 49% and 42% respectively.

5 Lawsuits lodged by the Public Prosecutors' Office by district

Differently from the cases represented by the DP, the class actions lodged by the MP are what we call structural cases, in the sense that they try to promote significant changes in the public health policies that will affect a larger number of people (improvement in public health units and inclusion of medicines or treatments in the public system), rather than seek a health benefit for a single individual.

Chart 4



Sources: Defensoria Pública do Estado de São Paulo, 2009 and SÃO PAULO (2002)

Among the cases described in Section 3.2, the case in which free public transportation was demanded for low income pregnant women is the only one in which the lawsuit was clearly aimed at benefiting the poor. This makes the question we are trying to answer here a lot trickier than in the DP cases. Indeed, whether the poor or the severely poor are benefited by MP, right to health litigation is more difficult to answer in these structural cases in which a large-scale public policy that can potentially benefit a large group of individuals is at stake. More in depth research would be necessary to assess which social classes are more affected by these policies and who are the people who actually end up benefiting from these policies. This is crucial given that we can neither take for granted that these policies are effectively implemented nor that, when they are, they are extended to everyone who could potentially benefit (they might well be only “nominally universalized”, GAURI; BRINKS, 2008).

A good illustration of this is the civil action brought by the MP to force the state of São Paulo to provide all autistic individuals with special health care and education. Despite winning in the courts, the decision is far from being fully implemented several years after it was handed down. The obstacles, not surprisingly, are lack of sufficient resources, the need to hire staff and build new facilities, which takes time, and probably also some inefficiency and lack of political will. As a consequence, out of the hundreds of thousands of potential beneficiaries of the decision, only some of them are actually benefiting from it. Several hundred, it is noteworthy, with the help of private lawyers, who use the decision of the civil action sponsored by the MP to claim, almost always successfully, that the state should provide their individual client's with a place in a private institution until it fully implements the decision.¹³

With the data we collected we cannot therefore answer these important questions for all civil actions sponsored by the MP, so we decided to focus our analysis on 22 cases in which the MP intended to force the government to improve the functioning of public health units (hospitals, primary care units and clinics). In such cases, through the location of these health units we are able to perform an analysis similar to the one made for the DP cases using HDI and HNI.

5.1 Human Development Index

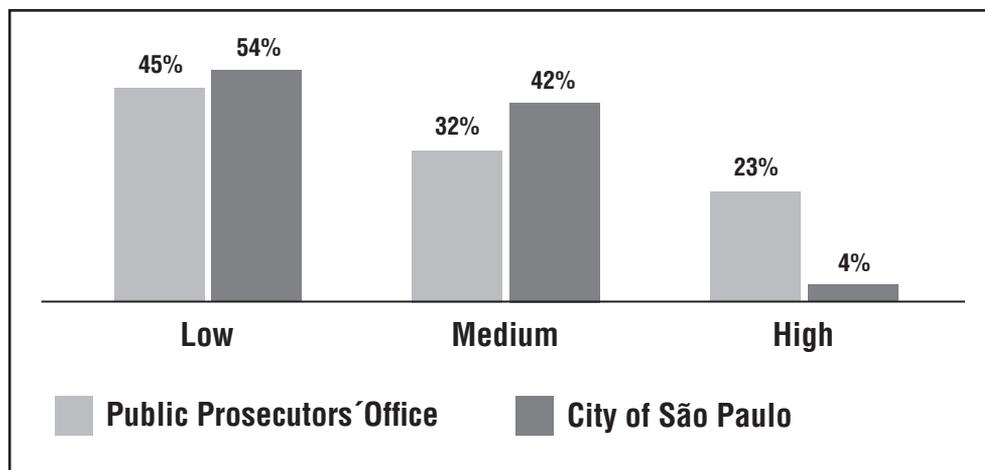
The first aspect to note is that, when concerned with improving health units (hospitals, clinics, etc.), the MP tends to bring more cases involving districts with a high HDI. Even though only 4% of the population in São Paulo live in districts that have high HDI, 23% of the cases lodged by the MP involve districts in this category (see Chart 8).

Yet districts with low HDI, although comprising 54% of the population, are involved in 45% of the MP lawsuits. Districts with a medium HDI, in which 42% of the population live, have filed comparatively fewer right to health lawsuits (32%) (see Chart 5).

The first hypothesis to explain this difference is that class actions are more difficult to lodge. Class actions do not depend simply on proving that one individual's health need is unattended by the state. They demand more extensive work, requiring extensive evidence research and technical expertise. Consequently, health units in areas that are covered by the media and the public opinion and where users tend to have more education may be ahead of others in the competition for these resources.

Chart 5

DISTRIBUTION OF HEALTH UNITS REPRESENTED BY THE MP AND POPULATION IN SÃO PAULO ACCORDING TO HUMAN DEVELOPMENT INDEX



Sources: Ministério Público do Estado de São Paulo, 2009 y SÃO PAULO (2008)

5.2 Health Need Index

When we look at the Health Need Index, it is clear that districts with high levels of health needs receive the least attention from the Public Prosecutors' Office (see Chart 6). These areas are arguably those in which the right to health requires more urgent protection. However, most lawsuits filed by the MP are in areas where the health needs are comparatively low. Even though 44% of the population in São Paulo lives in areas of high HNI, the MP directed to these districts only 27% of its right to health litigation (see Chart 6).

Again, this could happen due to the inequality in access to Justice, or more specifically, inequality to access to the attention from and representation of the Public Prosecutor's Office, as was explained in the item above.

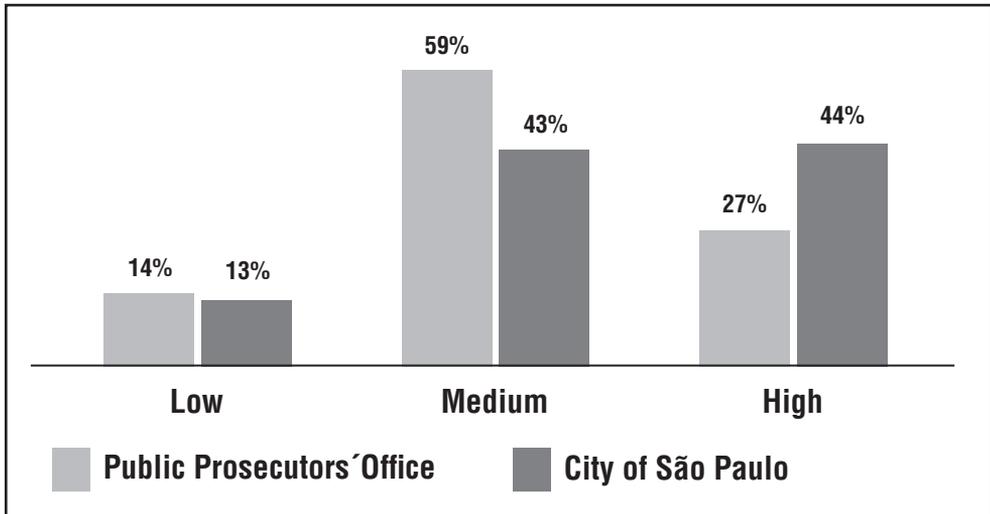
But one could also inquire whether this is not rather the consequence of the geographic inequality in the distribution of health services in São Paulo. Since the MP can obviously only sue health units where the health units are, it would not be surprising that litigation seeking the improvement of health units are concentrated in the comparatively more affluent areas if health units were mostly located there.

In order to test this hypothesis, and based on the National Survey of Health Units (*Cadastro Nacional de Estabelecimentos de Saúde (CNES)*), we listed all the 1,109 health units in São Paulo city¹⁴ and classified them according to the HNI and HDI of the districts where they are located. The result is that, in spite of some differences, the distribution of health units according to HDI and HNI is largely well balanced across districts (See Chart 7 and 8).

Thus, health units in areas where human development is low and health needs are high are less represented not because there are no or fewer health units there, but because they received, for some reason, less attention from the MP.

Chart 6

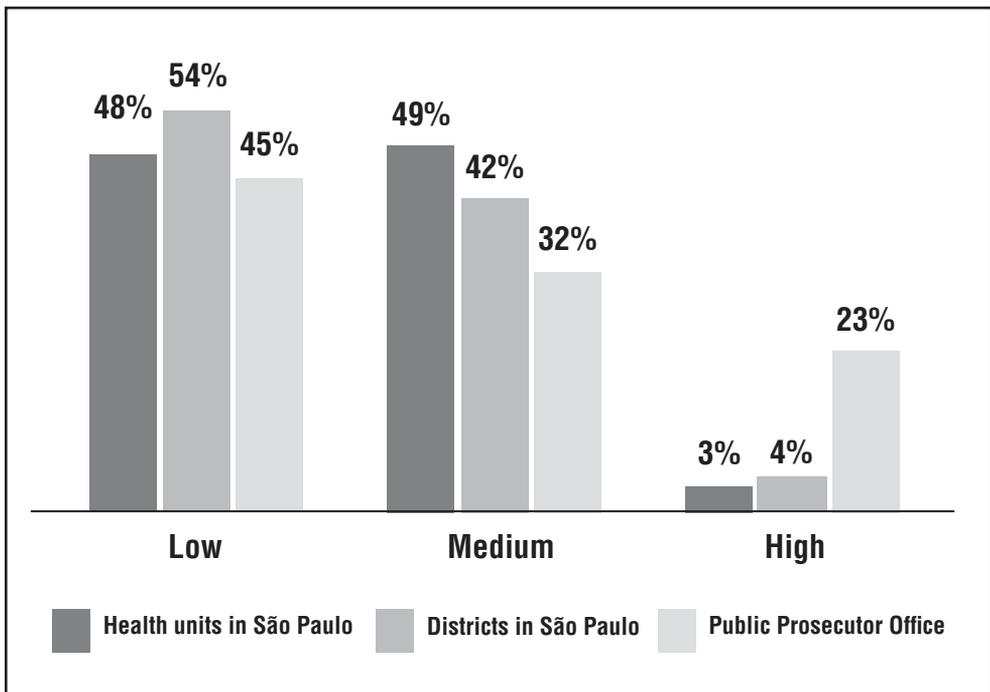
DISTRIBUTION OF HEALTH UNITS REPRESENTED BY THE MP AND POPULATION IN SÃO PAULO ACCORDING TO HEALTH NEED INDEX



Sources: Ministério Público do Estado de São Paulo, 2009 and SÃO PAULO (2002).

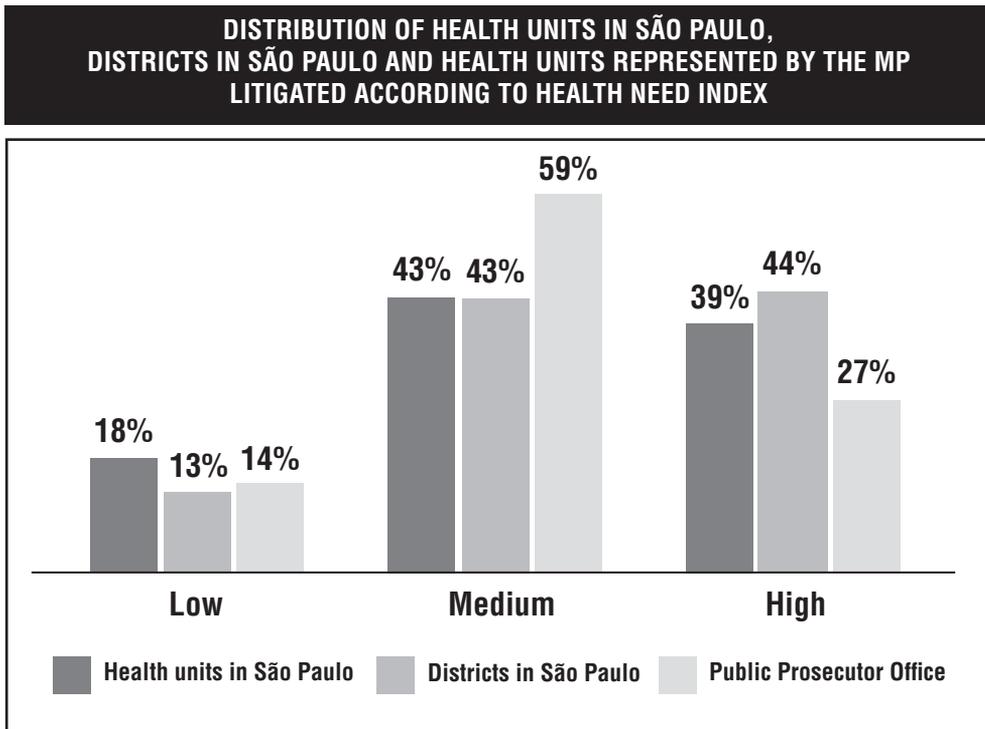
Chart 7

DISTRIBUTION OF HEALTH UNITS IN SÃO PAULO, DISTRICTS IN SÃO PAULO AND HEALTH UNITS REPRESENTED BY THE MP LITIGATED ACCORDING TO HUMAN DEVELOPMENT INDEX



Sources: Cadastro Nacional de Estabelecimentos de Saúde – CNES, 2009; Ministério Público do Estado de São Paulo, 2009 and SÃO PAULO (2008).

Chart 8



Sources: Cadastro Nacional de Estabelecimentos de Saúde – CNES, 2009; Ministério Público do Estado de São Paulo, 2009 y SÃO PAULO (2002).

It is also interesting to note that among the 22 health units in which bad conditions were complained through a lawsuit lodged by the MP, only 3 of them were basic health units, whereas 9 were hospitals. Based on the fact that 55% percent of the health units in São Paulo are basic health units and only 9% are hospitals, we can affirm that the MP lawsuits are more focused on middle and high complexity healthcare rather than focused on preventive and basic healthcare.

6 Discussion

The data presented above show some interesting patterns in right to health litigation sponsored by public lawyers in the city of São Paulo. For health litigation to be regarded as a positive tool in the implementation of the right to health in the non-neutral, pro-poor interpretation we adopt in this article, it must, at least, reverse two main characteristics that are currently prevalent in the so-called Brazilian model of right to health litigation: (a) it must be extended significantly beyond the narrow group of middle class and upper middle class individuals represented by private lawyers that currently dominate this type of litigation in São Paulo to include the most disadvantaged in society in terms of health needs (i.e. improve access to Justice) and (b) it must change its focus from new and expensive treatment to health actions and services that are a priority for these most disadvantaged groups, mostly primary care facilities and actions.

