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UNIVERSALISM OF HUMAN RIGHTS AND SUBSIDIARITY OF INTERNATIONAL JURISDICTION: THE SUBTLE RESISTANCE?

UNIVERSALISMO DOS DIREITOS HUMANOS E SUBSIDIARIDADE DA JURISDIÇÃO INTERNACIONAL: A SUTIL RESISTÊNCIA?

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ABSTRACT

Objective: This article aims to study the challenges to the implementation of the universalism of human rights, based on the reaction of States that are opposed to the control of the conventionality of the supranational matrix carried out by international bodies such as the European Court of Human Rights and the Inter-American Court of Human Rights. This reaction led to the reworking of the subsidiarity of the international jurisdiction of human rights, which gains a substantive facet. The main delineations of the theory of the national margin of appreciation and the rule of the prohibition to act as a fourth instance will be studied. As a conclusion, the risk faced by the universalism of human rights is exposed by the unbridled adoption of these two types of material subsidiarity of the international jurisdiction of human rights.

Methodology: The research adopts an inductive approach, using bibliographic and documental research techniques, with a methodological objective aimed at exploring the theme and proposing a new way of understanding and accomplishing the study theme.

Contributions: The article analyses a topic that has been little addressed in the study of the universalism of human rights in Brazil through the study of the reaction of States

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to the internationalist interpretation. This posture of the States negatively affects the universalism of human rights, also implying a reduction in the protection of vulnerable minorities.

Keywords: International law; Human rights; Control of conventionality; National margin of appreciation; Rule of the fourth instance.

RESUMO

Objetivo: *O presente artigo visa estudar os desafios à implementação do universalismo dos direitos humanos, a partir da reação dos Estados que se opõem ao controle de convencionalidade de matriz supranacional realizado por órgãos internacionais como a Corte Europeia de Direitos Humanos e a Corte Interamericana de Direitos Humanos. Tal reação levou à reelaboração da subsidiariedade da jurisdição internacional dos direitos humanos, que ganha uma faceta substantiva. Serão estudados os principais delineamentos da teoria da margem de apreciação nacional e da regra da proibição de agir como quarta instância. Como conclusão, é exposto o risco ao universalismo dos direitos humanos pela adoção sem freios dessas duas espécies de subsidiariedade material da jurisdição internacional dos direitos humanos.*

Metodologia: *A pesquisa adota abordagem indutiva, usando técnica de pesquisa bibliográfica e documental, com objetivo metodológico voltado à exploração da temática e à proposição de nova forma de entender e realizar o tema de estudo.*

Contribuições: *O artigo analisa um tema ainda pouco abordado no estudo do universalismo dos direitos humanos no Brasil por intermédio do estudo da reação dos Estados à interpretação internacionalista. Tal postura dos Estados afeta negativamente o universalismo dos direitos humanos, implicando ainda uma diminuição da proteção das minorias vulneráveis.*

Palavras-chave: *Direito Internacional; Direitos Humanos; Controle de convencionalidade; Margem de apreciação nacional; Regra da quarta instância.*

1 INTRODUCTION

The present article seeks to analyse the challenges of concretely implementing human rights universalism through an analysis of the theory of the national margin of appreciation and the rule of the prohibition to act as a fourth instance.

The underlying desire of States to make their national interpretation of human rights prevail over a possibly divergent international interpretation is common to both

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instances. This puts at risk the universalism generated by the expansion of international human rights law. By instituting prohibitions on the actions of international courts, both theories preserve national decisions, resulting in national interpretations of human rights, which can harm the vulnerable in national societies.

For this reason, this article investigates the universalism of human rights and the application, with limits, of the theory of the national margin of appreciation and the rule prohibiting action in the fourth instance, based on the precedents of the European Court of Human Rights (ECtHR) and the Inter-American Court of Human Rights (IACtHR).

To this end, the article is divided into five parts: in the first, the current design of international human rights law will be analysed, with a focus on universalism in concrete terms and the importance of international human rights processes in shaping the internationalist interpretation of the subject.

Then, in two parts, the different facets of the principle of subsidiarity will be addressed, showing its use in the construction of the theory of the national margin of appreciation and the rule on the prohibition to act as a fourth instance.

Finally, the concepts and limits of both the theory of the national margin of appreciation and the rule of prohibition to act as a fourth instance will be critically analysed.

The question to be answered here is: what is the impact on the universalism of human rights arising from the adoption of the principle of material subsidiarity by international human rights courts?

2 INTERNATIONAL HUMAN RIGHTS LAW AND THE INTERNATIONAL CONTROL OF CONVENTIONALITY

International human rights law consists of a set of international norms that stipulate essential human rights and benefit from institutionalised international guarantees. This branch of international law has unique characteristics: (i) it deals with

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the rights of one and all, regardless of nationality, religion, political opinion, among others; (ii) States assume duties on behalf of individuals, without the logic of reciprocity found on traditional treaties (objective nature of international human rights norms); (iii) individuals have access to international instances of supervision and control of States obligations, and a set of sophisticated international human rights processes is created (CARVALHO RAMOS, 2019, pp. 109-114).

This internationalization enshrined the universalism of human rights, both *ratione materiae* – for being the rights of all and everyone and *ratione loci*, not limited to the borders of any given State. Thus, a treaty such as the American Convention on Human Rights establishes the same wording of rights for different States, such as Brazil, Costa Rica or Nicaragua.

However, this universalism would be merely abstract if each State could freely interpret the rights provided for in the treaties. Thus, the adoption of the same wording of a certain right is not enough for universalism to be implemented in dozens of countries that have ratified the same treaty. There must also be a uniform interpretation of this text. In other words, it an international mechanism that investigates how States parties interpret the adopted text is indispensable.

The interpretation function performed by international human rights judicial and non-judicial processes consists in determining the correct scope and meaning of the protective human rights norm. In the current stage of the drafting of international norms, this function is of crucial importance to overcome the vagueness and imperfections existing in the normative text (DJIK, 1992, p. 28).

International mechanisms for the investigation of human rights violations are important not only for their function of reviewing and correcting State conduct that is harmful to protected rights, but especially for the preventive effect and the interpretative force that such international decisions generate in the consolidation of the content of human rights protection norms.

The actions of these international human rights bodies have produced an international control of conventionality. Conventionality control consists of an analysis of the compatibility of internal acts (whether active or passive) with international

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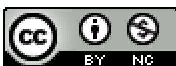
standards (treaties, international customs, general principles of law, unilateral acts, binding resolutions of international organisations). The international control of conventionality is, in general, attributed to international bodies composed of independent judges, created by international treaties, to prevent the States themselves from being, at the same time, inspected and inspectors, creating the undesirable figure of the *nemo judex in causa sua*. In the area of human rights, the relevant international courts (European, Inter-American and African Courts of Human Rights) and the competent United Nations committees, among others, exercise international control of conventionality (CARVALHO RAMOS, 2022, p. 630).

There is also compulsory international control of conventionality, which consists of