In this article we looked at the litigation record of the two institutions in Brazil that could potentially do this, the MP and DP, given that their remit is exactly to protect the public interest and the interests of the most disadvantaged.

As regards the first condition (enhancement of access to Justice to the most needy), we have used, where available, three different indicators of health disadvantage: income, human development, and health need. The first one (income) is collected through self-declaration and seems to indicate that the DP (no data is available for the MP) does represent mostly individuals who are poor and extremely poor in purely economic terms (varying from 80% to 88% depending on the year). However, when HDI or HNI are used, the picture seems to change. As regards the DP, only 49% of individuals represented come from districts with low human development, and only 42% come from districts with high health needs. That is, most DP litigation happens in districts that have medium and high human development (51%) and low and medium health needs (58%).

Two main hypotheses present themselves to interpret these apparently contradictory data concerning the profile of litigants represented by the DP. The first hypothesis is that household income is an indicator that should be taken with caution since this data is collected through self-declaration. Citizens may have underestimated their household income and declared it to be lower than the poverty threshold established by the DP in order to receive free legal aid. Moreover, research on the reliability of data on self-declared household income has shown that it tends to be systematically underestimated (COLLINS; WHITE, 1996; MICKLEWRIGHT; SCHNEPF, 2010). People may have imperfect information about the income of the other members of the house, and tend to leave out contributions from sources such as part-time earnings and social benefits.

The second hypothesis is that the DP is more accessible to individuals who are economically poor yet live in better areas. The fact that they live in more affluent areas possibly implies that they have more access to information concerning their rights and the existence of institutions providing free legal aid. Moreover, these people have better access to public services and facilities that make more probable that their unfulfilled health needs will lead to a lawsuit, such as a hospital from where they can get a medical prescription and public transportation to go the DP office.

Our data does not allow us to test which hypothesis is the correct one (maybe a combination of both is), but both seem to indicate that the DP finds obstacles to reach those in the most deprived areas of the city.

Moreover, access to health care litigation does not necessarily imply promotion of health equity. The object of litigation (our second condition) would also have to be of a transformative nature, that is, it would have to focus on health actions and services which are urgently needed by the most disadvantaged. This article was not able (for lack of space and data) to develop this aspect in much significant detail, yet the emerging data indicates that this condition is also far from being fulfilled. Most of the cases represented by the DP, are individual actions for items such as diapers and diabetes drugs. Even though these may be important for those who eventually receive health care by means of litigation, individual cases will seldom promote structural changes in the public health policies that may affect positively a larger share of the poor population.

It could be expected that the cases that demand structural changes – such as the MP class actions – would have greater potential to improve health services

for the poor. Nonetheless, our research suggests that the MP actions are giving disproportionately more attention to those areas where the right to health is comparatively better fulfilled and not sufficiently focusing on basic and primary healthcare, the improvement of which is essential for an equitable health system (MEDICI, 2011). Only 27% of its lawsuits are filed in districts with high health needs and only 45% in districts with low human development.

Again, the bulk of litigation concentrates on districts with low and medium health needs and medium and high human development and on middle and high complexity healthcare rather than focused on preventive and basic healthcare. Moreover, we have seen that MP class actions rate of success in upper courts are lower when compared to individual lawsuits, which suggests that Courts are more prone to individual solutions rather than structural ones.

7 Conclusion

The empirical analysis of the socio-economic profile of litigants represented by public attorneys, the types of health benefits they claimed and the lower rate of success of collective cases involving structural changes indicate that even litigation sponsored by public attorneys face important obstacles for reaching the neediest.

Providing free legal representation does not in itself guarantee that the worst-off will be able to take their grievance to courts. As Felstiner, Abel, and Sarat (1980) have persuasively argued, there is a long process between a situation of personal distress or injustice that could potentially be judicially redressed and the start of a legal dispute. First, the person has to perceive that a particular experience has been injurious. Second, the injured person has to feel wronged and believe something might be done in response to the injury. Thirdly, the person has to transform his grievance into a claim against the person or entity believed to be responsible and ask for a remedy. Finally, if this claim is rejected, the person must have the knowledge and resources to resort to the next step: litigation. There is a long and complex way to be trodden, therefore, between suffering an injury and resorting to litigation, which is not accessible to a great number of individuals.

This analysis can explain some of the obstacles that seem to hinder the use of litigation in Brazil to benefit the worst-off. Considering that one of the main problems in the Brazilian healthcare system is the inequality in the access to basic and preventive health (MEDICI, 2011), and that education and information are important determinants of access to health care (SANCHEZ; CICONNELI, 2012), many poor people are not even aware of their health problems – especially when it comes to chronic diseases – or may just realize it when it is too late. Among those who know that they have a health problem, just the better educated and informed will know that they could be receiving treatment from the public health service as a matter of constitutional right. And not all of them will know that if they are refused treatment, they can make a claim against government. Finally, only a small number of people will know that there are public institutions that provide free legal aid, such as the DP and the MP.

It is hardly surprising, then, that the Brazilian model of litigation, where cases brought by comparatively better off individuals represented by private lawyers,

prevails in most places around the country, and that even litigation sponsored by public attorneys can face important obstacles to depart significantly from that model.

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NOTES

1. There is no comprehensive study as yet that shows the precise volume of litigation across the country. Octavio Ferraz has arrived at 40.000 cases per year in a conservative estimate done through several different studies (FERRAZ, 2011a).
2. For a clear example of this polarization see the debate between the pro-litigation lawyers Andrea Lazzarini Salazar and Karina Bozola Grou ("As Verdadeiras Causas e Consequências", *Folha de S. Paulo*, 9 maio 2009) and the public health expert, against litigation, Marcos Bosi Ferraz. ("O STF e os Dilemas da Saúde", *Folha de S. Paulo*, 9 maio 2009). An example of an academic defense of litigation can be found in (PIOVESAN, 2008).
3. One of the hypothesis to explain the high rate of litigants represented by public attorneys in Rio de Janeiro and Rio Grande do Sul is that, in the former state, the income threshold to receive legal aid from the Public Defensory is higher than in other states (PEPE et al., 2010) and, in the latter, there is not an income threshold and the need of the patient will be assessed in each case based on a questionnaire, provision of documents and self-declaration (see Rio Grande do Sul Public Defensory Office official website <http://www.dpe.rs.gov.br/site/faq.php>. Last accessed on: May 2013)
4. There is also the possibility that NGOs, in particular patient's associations, bring collective claims on behalf of groups of needy patients, and/or finance individual litigation, which could promote access to Justice for disadvantaged groups. We have not looked at this type of litigation in our study. We are however confident that the potential transformative impact of such litigation is not as great as that sponsored by public attorneys. There have been studies that show that some NGOs have indeed sponsored patient's litigation, yet on an individual basis, and often for a particular disease and focused mainly on certain expensive drugs (SILVA; TERRAZAS, 2011). There are also studies that suggest a link between these patient's associations and the pharmaceutical industry. (CHIEFFI; BARATA, 2010).
5. SÃO PAULO (Estado), 2006.
6. BRASIL, 1988, Article 129, II and III.
7. Note however that this is not a rigid rule, and thus one can find both collective lawsuits being filed by the DP and individual ones being brought by the MP (Interview with the Public Defendants Rafael Vernaschi, Vania Casal and Sabrina Carvalho in 29 July of 2009).
8. In these cases there were only general complaints about the lack of medicines, not specifying which drugs were lacking.
9. That is why in many cases there is no information on how many members there are in each family. Yet this data appears in some cases to explain why someone whose family income was above the threshold was still able to receive legal assistance from the DP due to the large size of his or her family.
10. The data on HNI and HDI in São Paulo city was calculated based on studies published by the São Paulo Secretary of Health (SÃO PAULO, 2008) and the São Paulo Secretary of Development Work and Solidarity (SÃO PAULO, 2002), respectively.
11. We are also aware that one has to be careful when using district level information as a proxy to individual characteristics because districts can be internally unequal (some areas in the same district can be better than others) and people with different socioeconomic backgrounds can live very close to each other. However, we consider that district is a good (although imperfect) proxy to measure someone's socioeconomic condition. A district HDI and HNI performance is partially caused by reasons that are geographically determined, for example, access to education, basic sanitation, healthcare facilities and other public services. And access to these services, which is geographically distributed, can impact on individuals' level of deprivation.
12. It is important to remark that the proportion of poor and extremely poor people in our analysis is possibly underestimated. It is known that poor families usually have more members than the average (3.2 people per family). However, because we do not have more accurate numbers, the average should be used.
13. Interview with Public Attorney's (2011).
14. The National Survey of Health Units is available in <<http://www.saude.sp.gov.br/ses/perfil/cidadao/homepage/destaques/unidades-de-saude>>. Last accessed on: May 2013.

RESUMO

No Brasil, litígio sobre direito à saúde suscita um debate sobre os efeitos distributivos deste litígio em um contexto de escassez de recursos. Vários estudos indicam que uma parcela significativa deste litígio inclui litigantes individuais que vivem nos estados, cidades e bairros mais ricos do Brasil e, em geral, são representados por advogados particulares, cujos honorários muito excedem o que a maioria da população pobre poderia custear. Para alguns, isto sugere que os efeitos distributivos de litígio são, muito provavelmente, negativos, porque litígio tende a beneficiar um grupo socioeconômico privilegiado, e compele autoridades da área de saúde a desviar para este grupo recursos de programas de saúde abrangentes que atendem a maioria da população. Outros, no entanto, sustentam que o sistema judiciário pode, mesmo assim, servir como um mecanismo institucional importante onde pobres podem expressar suas demandas, e desta forma tornar o sistema de saúde mais equânime caso esta parcela da população consiga ter acesso ao sistema judiciário. Portanto, o principal problema a ser enfrentado por este “campo pró-litígio” é aprimorar o acesso à Justiça. Nosso objetivo é analisar ações judiciais em que litigantes são representados por advogados públicos, no litígio relativo ao direito à saúde na cidade de São Paulo, com o intuito de verificar se ao menos este tipo de litígio tem beneficiado os cidadãos mais necessitados. Este estudo considera três indicadores: a renda dos litigantes, o Índice de Desenvolvimento Humano e o Índice de Necessidade em Saúde das áreas onde estes litigantes residem. Nossa conclusão é que, embora advogados públicos pareçam de fato representar principalmente pessoas de baixa renda, outros indicadores sugerem que há ainda obstáculos consideráveis para que advogados públicos consigam atender os mais necessitados.

PALAVRAS-CHAVE

Direito à saúde – Acesso à justiça – Advogados públicos – Pobreza – Brasil

RESUMEN

Los litigios en materia de derecho a la salud en Brasil plantean un debate sobre sus efectos distributivos en un entorno de recursos limitados. Varios estudios han mostrado que una proporción significativa de los litigios los llevan a cabo demandantes individuales que viven en los estados, ciudades y distritos más ricos de Brasil y por lo general están representados por abogados privados, cuyos honorarios están fuera del alcance de la mayoría de la población pobre. Para algunos, esto es una indicación de que los efectos distributivos de los litigios son muy probablemente negativos, pues tienden a beneficiar a un grupo socioeconómico privilegiado y pueden obligar a las autoridades sanitarias a desviar hacia ellos recursos de los programas integrales de salud destinados a la mayoría de la población. Otros, sin embargo, sostienen que, pese a ello, los tribunales pueden proporcionar una voz institucional importante para los pobres y promover la equidad en salud cuando logran acceder a ellos. Por tanto, el principal problema para este “bando favorable a los litigios” es mejorar el acceso a la justicia. Nuestro objetivo es analizar las demandas en que los litigantes están representados por abogados públicos (de la Defensoría Pública y del Ministerio Público), en litigios en materia de derecho a la salud en la ciudad de São Paulo para averiguar si al menos este tipo de litigios está llegando a los ciudadanos más necesitados. Este estudio analiza tres indicadores: los ingresos de los litigantes, el índice de desarrollo humano y el índice de necesidades de salud de las zonas en que viven. Nuestra conclusión es que, aunque los abogados públicos parecen representar principalmente a personas de bajos ingresos, otros indicadores sugieren que todavía hay importantes obstáculos para que lleguen a los más necesitados.

PALABRAS CLAVE

Derecho a la salud – Acceso a la justicia – Abogados públicos – Pobreza – Brasil



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ABSTRACT

The procedure of extradition has not escaped restraints placed by human rights law on states in their dealings with the liberties of individuals. This is because human rights notions are considered to be part of the public order of the international community and as such enjoy a superior relational position to treaty obligations. One of the principal norms that have been adopted in extradition treaties concerns the death penalty. This paper discusses this norm within the context of South Africa, an abolitionist State, and Botswana, a retentionist one. Extraditions where the death penalty is involved have caused a diplomatic controversy between the two countries, with South Africa insisting that Botswana must furnish it with satisfactory assurance that the death penalty will not be imposed on the extraditee, or that if imposed, it will not be carried out. Botswana is on record declining to give such assurances. Thus, an impasse has developed between the two countries in this regard. This article offers reflections on the extradition regime between the two countries with specific reference to the death penalty in the light of the present stand-off. It argues that the position adopted by South Africa in insisting upon assurances is in line with international best standards and practice and that Botswana must acquiesce to this demand.

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KEYWORDS

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HUMAN RIGHTS, EXTRADITION AND THE DEATH PENALTY: REFLECTIONS ON THE STAND-OFF BETWEEN BOTSWANA AND SOUTH AFRICA

Obonye Jonas

1 Introduction

The Republic of South Africa has abolished capital punishment as a competent sentence for any offence.¹ In other words, South Africa is an abolitionist state. On the contrary, Botswana is a retentionist one,² and according to section 26 (1) of the Penal Code of Botswana (1964, cap 08:01), the method of execution is by hanging.

Under the Penal Code of Botswana, the death penalty is a competent sentence for offences such as murder (s 203(1)); treason (s 34(1)); committing assault with intent to murder in the course of the commission of piracy (s63 (2)); instigating a foreigner to invade Botswana (s35); cowardly behaviour (s29) and mutiny (ss34-35). As a limitation, the death penalty may not be imposed on persons below eighteen years (s 26(3)) and pregnant mothers (s 26(3)). It also may not be imposed where there are extenuating circumstances.³

The penological difference between South Africa and Botswana in relation to the death penalty has created a diplomatic schism between the two countries, with South Africa insisting through its courts that it cannot sanction any extradition for offences attracting the death penalty to a retentionist state like Botswana, save where such retentionist state has given the requisite assurance that upon conviction on the offence on which extradition was sought, the death penalty will not be passed on the extradited person, or that if it is passed, it will not be implemented.

For its part, the government of Botswana has taken a deliberate “decision to stop signing any undertakings papers for murder suspects who have to be extradited from South Africa to Botswana” (PITSE, 2010). With both countries stuck in their respective positions, the end result has been that fugitives who committed offences

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attracting the death sentence in Botswana and fled to South Africa remain untried, as South Africa has been refusing to hand them over to Botswana to stand trial. In addition, South Africa is unable to prosecute them owing to the absence of legislation in that country that vests its court with the necessary powers or jurisdiction to put accused persons on trial for offences they committed outside South Africa's frontiers.

This article analyses the present stand-off between South Africa and Botswana in relation to extraditions of fugitives who have committed offences in Botswana that attract the death penalty and fled to South Africa. The article's claim is that South Africa's insistence on assurances from Botswana that the latter will not implement or enforce the death penalty is properly situated within the normative framework of international law and best practice. Thus, Botswana must comply with such requests for assurance in order to ensure that the extradition system between the two countries is not undermined. If the present stand-off persists unabated, criminals will be victors and justice, the loser.

2 Brief overview of the status of the death penalty under international law

Death penalty abolitionist efforts have been traced back to Cesare Beccaria during the Enlightenment era, and public debates around the issue have been recorded in Greece as early as 427 B.C.E. (DEVENISH, 1990, p. 1). The first international instrument seeking to limit the use of the institution of the death penalty was the 1929 Geneva Convention Relative to the Treatment of Prisoners of War,⁴ but it circumscribed its application to prisoners of war taken in armed conflict (ROTHENBERG, 2004). According to some scholars, such as William Schabas, more systematic, consolidated and real efforts to abolish the death penalty began only in the twentieth century around the late 1940s. In the wake of untold loss of life in the Second World War, the abolition movement gained popular support, and several states began moving towards that end, with numerous former pariah states in Europe, such as Germany, Austria and Italy, outlawing capital punishment as part of the process of 'transitional justice' to close chapters of human rights abuses of the previous decade. (SCHABAS, 2002, p. 2).

The mid- twentieth century was also the time in which human rights law started to gain credence as the controlling normative system for the newly established international institutions like the United Nations (UN) and the Council of Europe. While drafting the Universal Declaration of Human Rights (UDHR), the UN General Assembly planned to call for the prohibition of the death penalty under article 3, which enshrines the "right to life". Hardly any voice was raised during the course of the debate "to claim that capital punishment was legitimate, appropriate or justified" for any offence. However, the majority of states were not yet willing to abolish it, and to appease both opponents and proponents of the death penalty and avoid a stalemate in the negotiations towards the adoption of the Declaration, negotiators treated the death penalty "as an inevitable and necessary exception to the right to life, but also one whose validity was increasingly open to challenge" (SCHABAS, 2002).

When the International Covenant on Civil and Political Rights (ICCPR) was adopted in 1966, many hoped that it would abolish the death penalty (SCHABAS, 2002). However, abolition was not made mandatory due to ‘the prudence of its drafters, aware of its anomaly but fearful of alienating retentionist States and discouraging them from ratification’ (SCHABAS, 2002). Despite the ICCPR’s failure to abolish the death penalty, Schabas observes that “there is an unmistakable trend towards abolition,” and that this trend finds expression “in State practice, in the development of international norms, and in fundamental human values [that] suggest that... [the death penalty] will not be true for very long” (SCHABAS, 2002, p. 377).

It is worth noting that scholars are divided on the question of whether or not capital punishment is outlawed under international law. According to Dugard and Van den Wyngaert, (1998, p. 196) no international human rights law instrument outlaws the death penalty, although protocols to the ICCPR, the European Convention on Human Rights (European Convention) and the American Convention on Human Rights (American Convention) do so. The two authors further contend that neither *usus* nor *opinio juris* of states support an embargo on capital punishment under international law (DUGARD; VAN DEN WYNGAERT, 1998, p. 196). Consistent with this view, in *Prosecutor v. Klinge*, the Supreme Court of Norway held that the enforcement of the death penalty in Norway was permissible as it was not prohibited by international law (NORWAY, *Prosecutor v. Klinge*, 1946, p. 262).⁵ Schabas, on the other hand, argues that to say international law does not outlaw capital punishment is imprecise, ‘because several international treaties now outlaw the death penalty’. Whereas he concedes that these instruments are far from attaining universality, Schabas points out that approximately seventy states are now bound ‘as a question of international law and a result of ratified treaties, not to impose the death penalty’ (SCHABAS, 2003).

While the present author is not necessarily seeking to reconcile the divergent views of scholars set out above, it is clear that the sentencing trend in the world is inclined towards disuse or abolition of death penalty.⁶ In 2003, the European Court of Human Rights ruled in *Öcalan v. Turkey* that despite the fact that article 2(1)⁷ of the European Convention expressly recognises the death sentence, the practice of members of the Council of Europe means that this form of sentencing is outlawed by the European Convention on Human Rights (EUROPEAN COURT OF HUMAN RIGHTS, *Öcalan v. Turkey*, 2003, paras. 188-199), as all Western European states have either abolished the penalty *de facto* or *de jure* (VAN DEN WYNGAERT, 1990).

According to Schabas, even though it is still premature to say that the death penalty is prohibited by customary international law, the dynamics of international norms suggest that it will soon be so (SCHABAS, 2002, p. 2). For instance, the founding statute of the International Criminal Court (ICC) and United Nations Security Council Resolutions establishing the International Criminal Tribunals for the Former Yugoslavia and for Rwanda do not provide for the death sentence among the range of penalty options, despite the fact that these judicial tribunals have been established to try the most heinous crimes that have shaken the conscience of mankind. The United Nations Human Rights Committee has also remarked

that the ICCPR “strongly suggest[s] that abolition is desirable” (ROTHENBERG, 2004, p. 65). In fact, since the adoption of the ICCPR, nations of the world have moved with remarkable speed towards ending capital punishment such that by the mid-1990s, abolitionist states had outnumbered retentionist states (SCHABAS, 2002, p. 2). The movement towards abolition continues to date, with an average of three states per year ending capital punishment throughout the last two decades (BADINTER, 2004). Consistent with this trend, as of last the quarter of 2011, about 16 countries in Africa have abolished the death penalty (KAYTESI, 2012). In Southern Africa, six countries have abolished the death penalty,⁸ and about three of them have placed a moratorium on it.⁹

Despite these developments on the international plane, however, Botswana continues to use the death penalty as a viable form of punishment for select offences. Coherent with the movement for abolition, the African Commission urged upon Botswana in the case of *Interights & others v. Botswana* (TANZANIA, 2003, p. 84) that:

...it would be remiss for the African Commission to deliver its decision on this matter without acknowledging the evolution of international law and the trend towards abolition of the death penalty.... The African Commission has also encouraged this trend by adopting a ‘Resolution Urging States to Envisage a Moratorium on the Death Penalty’ and therefore encourages all states party to the African Charter to take all measures to refrain from exercising the death penalty.

(AFRICAN COMMISSION ON HUMAN AND PEOPLE’S RIGHTS. *Interights et al. v. Botswana*, 2003).

During Botswana’s first appearance before the Universal Periodic Review (UPR) in 2008, members of its review team¹⁰ urged it to abolish the death penalty, to which it responded by declaring that it has no plans to do so. Following the execution of murder convict, one Zibane Thamo on 31 January 2012, the Special Rapporteur for the African Commission’s Working Group of Experts on the Death Penalty, Commissioner, Zainabo Sylvie Kayitesi, stated that “the African Commission regrets the execution that took place in Botswana [...] at the time when many African countries observe a moratorium on the death penalty and some are in the process of completely abolishing the death penalty” (KAYITESI, 2012). She continued to observe that, the death penalty represents, the “most grave violation of fundamental human rights, in particular the right to life under Article 4 of the [African Charter]” (KAYITESI, 2012).

3 Botswana and the tide of abolition of the death penalty

As indicated above, it appears Botswana is swimming against the tide of abolition of the death penalty, as the country seems to be impervious to international legal efforts in this direction. However, it is important to note that Botswana is not party to any instrument that abolishes the death penalty, and as such, it can be argued that its enforcement of the death penalty does not fall foul of principles of international law since it has not incurred any responsibility under international law either to

abolish or place a moratorium on the death penalty. Thus, commenting on the impact of international law on the enforcement of the death penalty in Botswana, the Botswana Court of Appeal observed in *Ntesang v. The State* (BOTSWANA, 2007, p. 387) that developments in the international arena are not and cannot be decisive so as to sway it from upholding the constitutional imperatives that enjoin it to impose the death penalty in statutorily designated cases. In its own words, the court observed:

Of course this Court ... cannot and should not close its eyes to the happenings in other parts of the world and among the international community to which we belong. But this Court must keep within the role assigned to us as a purely adjudicating and not legislative body under the Constitution which is the basic law of this country; and it is the interpretation of that basic law that we are called upon to decide in this proceeding.

(BOTSWANA, *Ntesang v. The State*, 2007, p. 158).

Tshosa argues that the attitude of the *Ntesang* Court demonstrates judicial restraint in the invocation of international law to abolish the death penalty (TSHOSA, 2001, p. 107). He argues that this “[...] form of restraint is an indirect judicial confirmation of the classical theory that international and national law are distinct legal orders each governing a different legal sphere” (TSHOSA, 2001, p. 107).

South African Courts have adopted the same position as Botswana courts, namely that international law does not outlaw the death penalty (SOUTH AFRICA, *State v. Makwanyane*, 1995, para 36). It is important to note however that South Africa’s refusal to surrender to Botswana criminal fugitives that face possible death sentences is grounded on the imperatives of its Bill of Rights and the customary international law principle of comity, but not on human rights provisions of international instruments. It was explained in the case of *Hilton v. Guyot* (UNITED STATES, 1895, p. 133), quoted in the High Court decision in the case of *Minister of Home Affairs & Others v. Emmanuel Tsebe & Others* (SOUTH AFRICA, 2012, p. 16), that the principle of comity entails a recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or other persons who are under the protection of its laws’ (UNITED STATES, *Hilton v. Guyot*, 1895, p. 136).

4 Botswana-South Africa extradition arrangements

The Republic of South Africa and Botswana entered into an Extradition Treaty in 1969. Despite the existence of this treaty between the two countries, South Africa refuses to hand over any person accused of having committed an offence attracting the imposition of the death penalty to Botswana, or any other country for that matter, because it believes that the institution of capital punishment is violatory of fundamental human rights, such as the rights to life, dignity and freedom from cruel, inhuman and degrading treatment, contained in its Constitution’s Bill of Rights. Besides South Africa’s prohibitive constitutional

imperatives, article 6 of the Extradition Treaty between Botswana and South Africa states that: 'Extradition may be refused if under the law of the requesting Party the offence for which extradition is requested is punishable by death and if the death penalty is not provided for such offence by the law of the requested Party.' In addition, Botswana and South Africa, together with other countries in the Southern African region, have concluded the Southern African Development Community (SADC) Protocol on Extradition (2006). In terms of article 5 (j) thereof, extradition may be refused:

If the offence for which extradition is requested carries a death penalty under the law of the Requesting State, unless that State gives such assurance, as the Requested State considers sufficient that the death penalty will not be imposed or, if imposed, will not be carried out [...]

(SOUTHERN AFRICAN DEVELOPMENT COMMUNITY, 2006, article 5 (c), p. 5).

To this end, the Bill of Rights of the Constitution of South Africa, taken together with the Extradition Treaty between the two countries and the SADC Extradition Protocol place beyond reproach the view that South Africa is not constrained by the applicable law to surrender any extraditee facing the death penalty to Botswana in the absence of an assurance from the latter that the person will not be executed if found guilty. Between South Africa and Botswana, the problem of extradition in situations where the extraditee faced a possible death sentence arose in the *Tsebe* case (SOUTH AFRICA, *Minister of Home Affairs & Others v. Emmanuel Tsebe & Others*, 2012, p. 16). Given the cardinal importance of this case for present purposes, it is apposite to discuss it, albeit briefly.

In this case, the applicants, Mr Tsebe¹¹ and Mr Phale, were charged by Botswana authorities for having 'brutally' murdered their love partners in separate incidents. In an attempt to evade being prosecuted, the applicants skipped the border from Botswana into South Africa. They were later arrested in South Africa with a view to extraditing them to Botswana upon the latter's request. The South African Minister of Justice sought an assurance from Botswana that, upon extradition, the death sentence would not be imposed on the applicants and that if it was, it would not be executed. This request was refused. Despite of Botswana's refusal, South Africa sought to extradite the applicants. In resisting their extradition, the applicants approached the South Gauteng High Court (the High Court) in South Africa for an order declaring their intended extradition unconstitutional.

After taking into consideration the relevant international instruments, foreign case law, its domestic legislation and case law, the High Court upheld the applicants' application and refused extradition. It held that the extradition of the applicants to Botswana, which refused to give an assurance that the death penalty would not be imposed - or, if imposed, would not be carried out - would be unlawful and constituted a violation of their rights to life, dignity and freedom from being treated in an inhuman and degrading manner, as enshrined in the South African Constitution. In handing down its decision, the court noted that:

As indicated above, [Botswana's position on capital punishment] is out of synchrony with the trend worldwide to abolish the death penalty; it has an appalling history of "secret executions" in regard to its implementation of the death penalty; its constitution does not induce confidence that the clemency provisions are applied in a humane and independent manner; the international investigative reports as to the quality and fairness of its judicial system when dealing with capital crimes are less than complimentary; the international instruments that binds it contemplate that extradition would be refused by the Republic; the national law of the republic to its knowledge prohibits the extradition; and there is no international law which would force the republic to extradite under these circumstances.

(SOUTH AFRICA, *Minister of Home Affairs & Others v. Emmanuel Tsebe & Others*, 2012, para. 19).

On appeal, the Constitutional Court upheld the decision of the Court *a quo* reasoning that to extradite individuals to a place or country where they may be executed would be antithetical to the ethos of South African society, which is founded on the "values of human dignity, the achievement of equality and the advancement of human rights and freedoms [...] and the supremacy of the Constitution and the rule of law" (SOUTH AFRICA, *Mohamed and Another v. President of the RSA and Others*, 2001, para. 17). In criticising the death penalty, both courts just stopped short of calling it barbaric. In deciding the *Tsebe* case, both courts relied on an earlier decision of the South African Constitutional Court, namely, *Mohamed v. President of the Republic of South Africa* (SOUTH AFRICA, 2001, para. 18) which is the first case in South Africa to set the principle that South Africa is required by its laws to decline extradition when the requesting state is a retentionist and is unprepared or unwilling to give the requisite assurance to South Africa that the death penalty will not be imposed on the fugitive or that if imposed, it will not be carried out.

Given the importance of the *Mohammed* decision, it is also important to briefly discuss the case for completeness. In that case, Mr. Mohamed, a Tanzanian national, was accused of acting in cahoots with other terrorists in the bombing of US embassies in Nairobi and Dar es Salaam, where a number of people were killed. After the bombings, he fled to South Africa. Fully seized with the knowledge that, if taken to the US, Mr. Mohamed would be sentenced to death if found guilty on the serial murder charges, the South African authorities surrendered him over to US officials without requisitioning the US government to give an assurance that the death penalty will not be imposed on him upon conviction or that, if imposed, it would not be carried out. In handing down its decision in the matter, the Constitutional Court deprecated South Africa's failure to make 'an acceptable arrangement' in ensuring that Mr *Mohammed* would not face the death penalty in the US. The Court further reasoned that in handing the extraditee to the US, the South African government facilitated the imposition of the death penalty on him and that that conduct was in breach of its obligations contained in section 7(2) of the Constitution which requires the government to 'respect, protect, promote and fulfil the rights in the Bill of Rights' (SOUTH AFRICA, *Mohamed and Another v. President of the RSA and Others*, 2001, paras. 58-60).

The Court proceeded to state that in handing Mr. Mohamed over to the US

authorities to be prosecuted in that country while fully knowing that in the event of conviction he would suffer death, without demanding the requisite assurance from the US government, the South African government violated Mr Mohamed's constitutional right to life, right to human dignity and right not to be treated or punished in a cruel, inhuman or degrading manner (SOUTH AFRICA, *Mohamed and Another v. President of the RSA and Others*, 2001, para. 37, 58 and 60). A comparable approach was adopted by the Court of Appeal of Canada in *Canada (Minister of Justice) v. Burns & Anor* (CANADA, 2001, p. 19). In this case, the court held that the issuance of an order by the Canadian Minister of Justice to extradite fugitive respondents to the US, where they were being wanted to stand trial on a murder charge, in the absence of an assurance from the latter state that the respondents would not be condemned to death, constituted an infringement on their rights to life, liberty and security of the person guaranteed under article 7 of the Canadian Charter. The Court of Appeal thus set aside the extradition order on ground that it was unconstitutional (CANADA, *Canada (Minister of Justice) v. Burns & Anor.*, 2001, para 20).

5 Harmonising extradition with human rights

As shown above, there is now vast jurisprudence in international human rights law that supports the view that concerns about the human rights of the fugitive must be taken into account before extradition is effected. According to Plachta, the development of human rights discourse has inevitably impacted the area of international cooperation in criminal justice, whose prominent feature – extradition - has for several centuries been dominated by concerns deeply engraved in 'state interests, such as sovereignty, maintaining power and domestic order, keeping external political alliances, etc.' (PLACHTA, 2001, p. 64). Accordingly, under classical international law, human rights were protected to the extent that their protection would be consistent with the stated priorities or interests of the State (PLACHTA, 2001). This is because under conventional international law, emphasis was being placed on the protection of the state and not the individual (MURRAY, 2004, p. 7). With the human rights movement gaining prominence on the world stage, this state-centric perspective has changed radically. This change coincided with the strengthening of the position of a human being on the international plane and the shrinking of state dominance on the global affairs. Today, human rights are so critical that even extraditees who have committed or are suspected to have committed the most heinous crimes must be treated in a manner that is sensitive to their rights (DUGARD, 2011, p. 226).

As some nations remain keen on protecting extraditees' rights, it must also be appreciated that the levels of transnational and international crimes have grown significantly in the last decade in the wake of globalisation and technological advancement (EKMEKCIOGLU, 2012, p. 204). The international community has responded to the scourge of trans-frontier crime by putting in place institutions such as the European Police Office (Europol)¹² and International Criminal Police Organisation (Interpol)¹³ and other bilateral and multilateral treaties devised to 'outlaw transnational crime, promote extradition and authorise mutual assistance' (DUGARD; VAN DEN WYNGAERT, 1998, p. 1). The construct of extradition presents

an unavoidable tension between the need to combat crime and the observance of human rights notions in criminal justice, thus the importance of establishing a criminal system in which crime is addressed or suppressed in a manner that is sensitive to human rights. This observation was made by the European Court on Human Rights in *Soering v. United Kingdom* (EUROPEAN COURT ON HUMAN RIGHTS, 1989, p. 161) when it opined:

[I]nherent in the whole of the [European] Convention [on Human Rights] is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interests of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition.

(EUROPEAN COURT ON HUMAN RIGHTS, *Soering v. United Kingdom*, 1989, para. 89).

The decision in *Soering* is regarded as pioneering in linking extradition to human rights. A brief excursus of the material facts of this case is apt. In this case, the applicant *Soering*, a West German national, murdered his girlfriend's parents in Virginia (a retentionist US state) and fled to the United Kingdom, from where the United States requested his extradition. When the United Kingdom was preparing his extradition, the applicant approached the European Commission of Human Rights to stop the extradition on the basis that since the state of Virginia was a retentionist, the United Kingdom would have violated its obligations under article 3 of the European Convention, which outlaws the subjection of any person to torture and inhuman or degrading treatment or punishment.

The Commission referred *Soering's* case to the European Court of Human Rights. The Court upheld the applicant's contention that in surrendering him to the US, the United Kingdom would be violating its obligations under article 3 of the European Convention, arguing that the United Kingdom was proscribed from surrendering *Soering* to the United States because there was a real risk that he would be subjected to inhuman and degrading treatment by being kept on a death row for a prolonged period in the state of Virginia. The Court further held that the fact that the actual human rights violations would occur outside the territory of the United Kingdom did not absolve it from responsibility for any foreseeable consequence of extradition suffered outside its jurisdiction (EUROPEAN COURT OF HUMAN RIGHTS, *Soering v. United Kingdom*, 1989, para 91). In terms of this approach, a requested state incurs a responsibility under the European Convention when, despite having reasonable grounds to foresee that human rights violations will occur, it decides to proceed with the extradition of the fugitive. This approach was adopted by the United Nations Human Rights Committee (the HRC) in *Ng v. Canada* (1993b, 161). In this case, the Committee held that Canada had violated article 7 of the ICCP, which prohibits the subjection of a human being to cruel,

inhuman or degrading punishment by extraditing Ng to the United States when it was reasonably foreseeable that, if condemned to death in California, he would be executed through gas asphyxiation, a form of punishment outlawed under the script of the above quoted article 7 of the ICCPR.

Despite the desirability of reconciling extradition and human rights imperatives, the achievement of such reconciliation may prove well-nigh impossible precisely because international law has not yet put in place clearly articulated standards or guidelines and rules that must guide the decision-making process of the country having custody of a fugitive on whether or not to surrender him to the requesting state, regard being had to the human rights situation of the latter state. Dugard & Van den Wyngaert correctly argue that a balancing exercise between the two competing interests cannot be achieved by intuition or unarticulated forces but by first identifying interest(s) involved and then establishing mechanisms and procedures that should guide decision makers in the process (DUGARD; VAN DEN WYNGAERT, 1998, p. 1).

6 The rights implicated in an extradition process

The principal rights that have been invoked to obstruct extradition include the following: the right to life, the right to dignity, and the right not to be treated in a degrading or inhumane manner. These rights are implicated during the period after sentencing and before execution, in the method of execution and in the loss of life itself.

6.1 *The right to life (where the fugitive will face death penalty)*

In Botswana, the right to life is guaranteed under section 4(1) of its Constitution. This is also the section that permits the death penalty by way of an exception to the right to life. It provides that: "No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of an offence under the law in force in Botswana of which he has been convicted." (BOTSWANA, 1996, 4(1)).¹⁴

Although this provision has been criticised for undermining the practical importance of the right to life (TSHOSA, 2001, p. 110), the fact is that in Botswana the death penalty is constitutional.¹⁵ Proponents of the death penalty can therefore argue that, since the death penalty is provided for under Botswana's Constitution and not outlawed under international law, Botswana is at large to apply it as it sees fit. However, this proposition cannot be entirely correct. As indicated above, this position is now against the tide of international law. In *Kindler v. Canada* (HUMAN RIGHTS COMMITTEE, 1993a, p. 426), the HRC took the view that, 'while States Parties are not obliged to abolish the death penalty, they are obliged to limit its use.' However, international law does not compel or obligate a requested state to demand assurance from a requesting state that the latter will not enforce the death penalty. Thus, in the *Kindler* case, the Canadian government refused to insist on such assurance from the United States, and both the Canadian Supreme Court and the United Nations HRC held that Canada was under no obligation to insist

on the furnishing of an assurance. However, the powerful dissenting opinion of HRC member, Mr B. Wennergren in this case is instructive. In his view, the right to life is the most supreme one, and there is no room for derogations permitted in relation to this right under article 6, paragraph 1, of the ICCPR. Thus, he observed that Canada violated the aforesaid article 6, paragraph 1, by consenting to extradite Mr. Kindler to the United States without having secured assurances that Mr. Kindler would not be subjected to the execution of the death sentence (HUMAN RIGHTS COMMITTEE, *Kindler v. Canada*, 1993a, para 23).

The Supreme Court of Canada later re-considered and overruled its decision in *Kindler* in the *Burns* case, above. Ten years later, the HRC also re-considered its position in *Kindler* (above) in *Judge v. Canada* (HUMAN RIGHTS COMMITTEE, 1998). Departing from its position in the former case, the HRC reasoned that:

For countries that have abolished the death penalty, there is an obligation not to expose a person to the real risk of its application. Thus, they may not remove, either by deportation or extradition, individuals from their jurisdiction if it may be reasonably anticipated that they will be sentenced to death, without ensuring that the death sentence would not be carried out.

(HUMAN RIGHTS COMMITTEE, *Judge v. Canada*, 2003, para 10.4).

Accordingly, the HRC found Canada to be in violation of Judge's right to life guaranteed under article 6(1) of the ICCPR by deporting him to the United States, where he was facing a death sentence, without seeking prior assurance from the latter state that the death sentence would not be implemented when imposed by the courts (HUMAN RIGHTS COMMITTEE, *Judge v. Canada*, 2003, para 10.6).

The Italian courts have taken a more liberal approach. Before Italian courts, a mere assurance that the death penalty will not be implemented is not sufficient to trigger extradition or deportation processes. In *Venezia v. Ministero di Graziae Giustizia, Corte cost* (ITALY, 1996, p. 815) an Italian court ruled that assurances by requesting states that death penalty will not be applied did not constitute sufficient guarantees, and that such assurances by the executive did not bind Italian courts. Before Italian courts, once it is shown that the fugitive is being sought for offences that potentially attract the death penalty, extradition will be refused. The Italian approach underlies the cardinal importance of the right to life.

6.2 *The prohibition of torture*

Today the assertion that the practice of death penalty constitutes torture is gaining ground (PROKOSCH, 2004, p. 24). Some commentators have argued that execution constitutes torture, as it has extreme mental and physical impact on a person already under the control of the government (PROKOSCH, 2004, p. 26). The practice of torture is outlawed under customary international law. In fact the prohibition of torture enjoys the status of *jus cogens* under international law. Furthermore, torture has been outlawed by several international and regional human rights instruments to

which Botswana is a party, such as the UDHR (article 5), the ICCPR (article 7) the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,¹⁶ and the African Charter on Human and Peoples Rights (1986, article 5), among others. In *Filartiga v. Pena-Irala* Judge Kaufman held that:

In light of the universal condemnation of torture in numerous international agreements, and the renunciation of torture as an instrument of official policy by virtually all of the nations of the world (in principle if not in practice), we find that an act of torture committed by a state official against one held in detention violates established norms of the international law of human rights [...].

(UNITED STATES, *Filartiga v. Pena-Irala*, 1980, p. 630).

Since the death penalty constitutes torture, and torture is universally prohibited, the requested states should not experience any difficulty in declining extradition to any country where the extraditee will face torture in the form of the death penalty. Therefore, South Africa cannot be faulted for refusing to extradite a person sought by Botswana who stands accused of an offence attracting the death penalty. To acquiesce to a requisition for extradition by a retentionist state, in a case where an assurance for non-enforcement of the death penalty has not been given, would be to encourage the perpetuation of torture.

7 Cruel, inhuman or degrading treatment or punishment

Dugard and Van den Wyngaert argue that the status of the right to be free from cruel, inhuman or degrading treatment or punishment is not clear under international customary law because of its very broad nature (DUGARD; VAN DEN WYNGAERT, 1998, p. 198). However, certain forms of treatment or punishment will be readily discernible as constituting cruel, inhuman or degrading treatment or punishment. One such treatment is the death row phenomenon. There can be no doubt that when a prisoner is kept in harsh conditions for a prolonged duration, with the spectre of death hovering over his head coupled with ever-mounting anguish of the impending execution, he undergoes cruel, inhuman or degrading treatment or punishment. However, in the *Kindler* case, it was stated that, “prolonged periods of detention under a severe custodial regime on death row cannot generally be considered to constitute cruel, inhuman or degrading treatment if the convicted person is merely availing himself of appellate remedies” (HUMAN RIGHTS COMMITTEE, *Kindler v. Canada*, 1993, para 15.2). The Supreme Court of Zimbabwe adopted a contrary position in this connection in *Commission for Justice & Peace, Zimbabwe v. Attorney-General Zimbabwe* (ZIMBABWE, 1993, p. 239) where it stated that:

It seems to me highly artificial and unrealistic to discount the mental agony and torment experienced on death row on the basis that, by not making maximum use of the judicial process available, the condemned prisoner would have shortened and not lengthened his suffering.

(ZIMBABWE, *Zimbabwe v. Attorney-General Zimbabwe*, 1993, p. 265).¹⁷

Although Botswana is usually swift in executing those found guilty, there has been incidents of the death row phenomenon,¹⁸ thereby offending fundamental rights of concerned inmates. To this end, it is argued that the death penalty is a remnant of an old penological system and offends the concepts of human dignity and human rights which are today “acknowledged as the supreme principles, and as absolute norms, in any politically organised society” (YAZAMI, 2008).

8 Some observations on Botswana’s application of the death penalty

Judges and writers have expressed criticism of Botswana’s record in the application of the death penalty. The full bench of the Gauteng High Court in the *Tsebe* case observed that “since its independence granted in 1966, Botswana has not presented with a good track record with regard to implementing death penalties” (SOUTH AFRICA, *Minister of Home Affairs & Others v. Emmanuel Tsebe & Others*, 2012, para. 61).

Chenwi writes that it was particularly regrettable that in the case of *Interights v. Botswana*, the Botswana government secretly hanged the convict, Mrs. Bosch, while her case was pending before the African Commission. In the *Bosch* case, the accused was convicted with murder. After exhausting all local remedies, she petitioned the Commission alleging that the impending capital punishment in relation to her violated some of her rights under the African Charter. On 27 March 2001 the Chairman of the African Commission wrote to the President of Botswana appealing to him for a stay of the petitioner’s execution pending the final determination of Mrs. Bosch’s petition by the Commission. Despite the request, on 31 March 2001, Botswana secretly executed the petitioner.

International research institutions have also analysed the application of the death penalty in Botswana and established that the country’s application of the sentence leaves a lot to be desired. For instance, in one of its reports, entitled *Hasty and Secretive Hanging*, the International Federation for Human Rights (2007) lays bare some deficiencies in the sentencing processes of Botswana’s judicial system, particularly in relation to the application of the death sentence. Principally, the report notes that since Botswana’s independence in 1966, “only one person has been granted clemency after being sentenced to death” (INTERNATIONAL FEDERATION FOR HUMAN RIGHTS, 2007, p. 18). The report notes that the clemency process conducted by the Clemency Committee is less than credible. Significantly, it noted that the Clemency Committee “is an executive advisory body” (INTERNATIONAL FEDERATION FOR HUMAN RIGHTS, 2007, p. 26) upon which *inter alia* the Attorney-General, the government’s principal legal advisor, served as a member.’ It therefore stands to reason that the ability of the Attorney-General to act independently without pandering to the whims and caprices of her political appointees is severely undermined. In addition, the workings of the Clemency Committee are not open to public scrutiny: the criteria and legal basis upon which the President acts are unknown to the public. This opaqueness militates against the visibility of official action which is so necessary

if the public is to have confidence in public institutions. In this connection the report remarked that: "This complete opaqueness is a serious threat to due process and the administration of justice, and violates the right to seek pardon or commutation of the sentence, enshrined in Article 6, paragraph 4, of the ICCPR." (INTERNATIONAL FEDERATION FOR HUMAN RIGHTS REPORT, 2007, p. 26).

The report also expresses concern over the fact that the low fees paid to *pro deo* counsel in murder cases compromise accused persons' rights to fair trial in that the problem of low tariffs result in cases that have grave implications on the rights of accused persons being handled by inexperienced lawyers lacking 'skills, resources and commitments to handle such serious matters and this detrimentally affected the rights of the accused.'

9 Way forward

Whereas it should be admitted that requested states must not surrender fugitives to a country where their rights will be violated, it must equally be appreciated that such fugitives must stand trial in an effort to suppress crime and avoid requested states turning into safe havens for criminals. Thus, it is important to seek strategies and methods that could be used to create a fine balance between the protection of human rights and the suppression of crime. It is suggested that South Africa and Botswana can use the procedure of conditional extradition. This procedure or mechanism is important in balancing the two interests at play, namely: protection of rights of the extraditee and prosecuting those alleged to have fallen foul of the law. Within the context of the death penalty, conditional extradition would require the requesting retentionist state to make a prior undertaking that the extraditee will not be executed on being found guilty of the offence he is being extradited for. At present Botswana has rejected this arrangement. It is hoped however that it will revisit its position on this approach and finally embrace it.

Conditional extradition is not uncommon. In the case of *Alberto Makwakwa & others v. The State* (SOUTH AFRICA, 2011, para. 19), the government of Lesotho furnished a satisfactory assurance to South Africa, upon the latter's request, that the extraditees who were facing a charge of conspiracy to kill the Prime Minister in Lesotho will not be executed if found guilty. Dugard and Van den Wyngaert also point out that, in October 1996, Canada extradited one Rodolfo Pacificador to the Philippines to be prosecuted for murder on condition that when found guilty, he would not be sentenced to death (DUGARD; VAN DEN WYNGAERT, 1998, p. 208).

The downside of conditional extradition is that the requesting state may not comply with its own assurances. An example in point is the case of Wang Jianye who was extradited by Thailand to China to stand trial for a capital offence on condition that if found guilty, he would be spared the guillotine or not sentenced to a term exceeding fifteen years. Hardly a year after his extradition, Jianye was executed by China (DUGARD; VAN DEN WYNGAERT, 1998, p. 208). The present stand-off between South Africa and Botswana in relation to extraditions involving the death penalty is another example of lack of political willingness to accept conditional extradition.

Another solution is the international law process of *aut dedere aut judicare* in terms of which a requested state may refuse to extradite for fear that the fugitive's rights will be violated and elect to prosecute the fugitive using its own judicial machinery. Usually, the principle of *aut dedere aut judicare* is invoked where an offender is charged with highly egregious and heinous crimes in which impunity in relation to such fugitives is considered as the most serious danger caused by the practice of non-extradition (BEDI, 2001, p. 103).

In modern international law, the principle of *aut dedere aut judicare* has been interpreted as pertaining only to widespread "crimes which in some way affect human society" in its entirety, and which in contemporary legal parlance can be regarded, to an appreciable extent, as international crimes (BEDI, 2002, p. 101). It is argued, however, that there is no practical impediment that limits the operation of the *aut dedere aut judicare* to international crimes only. However, the utility of this approach will be undercut by the fact that at present, and at a general level, purely national crimes are not subject to extra-territorial prosecution – especially in common law jurisdictions. These jurisdictions recognise the principle of territoriality as the basis for assuming jurisdiction over a criminal matter.

In recent years, South Africa has passed several pieces of legislation that seek to cloth South African courts with jurisdiction to try certain specified offences despite the fact that they had occurred outside South Africa. Examples of such legislation include the Prevention and Combating of Corrupt Activities Act (2004) and the Rome Statute of the International Criminal Court (2004). Commenting on this development in the *Tsebe* case (SOUTH AFRICA, 2012), the High Court observed that if South Africa could pass laws empowering its courts to try crimes that have been committed outside its territory, there is no reason why a similar legislation could not be passed to ensure that fugitives who are on South African soil and being sought by a requesting state that retains capital punishment for the offences that the fugitive is facing, can be tried by the South African courts when requesting states are not prepared to give the requisite assurance (SOUTH AFRICA, *Minister of Home Affairs & Others v. Emmanuel Tsebe & Others*, 2012, para 61).

Such legislation would be of immense utility value in ensuring that those who are accused of committing offences that attract the death penalty in Botswana and flee to South Africa stand trial in South Africa, whenever Botswana is not willing to guarantee that they will not be executed. This will ensure that those who commit capital offences in Botswana and cross into South Africa do not go unpunished, as is currently the case. In enacting this law, South Africa will be acting in line with the SADC Extradition Protocol which provides under its article 51 that in a case where extradition has been refused on ground that another SADC country is unprepared to give the requisite assurance for the exclusion of death penalty, "[...] the Requested State shall, if the other State so requests, submit the case to its competent authorities with a view to taking appropriate action against the person for the offence for which extradition had been requested." (SOUTHERN AFRICAN DEVELOPMENT COMMUNITY, 2006, article 5 (c)).

However, concerns have been raised that this arrangement may raise

problems of evidence, especially *viva voce* evidence which features prominently in the common law world (DUGARD; VAN DEN WYNGAERT, 1998, p. 209). There is no doubt that this trans-frontier extension of criminal jurisdiction will require that witnesses who almost reside in the requesting state be brought to the requested state to testify. In the *Tsebe* case (SOUTH AFRICA, 2012), the High Court just stated that this problem was not insurmountable, since all it requires for its effective implementation is the cooperation between the requesting and the requested states. But Dugard and Van den Wyngaert argue that it is highly unlikely that a state whose extradition request has been shot down on human rights concerns will be willing to cooperate with authorities of the requested state (DUGARD; VAN DEN WYNGAERT, 1998, p. 208). In addition, these two scholars argue that, even when the evidence has been procured, the courts of the requested state may treat it with suspicion on ground of the requesting state's unattractive human rights record on capital punishment (DUGARD; VAN DEN WYNGAERT, 1998, p. 208).

Another problem relates to retroactive application of criminal law. If South Africa passes such extra-territorial criminal legislation, will it apply to crimes that pre-date it? This appears unlikely owing to the impermissibility of retrospective application of criminal law. However, one may argue that this law will not be applying retrospectively *per se* because capital offences found in Botswana criminal statutes have long been recognised as offences in the penal statutes of all civilised jurisdictions, including South Africa. The statute that gives South African courts the criminal jurisdiction to deal with offences committed outside South Africa will thus be merely putting in place machinery for trial and not creating any new offence or punishment retroactively. Consequently, problems of retroactive application of the law may not arise.

The other problem associated with extension of criminal jurisdiction of South African courts in relation to capital offences committed in Botswana is that offenders of same offences will be accorded differential treatment or punishment in that whereas those in Botswana may be executed, those being tried in South Africa are not faced with the risk of the death sentence. This lack of uniformity in sentencing between the two jurisdictions may cause grave injustices. Despite this shortcoming, if the criminal jurisdiction of South African courts is extended, the problem would become one of differential sentencing schemes rather than one of impunity, which is presently prevailing. It may be argued that it is better that a lesser sentence be imposed than for a person accused of a capital offence to go unprosecuted, since the latter entrenches an undesirable culture of impunity and undermines efforts in crime prevention.

10 Conclusion

As indicated at the opening of this article, today, notions of human rights have forayed into all spheres of human life. Human rights have become an integral feature of contemporary international law, and extradition has not escaped their reach. The invocation of human rights principles in the area of extradition has

been denounced by many nations as an obstacle to combating transnational and international crimes. Whereas sympathy may go for these concerns, they are untenable at law.

As has been shown in this article, an exquisitely delicate balance has to be made between the protection of human rights and efforts to suppress crime. The two interests are both legitimate and at the forefront in world agenda, therefore one cannot be undermined in preference of the other. A better international criminal law system is the one served by an extradition arrangement that is sensitive to the rights of fugitives. To this end, Botswana and South Africa must move swiftly and agree on an extradition approach that is in line with the prevailing norms of international human rights law. The most prevalent and predominant approach in the world and easily workable or implementable is the conditional extradition that South Africa proposes. More critically, Botswana must synchronise her sentencing scheme on capital offences with emerging world trends and abolish the death penalty or place a moratorium on it.

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NOTES

1. In South Africa, the death penalty was abolished by the Constitutional Court in the seminal and well-known case of *The State v. Makwanyane* (SOUTH AFRICA, 1995, 3 SA 391 (CC)). In declaring the death penalty unconstitutional, Chaskalson P pointed out at para 144 of the judgment that by committing to human rights ethos, the society of South Africa was required to give particular premium on the rights to life and dignity and added that "this must be demonstrated by the State in everything it does" (SOUTH AFRICA, 1995, 451C-D).
2. A retentionist State is a State that has retained death penalty as a competent sentence for an offence in its statute books.
3. Extenuating circumstances is an amorphous term covering a wide repertoire of factors in its meaning. In *Rex v. Fundakubi* (SOUTH AFRICA, 1948, p. 818) the court observed that "no factor, not too remote or too faintly or indirectly related to the commission of a crime, which bears upon the accused's moral blameworthiness in committing it, can be ruled out from consideration." Factors such as provocation, intoxication, youthfulness, witchcraft etc have been found by courts to constitute extenuating circumstances.
4. This instrument was signed at Geneva, July 27, 1929.
5. However, it should be noted that in 1979 the death penalty was subsequently abolished in Norway for all crimes.
6. In this connection article 6(2) of the International Covenant on Civil and Political Rights (ICCPR) is instructive. It states that those countries that have not abolished the death penalty must only implement it in the most serious crimes according to law, not in a manner inconsistent with provisions of the ICCPR and only pursuant to a judgment of a competent court. The Second Optional Protocol to the Covenant (1991) state that abolition of the death penalty contributes to enhancement of human dignity and progressive development of human rights.
7. Article 2(1) explicitly recognises the death penalty.
8. These are Angola, Mauritius, Mozambique, Namibia, Seychelles and South Africa.
9. These include Malawi, Swaziland and Zambia. The last execution in Malawi was in 1992, Swaziland in 1983 and Zambia in 1999.
10. These States were: Spain, Netherlands, Brazil, United Kingdom, Italy, Canada, Australia, Holy See, Ireland and Denmark.
11. Mr. Tsebe died before conclusion of the case.
12. This is the European Union's criminal intelligence agency. It became fully operational on 1 July 1999.
13. This is an organization that facilitates international police cooperation. It was established as the International Criminal Police Commission (ICPC) in 1923 and adopted its telegraphic address as its common name in 1956.
14. See also section 203 of the Botswana Penal (above) Code (1964) which is essentially to the same effect.
15. The constitutionality of death penalty in Botswana has been declared in a long line of cases such as: *Molale v. The State* (BOTSWANA, 1995); *Ntesang v. The State* (BOTSWANA, 2007) etc.
16. Provisions of CAT prohibit torture in their entirety in all its manifestations.
17. However the view is divided on this point. Contrary to the view expressed above, see *Abbot v. Attorney General of Trinidad and Tobago* (UNITED KINGDOM, 1979) where the court said that time passing before execution can never be invoked as a basis for a finding that an inmate in death row has been treated in a cruel, inhumane degrading manner.
18. The death row phenomenon refers to: "the inhumane treatment resulting from special conditions on death row and often prolonged wait for executions, or where the execution is carried out in a way that inflicts gratuitous suffering." See SCHABAS, 1993, p. 127.

RESUMO

Procedimentos de extradição não estão imunes às restrições impostas aos Estados pelo direito internacional de direitos humanos em questões de liberdades individuais. Isso ocorre porque noções fundamentais de direitos humanos compõem a ordem pública da comunidade internacional e, como tal, possuem primazia em relação a obrigações decorrentes de tratados. Uma das principais normas adotadas em tratados de extradição diz respeito à pena de morte. Este artigo discute tal norma no contexto da África do Sul, um Estado de viés abolicionista, e Botsuana, retencionista. Extradições envolvendo pena de morte têm gerado tensões diplomáticas entre os dois países; uma vez que a África do Sul insiste que Botsuana deve garantir de maneira satisfatória que a pena de morte não será imposta ao extraditando ou, caso o seja, não será de fato executada. Botsuana tem se recusado a conceder tal garantia. Isso tem levado a um impasse entre estes dois países nesta seara. Este artigo analisa o regime de extradição entre os dois países, referindo-se especificamente à pena de morte à luz do presente impasse. Argumenta-se, neste artigo, que a posição adotada pela África do Sul está de acordo com os melhores parâmetros e práticas sobre o tema e que Botsuana deve acatar as reivindicações da África do Sul.

PALAVRAS-CHAVE

Pena de morte – Direito à vida – Extradição – Botsuana – África do Sul

RESUMEN

El proceso de extradición no ha escapado a las restricciones impuestas por la legislación de derechos humanos a los Estados en sus relaciones con las libertades de los individuos. Eso se debe a que las nociones de derechos humanos se consideran parte del orden público de la comunidad internacional y, como tales, gozan de una posición superior respecto a las obligaciones de los tratados. Una de las principales normas adoptadas en los tratados de extradición se refiere a la pena de muerte. En este trabajo se analiza esa norma en el contexto de Sudáfrica, un Estado abolicionista, y Botsuana, que es retencionista. Las extradiciones en que está implicada la pena de muerte han provocado disputas diplomáticas entre ambos países: Sudáfrica insiste en que Botsuana debe proporcionar garantías suficientes de que no se impondrá la pena de muerte al extraditado o de que si se impone no será aplicada; Botsuana afirma no poder dar esas garantías, con lo que se ha creado un callejón sin salida. Este artículo brinda una reflexión sobre el régimen de extradición entre ambos países, con una referencia especial a la pena de muerte a la luz del actual punto muerto. Se argumenta que la posición de Sudáfrica al insistir en las garantías está en línea con las mejores normas y prácticas internacionales y que Botsuana debe transigir respecto a esa demanda.

PALABRAS CLAVE

Pena de muerte – Derecho a la vida – Extradición – Botsuana – Sudáfrica



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ABSTRACT

In December 2008, when ruling on a number of cases involving the civil imprisonment of unfaithful trustees, the Supreme Court modified its understanding of the hierarchy of international human rights treaties in Brazilian law, adopting the thesis of supra-legality. This article analyzes the potential impacts that this change can have on constitutional interpretation in Brazil, examining how the Supreme Court has applied the thesis of supra-legality and the extent to which the hierarchy of international human rights treaties has influenced, in other countries, their use in interpreting the Constitution. The article concludes that supra-legality allows for the construction of arguments in favor of using human rights treaties as a parameter of constitutional interpretation in Brazilian law.

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KEYWORDS

International human rights treaties – Supra-legality – Supreme Court



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SUPRA-LEGALITY OF INTERNATIONAL HUMAN RIGHTS TREATIES AND CONSTITUTIONAL INTERPRETATION

Antonio Moreira Maués*

1 Introduction

In December 2008, the Supreme Court delivered judgment on a series of cases¹ that significantly modified its understanding of the hierarchy of international human rights treaties in Brazilian law. Although article 5, paragraph 2 of the Constitution of 1988² had already innovated by providing for the incorporation of rights recognized in international treaties, the Supreme Court had upheld the jurisprudence established under the regime of the Constitution of 1969, according to which international treaties were equal in rank to ordinary laws. The adoption of this understanding by the Supreme Court was not immune to criticism, since several authors, when interpreting this constitutional provision, argued that human rights treaties had a constitutional status (CANÇADO TRINDADE, 1996; PIOVESAN, 1997) or even a supra-constitutional status (MELLO, 1999).

The cases that led to the Court's new orientation involved the civil imprisonment of unfaithful trustees, which is provided for in article 5, LXVII of the Constitution of 1988³ and which contrasted with article 7.7 of the American Convention on Human Rights (ACHR), according to which imprisonment for indebtedness is only permissible for non-payment of alimony.⁴ For many years, the Supreme Court considered that the constitutional norm had not been affected by Brazil's 1992 ratification of the ACHR, thereby maintaining the validity of the infra-constitutional norms that regulated this type of imprisonment. The court, having published a binding precedent on the matter, now considers, however, that the civil imprisonment of unfaithful trustees is *unlawful*.⁵

The summary of the Supreme Court's exemplary decision in Extraordinary Appeal No. 466,343, taken unanimously, helps us understand the reasons for the change:

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CIVIL IMPRISONMENT. Deposit. Unfaithful Trustee. Collateral. Declaration of enforcement action. Absolute Inadmissibility. Insubstantiality of the constitutional provision and the subordinate norms. Interpretation of article 5, item LXVII and paragraphs 1, 2 and 3 of the Federal Constitution in the light of article 7, paragraph 7 of the American Convention on Human Rights (Pact of San José da Costa Rica). Appeal Denied. Joint judgment of Extraordinary Appeal No. 349,703 and Habeas Corpus No. 87,585 and No. 92.566. Civil imprisonment of unfaithful trustees is unlawful, regardless of the type of the deposit.

As can be noted, for the Supreme Court to rule out the possibility of imprisonment for unfaithful trustees, it first had to modify its understanding of the hierarchy of international human rights treaties in Brazil so that the constitutional and infra-constitutional provisions could be interpreted *in the light* of the ACHR. Upon examining the justices' votes, we can identify two theories that substantiate this new interpretation: for the majority, human rights treaties had acquired supra-legal status, remaining lower in rank than the Constitution, although higher than other laws; for the minority, the constitutional status of these treaties ought to be acknowledged, so they can become, together with the constitutional text, part of the constitutional block.⁶

The fact that the decision on imprisonment of unfaithful trustees was taken unanimously does not diminish the interest in analyzing its legal grounding, since it sets a precedent that will influence future decisions on the application of human rights treaties.⁷ For this reason, the new understanding has attracted the attention of legal scholars, who have identified the need for the Supreme Court to develop a *dialogue* with other courts, in particular the Inter-American Court (RAMOS, 2009; SILVA, 2010), or to exercise the "conventionality control" of the law (CAMPOS; BASTOS JUNIOR, 2011; MAZZUOLI, 2011). In this article, we intend to analyze the changes that supra-legality can bring to the field of interpreting the Constitution by exploring how this thesis can be applied more consistently to the protection of human rights in Brazil. With this objective in mind, the article is divided into three parts. In the first section, we present an analysis of the Supreme Court's decision in the case of imprisonment of unfaithful trustees, in order to understand the meaning of the category of supra-legality, followed by an exploratory search intended to identify how the adoption of this thesis has been influencing the court's jurisprudence. In the next section, we examine, based on a study of other countries' legal systems, how the hierarchy of human rights treaties conditions their use in interpreting the Constitution. In the final section, we present arguments in favor of using human rights treaties as parameters of constitutional interpretation in Brazilian law.

2 The meaning of supra-legality

Prior to 1988, the Supreme Court had established the understanding, in its ruling of Extraordinary Appeal No. 80,004 (J. 01/06/1977), that international treaties are incorporated into domestic law with the same status as ordinary legislation, and may be revoked by a subsequent law or be overridden by a specific law. The need for a judicial interpretation of the matter was also due to the Constitution's silence

on the reception of international treaties and their effects on domestic law, since the constitutional norms on the subject are limited to the process of conclusion and approval of treaties (DALLARI, 2003, p. 46).

The fact that the rulings of the Supreme Court on the subject did not pertain to human rights, together with the explicit mention of international treaties made in article 5, paragraph 2 of the Constitution of 1988, created the expectation that the ratification of these international instruments by Brazil would lead to a change in the understanding of the court. This did not occur: in the ruling of the Direct Case of Unconstitutionality (ADIn) No. 1,347 (J. 05/10/1995), the Supreme Court refused to use international treaties as a parameter for constitutional review, denying that the Conventions of the International Labour Organization (ILO) could be invoked as grounds for declaring the unconstitutionality of a Labor Ministry Decree. Moreover, in ADIn No. 1,480 (J. 04/09/1997), the court reaffirmed that international treaties are not only subordinate to the Constitution, but they also have the same level of validity, effectiveness and authority as ordinary laws (GALINDO, 2002, p. 215-217; MAUÉS, 2008, p. 297-298).

The case of unfaithful trustees, however, posed a different problem. Ratified by Brazil in 1992, the ACHR was *lex posterior derogat legi priori*⁸ in relation to the legal provisions that regulate this type of civil imprisonment. Nevertheless, the Supreme Court solidified the understanding that the ACHR may neither override constitutional authority nor, as a general infra-constitutional norm, take precedence over special constitutional norms on civil imprisonment.⁹

This jurisprudence explains, in part, the minor impact that Brazil's ratification of human rights treaties had on domestic law, since these treaties were rarely used by the national judiciary. Placed on a par with ordinary laws and subject to the principle of speciality, international human rights treaties did not appear to offer a firm legal basis for arguing in court.¹⁰

The time between these decisions and those taken in December 2008 was marked by some changes that prompted the Supreme Court to review its jurisprudence.¹¹ Most prominent was the enactment of Constitutional Amendment No. 45, which added three important provisions on human rights: the requirement to incorporate international human rights treaties with the same legal status as constitutional amendments, provided they are approved by at least the same majority needed to pass such an amendment;¹² the constitutionalization of Brazil's accession to the International Criminal Court;¹³ and the possibility for jurisdiction to be taken to federal justice in cases of serious human rights violations.¹⁴ Although these are distinct issues, the innovations of Constitutional Amendment No. 45 all had in common the constitutional empowerment of international human rights law, by expressly making it possible to attribute constitutional status to human rights treaties, by subjecting the country to international criminal jurisdiction and by creating new instruments for complying with the obligations of the Brazilian State on the matter of protecting human rights.

The Supreme Court recognized the significance of these changes. Indeed, Justice Gilmar Mendes affirmed, in his opinion in Extraordinary Appeal No. 466,343, that the incorporation into the Constitution of article 5, paragraph 3 "emphasized the special nature of human rights treaties in relation to reciprocity treaties between States Parties, conferring upon them a privileged place in the legal system" (BRASIL.

2008b, p. 1.144), which indicated the insufficiency of the thesis of ordinary legality of these treaties and the outdated nature of the jurisprudence of the Supreme Court. In a similar vein, Justice Celso de Mello stressed that Constitutional Amendment No. 45 "introduced a legally relevant fact, capable of allowing the Supreme Court to redefine its position on the legal status that international human rights treaties and conventions have in the domestic legal system of Brazil" (BRASIL. 2008b, p. 1.262).

The common view shared without exception by all the justices, that the Supreme Court should recognize the privileged position of international human rights protection norms, did not avert a controversy over their hierarchy. Now that the thesis of ordinary legality for human rights treaties had been discarded, and with none of the Supreme Court justices defending the thesis of supra-constitutionality, two approaches vied to define the court's understanding.

For the minority, represented by the opinion of Justice Celso de Mello, human rights treaties have a "materially constitutional" nature, even those approved before Constitutional Amendment No. 45, and they therefore comprise the "constitutional block". As such, the newly added paragraph 3 of article 5 of the Constitution, by formally attributing constitutional status to treaties approved under its terms, should not strip previously approved treaties of their material constitutional status, recognized based on the duty of the State to:

Respect and promote the realization of the rights guaranteed by the Constitutions of national States and assured by international declarations, in order to permit the practice of an open constitutionalism to the process of growing internationalization of the fundamental rights of the human person.

(BRASIL. 2008b, p. 1.217-1.218).

As such, paragraph 3 should strengthen the constitutionality of human rights treaties, since it would be unreasonable for treaties on the same subject to have different hierarchies.

The position adopted by most Supreme Court justices, however, was the thesis of supra-legality. The main reasons presented in favor of this decision were:

- a) the formal and material supremacy of the Constitution over the entire legal system, based on the possibility of constitutional review even of international legislation;¹⁵
- b) the risk of an inadequate broadening of the term "human rights", that would permit the production of legislation outside the control of its compatibility with the domestic constitutional order;
- c) the understanding that the inclusion of article 5, paragraph 3 implied recognizing that the treaties ratified by Brazil before Constitutional Amendment No. 45 cannot be considered constitutional norms.

In spite of this, the current trend of global constitutionalism that respects international laws aimed at protecting human rights, the evolution of the Inter-American system of human rights protection, and the principles of international law on compliance with

international obligations would no longer permit the thesis of legality to be maintained. Therefore, supra-legality was presented as a solution that would make the jurisprudence of the Supreme Court compatible with these changes, without the problems that would result from the thesis of constitutionality. As such, human rights treaties could now override the legal effectiveness of any infra-constitutional law conflicting with them.

The fact that, despite their different reasoning, all the Supreme Court justices agreed on the unlawfulness of imprisonment for unfaithful trustees demonstrates that, in many cases, the option for the thesis of constitutionality or supra-legality does not lead to different decisions. However, one consequence of the thesis of supra-legality is to deny that human rights treaties can serve as a parameter for constitutional review, i.e. that they do not integrate the group of provisions based on which the constitutionality of laws and other legal acts are analyzed (CRUZ VILLALÓN, 1987, p. 39-41). In contrast, the adoption of the thesis of constitutionality would allow the mechanisms of constitutional review to be engaged to examine the validity of laws not only before the Constitution, but also in relation to human rights treaties.

In spite of this difference, a more careful examination of the fundamentals of the Supreme Court's decision illustrates that the two theses have a good deal in common. When ruling on the cases that involved the imprisonment of unfaithful trustees, the court not only interpreted the infra-constitutional legislation to ensure it was compatible with the ACHR, but it also interpreted the Constitution itself based on this treaty. As a result of the adoption of the thesis of supra-legality, the constitutional clause that determines the imprisonment of unfaithful trustees was drained of its legal force: since this clause is subject to legal regulation to have full effectiveness, what the Supreme Court did, by banning the ordinary legislator from deciding on the matter, was to prevent the constitutional norm from being applied, unless under the extremely unlikely hypothesis that the content of the laws that address the institution of civil imprisonment, currently contained in civil legislation and civil procedure, is approved by a constitutional amendment. Even in this case, such a constitutional amendment would be subject to review based on the principle of non-retrogression. Considering that the legislator cannot regulate this institution without disrespecting the ACHR, which is higher in rank than ordinary laws, this regulation has become legally impossible, as exemplified by Binding Precedent No. 25.¹⁶

By withdrawing the authority of the ordinary legislator, the Supreme Court effectively changed its interpretation of the constitutional provision, restricting the scope of the exception it provides for. The clause that deals with the imprisonment of unfaithful trustees was no longer interpreted as a norm that requires the legislator to regulate the institution, nor did it start to be interpreted as a norm that grants him this authority, since the legislator may not exercise it while the ACHR is in effect in Brazil. Therefore, it can be said that the Supreme Court reinterpreted the Constitution and established a norm that bans the ordinary legislator from regulating the institution. For these reasons, we consider that the expression used in the aforementioned court summary is accurate: not only the ordinary legislation, but the Constitution itself was interpreted *in the light* of the ACHR.

The analysis of the decision in the case of unfaithful trustees demonstrates that, despite the differences between the theses of constitutionality and supra-legality, both hypotheses admit the possibility that the Constitution – and not

just infra-constitutional laws – can be interpreted in a manner compatible with international human rights treaties. Is this decision an isolated case? An examination of the jurisprudence of the Supreme Court reveals that, even before 2008, a new approach was already beginning to emerge that conferred greater legal force to international human rights treaties. Based on the adoption of the thesis of supra-legality, we can see that these precedents have grown stronger and new precedents are being established using human rights treaties, particularly the ACHR, to interpret the Constitution, as we can see in the cases below:

- a) according to article 7.2 of the ACHR: “No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto”. This provision has been used by the Supreme Court to interpret the principle of the presumption of innocence (article 5, LVII) in cases that involve the right of convicted defendants to appeal in freedom. In Habeas Corpus No. 99,891 (J. 15/09/2009), the Supreme Court overturned a decision by the Superior Court of Justice (STJ) that had enforced the sentence once the case had been appealed to a higher court. Confirming that the court does not recognize the constitutional possibility of preventive detention, taking into account the presumption of innocence, the scope of this detention is established in the ACHR, which does not guarantee convicted defendants the right to always appeal in freedom, since each country’s legal system must establish when preventive detention is permitted. Under Brazilian law, this implies recognizing the exceptional nature of preventive detention, which must meet the requirements of article 12 of the Code of Criminal Procedure and demonstrate its absolute necessity;¹⁷
- b) Constitutional Amendment No. 45 included the right to a trial of reasonable duration (article 5, LXXVIII) among the fundamental guarantees, a right that is also recognized more specifically in articles 7.5 and 7.6 of the ACHR:

Article 7 (...) 5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial. 6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful (...).

Before adopting the thesis of supra-legality, the Supreme Court had already used this provision of the ACHR, together with the constitutional clause on the right to a trial of reasonable duration, to rule in favor of remitting preventive detention due to excessively long court proceedings. In Habeas Corpus N. 85,237 (J. 17/03/2005), cited as a precedent in several other decisions, Justice Celso de Mello had already affirmed the importance of the ACHR as a parameter to resolve the “tension” between the punitive action of the State and the defendant’s desire for liberty, which has been upheld in later decisions;¹⁸

c) concerning judicial guarantees, the ACHR recognizes several rights:

Article 8.2.b. *“prior notification in detail to the accused of the charges against him”*,
 “Article 8.2.d. *the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel”*,
 “Article 8.2.f. *the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts”*,
 “Article 8.2.h. *the right to appeal the judgment to a higher court”*.

These provisions have been used by the Supreme Court to interpret the constitutional guarantees of an adversarial trial and a full defense (article 5, LV), recognizing, among the *means* inherent in a full defense, that charges are void if they do not observe the standards provided for in the ACHR;¹⁹ that the accused has the right, even when detained, to be present at the procedural acts;²⁰ that failure to personally serve the accused with a summons can lead to the annulment of the case, since it makes it impossible for him to exercise the right defend himself and the right to freely choose his counsel, which is provided for in the ACHR;²¹ and that article 594 of the Code of Criminal Procedure, which establishes the committal of the accused to prison as a condition for appeal is unconstitutional, among other reasons because it does not respect the right of appeal to a higher court, which is provided for in the ACHR;²²

d) the ACHR contains two important clauses on freedom of expression:

Article 13.1. Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice. 2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: a) respect for the rights or reputations of others; or b) the protection of national security, public order, or public health or morals.

In the judgment of Extraordinary Appeal No. 511,961 (J. 17/06/2009), the Supreme Court declared the requirement for journalists to have a higher education degree, stipulated in article 4, item V of Decree-Law No 972/1969, unconstitutional. In its justification for the decision, the Court makes broad use of the ACHR, and also draws on the Advisory Opinion No.5 of the Inter-American Court and the decisions of the Inter-American Commission, emphasizing that the Court’s interpretation was adjusting to that of the Inter-American System. In other words, the Supreme Court interprets constitutional norms related to the freedom of expression and the freedom to practice a profession in the same way, considering the practice of journalism as a manifestation of the freedom of expression.

This series of decisions demonstrates that the jurisprudence of the Supreme Court has begun to use human rights treaties more consistently to interpret not only infra-constitutional legislation, but also the Constitution itself. It can be

observed, therefore, that the adoption of the thesis of supra-legality permits the court to go beyond the need to examine the compatibility of laws with international treaties. In order to understand the extent to which the hierarchy of human rights treaties influences the interpretation of the Constitution, it is worth looking at the experiences of other countries.

3 Comparative experiences

In the previous section, we saw how the debate in recent years in the Supreme Court revolved around defining the hierarchy of international human rights treaties in Brazil. While the adoption of the thesis of supra-legality has prompted changes in the jurisprudence of the Supreme Court that would not have been possible if the thesis of legality had been maintained, we can see that several of the court's decisions resemble the thesis of constitutionality when it comes to the interpretation of constitutional provisions in conjunction with human rights treaties, with a view to making them compatible. This leads us to conclude that the hierarchy of these treaties is not the only variable that helps to understand their impact on domestic law, as we can observe in the experiences of other countries.

In the context of the European Convention on Human Rights (ECHR), a study conducted in 18 countries (KELLER; STONE SWEET, 2008) demonstrates that they all underwent structural changes in their constitutional systems as a result of the reception of the ECHR. The most significant changes included the possibility for judges to exercise the constitutional review of laws based on the ECHR; the development of a monist system, in relation to the Convention, in countries that are traditionally dualist; and the modification of the traditional views on the separation of powers concerning the role of the judiciary.

Although these changes are the result of multiple factors, one of the central elements of the process was the incorporation of the ECHR into domestic law, making it binding on governments and allowing judges to directly apply the Convention. Concerning hierarchy, the study indicates the importance of recognizing at least the supra-legal status of the ECHR, in order to protect it from subsequent ordinary laws. However, the extension of the use of the ECHR by national courts does not depend on its hierarchy alone, but also on how the courts use the Convention to interpret the Constitution, as demonstrated by the experiences of three countries that do not recognize the constitutional status of human rights treaties.

In Spain, the Constitution of 1978 establishes that all international treaties are subordinate to it, conferring on the Constitutional Court the authority to exercise both the prior and successive control of their constitutionality (GÓMEZ FERNÁNDEZ, 2004). Meanwhile, the Constitution states, in article 96.1, that treaties that are incorporated into domestic law may only be modified in the manner provided for in the treaties themselves or in accordance with the general rules of international law, which protects them from any alteration or repeal that could result from ordinary legislation.

Just as important as these provisions in understanding the role of human rights treaties in the Spanish legal system is article 10.2, according to which:

Provisions relating to the fundamental rights and liberties recognized by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain.

In the application of this rule, the Spanish Constitutional Court developed a jurisprudence that requires all the public authorities to interpret constitutional rights in accordance with human rights treaties. As such, the Constitutional Court began to enforce the content of the rights declared in the Constitution based on international treaties, recognizing as fundamental certain faculties not expressed therein, while also using for this purpose the jurisprudence produced by international organizations. Therefore, although human rights treaties do not have the status of constitutional norms in the Spanish legal system, which means they may not serve as an autonomous canon for validating norms, they have become parameters for interpreting the Constitution (QUERALT JIMÉNEZ, 2008; SAIZ ARNAIZ, 2011).

Even though it lacks a constitutional clause like the one in Spain, Germany also exemplifies how international treaties can be used when interpreting the Constitution. In this country, which has a dualist tradition, a specific Act of Parliament is required for international treaties to be effective domestically, meaning that human rights treaties are incorporated as ordinary federal laws. As a result, they are not protected against subsequent federal laws, which, since they are equal in rank, would imply that their provisions would be repealed according to the principle that subsequent laws repeal prior laws (ABDELGAWAD; WEBER, 2008, p. 117-118; MÜLLER; RICHTER, 2008, p. 165).

In order to avoid the problems that could result from the repeal of international treaties by subsequent ordinary laws, the German Constitutional Court adopted, from 1987 onwards, the understanding that although treaties do not have constitutional status, the interpretation of the Constitution must take their content and development into consideration, since an obligation exists to interpret infra-constitutional norms in harmony with the commitments assumed by Germany before international law. On the matter of fundamental rights specifically, the court also established that the jurisprudence produced by the European Court of Human Rights (ECtHR) should also serve as interpretive assistance in defining the content and scope of fundamental rights and the principle of the rule of law (ABDELGAWAD; WEBER, 2008, p. 119-120; HOFFMEISTER, 2006, p. 728).

Subsequently, following the decision of the *Görgülü* case, in 2004, the German Constitutional Court took another step to reinforce the importance of human rights treaties in the domestic order. In addition to upholding the previous understanding on the need to interpret the Constitution in harmony with international treaties, the Constitutional Court accepted that national courts have the duty to observe the rulings of the ECtHR and to consider the ECHR when interpreting the Constitution. Failure to comply with this duty can result in the filing of a constitutional complaint with the Constitutional Court for the violation of fundamental rights. This understanding, however, does not alter the supremacy of the Constitution, since the provisions of international treaties may not offend fundamental constitutional principles (HOFFMEISTER, 2006, p. 725-730; MÜLLER; RICHTER, 2008, p. 166-168).

Finally, the case of the United Kingdom deserves attention for its singularity. Although it was one of the first States to ratify the ECHR, the United Kingdom did not incorporate it into domestic law. This only occurred following the approval of the Human Rights Act (HRA) of 1998, which came into force in 2000. This change resulted from the growing number of rulings against the British State by the European Court of Human Rights, which made it necessary to create mechanisms to improve the protection of human rights in the country. The HRA incorporates the rights mentioned in the ECHR into domestic law and establishes that the public authorities have a duty to observe the Convention, while empowering citizens to defend these rights in the national courts (BESSON, 2008, p. 36-42).

Formally, the HRA has the same hierarchy as other British laws and subsequent Acts of Parliament may modify it. However, two instruments grant it a distinct status in the domestic legal system: the first (article 3) establishes that the courts should interpret legislation – both prior and subsequent to the HRA – in a manner compatible with the rights recognized by the ECHR, meaning that when more than one interpretation of the law is possible, judges should give preference to the one that is more aligned with the ECHR. The second instrument (article 4) applies when it is not possible to interpret legislation in a manner compatible with the Convention: in these cases a “declaration of incompatibility” must be issued by the court, which does not affect the validity of the law, but encourages the Parliament to review the law and authorizes the Executive to begin a fast-track legislative process to modify it (BESSON, 2008, p. 51-52). The political weight of declarations of incompatibility can be determined by the fact that every one that has been issued has led to changes in the legislation or the start of a legislative process (REINO UNIDO. DEPARTMENT FOR CONSTITUTIONAL AFFAIRS, 2006, p. 17; KLUG; STARMER, 2005, p. 721).

As we know, the United Kingdom does not have a written Constitution that establishes parameters for reviewing the validity of laws. Nevertheless, the HRA represented a notable change in the British legal system, since the rights set out in the ECHR began to be used by the Judiciary to interpret legislation, either aligning it with the HRA or encouraging its review by Parliament, which has led some authors to classify it as a constitutional statute (CLAYTON, 2004, p. 33).

In the context of the Inter-American System for the Protection of Human Rights, Latin American countries in particular highlight the various ways in which international human rights treaties have been incorporated into domestic law. According to Brewer-Carías (2006), all the possible hierarchies (supra-constitutionality, constitutionality, supra-legality and legality) can be found in Latin American legal systems. Moreover, several Constitutions contain clauses providing for the incorporation of rights inherent to the human person, recognizing their direct applicability and establishing criteria for constitutional interpretation in accordance with international treaties.

Concerning this last case, the author emphasizes that, even in the absence of constitutional clauses on the hierarchy of international treaties, these treaties can acquire constitutional status and be directly applied on account of the different rules of constitutional interpretation, such as those that stipulate that the rights declared in the Constitution must be interpreted in accordance with international instruments;

those that establish a general orientation for the action of agencies of the State in relation to the respect and guarantee of human rights; and those that establish that human rights be interpreted based on the principle of progressiveness, according to which no interpretations are permitted that result in a reduction of their effective enjoyment, exercise and protection.

On this point, the most well known example is Colombia, whose Constitution of 1991 contains a provision similar to the one included in the Spanish Constitution (article 93):

International treaties and agreements ratified by the Congress that recognize human rights and that prohibit their limitation in states of emergency have priority domestically. The rights and duties mentioned in this Charter will be interpreted in accordance with international treaties on human rights ratified by Colombia.

Based on this clause, the Colombian Constitutional Court constructed its own concept of the “constitutional block”, which has two meanings: in the first (*stricto sensu*), the block is formed by the principles and norms of constitutional value, i.e. the text of the Constitution and international human rights treaties that cannot be limited even during states of emergency; in the second (*lato sensu*), the block is formed by all those norms, of different hierarchies, that serve as a parameter to review the constitutionality of laws, i.e. other human rights treaties, organic laws and some statutory laws. Despite this distinction, the jurisprudence of the Constitutional Court considers that all international human rights treaties serve to interpret constitutional rights, and this includes the jurisprudence of international courts, meaning it is responsible for harmonizing the rights recognized in the Constitution and in international treaties (UPRIMNY, 2001, p. 19-20).

The common feature of the aforementioned cases is that the hierarchy of human rights treaties in the domestic legal system is not the only variable that conditions their use in interpreting the Constitution. As we have seen, even countries that do not recognize the constitutional status of these treaties attempt to interpret constitutional provisions in harmony with them. This means that the debate on the hierarchy of human rights treaties in Brazil should be complemented with some reflection on their hermeneutic function in our legal system.

4 International human rights treaties as a parameter of constitutional interpretation

In addition to benefiting from the principle of *pacta sunt servanda*,²³ which is a basic tenet of international law (article 26 of the Vienna Convention on the Law of Treaties), human rights treaties have characteristics that make it necessary to adjust the domestic law of States Parties to international norms. Unlike instruments that only create reciprocal obligations between States, these treaties are intended to protect people, establishing duties of governments to the people under their jurisdiction. It is no coincidence, therefore, that the content of human rights treaties frequently overlaps with the content of Constitutions, since guaranteeing

the rights of the human person is common to both systems (BERNHARDT, 1993, p. 25-26; DRZEMCZEWSKI, 1997, p. 20-23; RAMOS, 2004, p. 36-40).

Therefore, the obligations assumed by the State when ratifying a human rights treaty involve an examination of whether the acts of the public authorities, including legislative acts, respect the provisions of the treaty. Very often, the central issue to be judged by the international court concerns the compatibility of domestic law with the treaty, such as situations in which the application of a law inevitably results in the violation of international norms (BERNHARDT, 1993, p. 30-32), which requires the law to be reviewed or repealed in order to stop the State's non-compliance with its obligations. The awareness of this repercussion explains the tendency, noticeable in countries from both the European human rights system and the Inter-American system, to incorporate these treaties into domestic law, and it is consolidated in article 2 of the ACHR.²⁴ The incorporation of international norms also allows domestic courts to help guarantee compliance with obligations by States, when their authority is recognized to apply them directly (KELLER; STONE SWEET, 2008, p. 683-688).

The frequency with which problems of compatibility emerge between domestic law and international law also derives from the open nature of constitutional and international human rights provisions, which require a definition of the scope and the content of the guaranteed rights. Both the European Court and the Inter-American Court of Human Rights interpret their respective treaties as *living instruments* that must be applied in light of present-day conditions (KILLANDER, 2010). This dynamic interpretation implies that international courts should continuously clarify and develop the principles and rules established in the treaties, defining the obligations that correspond to the States. As the domestic application of the treaty evolves, the jurisprudence of the bodies originally charged with its protection becomes more relevant. This lays the groundwork for a dialogue between the national and international jurisdiction on the compatibility of domestic and international law (SLAUGHTER, 1994).

In this context, it is no longer possible to defend a strictly hierarchical vision of the relationship between domestic law and international human rights treaties (BOGDANDY, 2008; TORRES PÉREZ, 2009, cap. 3). The development of regional protection systems has created a dynamic in which national bodies cannot ignore the impact of decisions taken by international courts in the field of human rights, otherwise the State will be constantly called to account by the international community. Since the duty of the State to comply with its obligations does not depend on the hierarchy attributed to international treaties, it is necessary to adopt hermeneutic criteria that permit States to harmonize the provisions of these treaties with the provisions of domestic law, in particular those of a constitutional nature.²⁵

Based on the assumption that the rights recognized in treaties should be guaranteed by the State to the people under its jurisdiction (even though their provisions may not have been incorporated into domestic law or, if this has occurred, regardless of the status they have been assigned in the legal hierarchy), we can see that the problem revolves around knowing which of these rights are binding on the public authorities. Both *fundamental rights* recognized in a Constitution and

human rights recognized in an international treaty have the same purpose: to limit the coercive power of the State (LETSAS, 2007, p. 33-35). Therefore, the questions that ought to be asked by a judge applying a constitutional or international provision are the same: is the State authorized to use its coercive power in this specific situation? From this point of view, the answer formulated by the Supreme Court in the case of civil imprisonment of unfaithful trustees is exemplary: the use of coercion in this hypothesis is not authorized *in the light* of the ACHR.

This series of elements and an understanding of the experiences in other countries lead us to conclude that the difference between the theses of supra-legality and constitutionality in Brazilian law ought to be put into relative terms. As we have seen, supra-legality precludes human rights treaties from being used as a parameter of constitutional review, which for the Supreme Court continues to be exclusively the Constitution of 1988. Therefore, the field in which the difference between the theses of supra-legality and constitutionality can be highlighted is eminently procedural: whether through a concrete review or an abstract review, international human rights treaties may not be invoked as a cause of action, unless they have been incorporated into the legal system as a constitutional amendment, under the terms of article 5, paragraph 3.

However, the jurisprudence of the Supreme Court indicates that human rights treaties are used not only as parameters for interpreting infra-constitutional norms, but also for interpreting constitutional norms. The institutions of civil imprisonment for unfaithful trustees, the presumption of innocence, a trial of reasonable duration, an adversarial trial and a full defense, freedom of expression and freedom to practice a profession, in the aforementioned cases, were all interpreted so as to make them compatible with the ACHR. This resulted in the recognition of new fundamental rights in the Brazilian legal system. Thus, the Supreme Court does indeed use human rights treaties as *parameters of constitutional interpretation*,²⁶ since they provide hermeneutic criteria for defining the content of constitutional norms. When judging the legality of government acts on the basis of the Constitution, the Supreme Court analyzes the human rights recognized in international treaties to determine how the constitutional provisions should be interpreted.

The use of human rights treaties as parameters of constitutional interpretation also resolves any problems of compatibility between constitutional and international provisions: it permits the Supreme Court to harmonize these sets of norms based on the interpretation that offers the best protection of human rights. Consequently, it also preserves the integrity of the Brazilian legal system, since the State should always act consistently with the principles that justify its actions (DWORKIN, 1999). Therefore, the ratification of a human rights treaty by Brazil implies that new principles must be taken into account in constitutional interpretation. These principles require the recognition of other rights and the extension of already recognized rights, as provided for in article 5, paragraph 2 of the Constitution. This means that the Judiciary will sometimes have to review its jurisprudence in search of consistency with the set of principles that govern Brazilian law, rejecting those precedents that are incompatible with a more updated interpretation of fundamental rights.

5 Conclusion

The incorporation of human rights treaties into domestic law is a factor that helps States comply with their obligations in this field. In this article, we have attempted to explore how the adoption of the thesis of supra-legality can contribute to the improvement of human rights protection by the Brazilian State. Based on an analysis of the jurisprudence of the Supreme Court, we found that supra-legality enables human rights treaties to be used to interpret not only legal provisions, but also the Constitution itself. We then determined that the experience in other countries indicates that the hierarchy attributed to treaties is not decisive for their use in this way, taking into account the requirement to make the Constitution compatible with international treaties. Finally, we defended that human rights treaties should serve as a parameter of constitutional interpretation in Brazilian law, in order to permit the harmonization of constitutional and international provisions.

It is worth noting, furthermore, that the use of international treaties should not be restricted to the Supreme Court, but they should also serve as interpretive guidance for all judicial bodies. Moreover, the public authorities should improve their knowledge of international human rights law, particularly the Inter-American system (BERNARDES, 2011, p. 141-146), so that the commitments assumed by Brazil are respected. In the legislative process, this requires an analysis of the compatibility of bills with human rights treaties and, in the Executive Branch, that any administrative act contravening these treaties be annulled. From this perspective, supra-legality can offer many ways for improving the protection of human rights in Brazil.

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 _____. 2009c. Supremo Tribunal Federal. **Recurso em Habeas Corpus nº 83.810**.
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 _____. 2009e. Supremo Tribunal Federal. **Recurso Extraordinário nº 511.961**.
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 _____. 2010c. Supremo Tribunal Federal. **Habeas Corpus nº 102.368**.
 _____. 2010d. Supremo Tribunal Federal. **Recurso em Habeas Corpus nº 103.546**.

NOTES

1. Cf., for them all, Extraordinary Appeal No. 466,343 (J. 03/12/2008). All the judgments cited in this article were consulted on the website of the Supreme Court: <<http://stf.jus.br>>. Last accessed in: May 2013.

2. "Article 5, paragraph 2. The rights and guarantees expressed in this Constitution do not exclude others deriving from the regime and from the principles adopted by it, or from the international treaties in which the Federative Republic of Brazil is a party."

3. "Article 5, LXVII. There shall be no civil

imprisonment for indebtedness, except in the case of a person responsible for the voluntary and inexcusable default of an alimony obligation and in the case of an unfaithful trustee."

4. "Article 7.7. No one shall be detained for debt. This principle shall not limit the orders of a competent judicial authority issued for nonfulfillment of duties of support."

5. Binding Precedent No. 25: "Civil imprisonment of unfaithful trustees is unlawful, regardless of the type of the deposit".

6. At the end of the debates held throughout the trial, Justice Gilmar Mendes presented an "addendum to the vote" establishing, on behalf of the majority, the thesis of supra-legality.
7. The growing importance of court precedents in Brazilian law has been emphasized, albeit in very distinct ways, in the literature. Cf. Marinoni (2010) and Streck (2011).
8. TN: Subsequent laws repeal prior laws.
9. Cf., for them all, Habeas Corpus No. 72,131 (J. 23/11/1995).
10. Also contributing to this situation was the fact that only in 1998 did Brazil recognize the jurisdiction of the Inter-American Court of Human Rights, which to date has judged only five cases against the Brazilian State: Ximenes Lopes, in July 2006; Nogueira de Carvalho, in November 2006; Escher, in July 2009; Garibaldi, in September 2009; and Guerrilha do Araguaia, in November 2010.
11. Previously, the thesis of supra-legality appeared for the first time in the Supreme Court in a case heard in 2000. In the Appeal in Habeas Corpus No. 79,785 (J. 29/03/2000), the reporting justice Sepúlveda Pertence admitted that international human rights treaties, while positioned below the Constitution, should be endowed with "supra-legal force" to give direct application to their norms, even when contrasting with ordinary laws, "whenever, without infringing on the Constitution, they complement it, by specifying or broadening the rights and guarantees it contains." In spite of this, the court refused to make the right of appeal to a higher court an absolute constitutional guarantee, thereby limiting the applicability of article 8.2.h of the ACHR, according to which, "[e]very person accused of a criminal offense has the right to be presumed innocent so long as his guilt has not been proven according to law. During the proceedings, every person is entitled, with full equality, to the following minimum guarantees: (...) h) the right to appeal the judgment to a higher court".
12. "Article 5, paragraph 3. International human rights treaties and conventions which are approved in each House of the National Congress, in two rounds of voting, by three fifths of the votes of the respective members shall be equivalent to constitutional amendments."
13. "Article 5, paragraph 4. Brazil accepts the jurisdiction of an International Criminal Court to whose creation it has expressed its adhesion".
14. "Article 109, paragraph 5: In cases of serious human rights violations, and with a view to ensuring compliance with obligations deriving from international human rights treaties to which Brazil is a party, the Attorney-General of the Republic may request, before the Superior Court of Justice, and in the course of any of the stages of the inquiry or judicial action, that jurisdiction on the matter be taken to Federal Justice".
15. It is worth noting that the position defended by Justice Celso de Mello does not exclude the principle of constitutional supremacy, recognizing that there would be an internal hierarchy in the constitutional block that would preserve the rights enshrined in the Constitution from any restrictions imposed on them by international treaties.
16. This change in the interpretation of the Constitution is even more evident when contrasted with the fundamentals presented by Justice Moreira Alves in the judgment of Habeas Corpus No. 72,131: "Since, then, it is a mere ordinary legal provision, this paragraph 7 of article 7 of the Convention in question may not restrict the scope of the exceptions provided for in article 5, LVII of our current Constitution (and note that these exceptions take precedence over the fundamental right of the debtor to not be susceptible to civil imprisonment, which implies a real fundamental right of the creditors of alimony and of conventional or necessary deposit), even for the effect of revoking, through a constitutional interpretation of its silence in the sense of not admitting that the Brazilian Constitution expressly admits, the rules on the civil imprisonment of unfaithful trustees (...)" (BRASIL. SUPREMO TRIBUNAL FEDERAL, 1995b, p. 8.686).
17. Similarly, Habeas Corpus No. 96,059 (J. 10/02/2009), Habeas Corpus No. 99,914 (J. 23/03/2010) and Habeas Corpus No. 102,368 (J. 29/06/2010).
18. Similarly, Habeas Corpus No. 95,464 (J. 03/02/2009), Habeas Corpus No. 98,878 (J. 27/10/2009), Habeas Corpus No. 98,579 (J. 23/03/2010) and Appeal in Habeas Corpus No. 103,546 (J. 07/12/2010).
19. Habeas Corpus No. 88,359 (J. 14/11/2006).
20. Habeas Corpus No. 86,634 (J. 18/12/2006) and Habeas Corpus No. 93,503 (J. 02/06/2009).
21. Habeas Corpus No. 92,569 (J. 11/03/2008).
22. Appeal in Habeas Corpus No. 83,810 (J. 05/03/2009)
23. In Latin, "agreements must be kept". (Editor's note).
24. "Article 2. *Domestic Legal Effects*. Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."
25. Note that even the attribution of constitutional status to human rights treaties does not dispense with the need for hermeneutic principles to solve potential conflicts between original constitutional provisions and international provisions, as exemplified by recourse to criteria such as the "most favorable law".
26. The importance of this category to understand the relations between the Constitution and international treaties is emphasized by Gómez Fernández (2004, p. 359-361).

RESUMO

Em dezembro de 2008, ao julgar várias ações que envolviam a prisão civil do depositário infiel, o Supremo Tribunal Federal modificou seu entendimento sobre o nível hierárquico dos tratados internacionais de direitos humanos no direito brasileiro, passando a adotar a tese da suprallegalidade. Este artigo analisa os possíveis impactos que a mudança pode trazer para a interpretação constitucional desenvolvida no Brasil, examinando como o STF tem aplicado a tese da suprallegalidade e de que modo o nível hierárquico dos tratados de direitos humanos influencia, em outros países, seu uso na interpretação da Constituição. O trabalho conclui que a suprallegalidade permite construir argumentos que favoreçam a utilização dos tratados de direitos humanos como parâmetro de interpretação constitucional no direito brasileiro.

PALAVRAS-CHAVE

Tratados Internacionais de Direitos Humanos – Suprallegalidade – Supremo Tribunal Federal.

RESUMEN

En diciembre de 2008, al juzgar varias causas en torno a la prisión civil del depositario infiel, el Supremo Tribunal Federal de Brasil (STF) cambió su concepción sobre el nivel jerárquico de los tratados internacionales de derechos humanos en la legislación brasileña, pasando a adoptar la tesis de la suprallegalidad. Este artículo analiza las posibles repercusiones de ese cambio sobre la interpretación constitucional llevada a cabo en Brasil, examinando de qué manera el STF ha aplicado la teoría de suprallegalidad y de qué forma el nivel jerárquico de los tratados de derechos humanos influye, en otros países, sobre su uso en la interpretación de la Constitución. Este trabajo concluye que la suprallegalidad permite construir argumentos que favorezcan la utilización de los tratados de derechos humanos como parámetro de interpretación constitucional en el derecho brasileño.

PALABRAS CLAVE

Tratados internacionales de derechos humanos – Suprallegalidad – Supremo Tribunal Federal

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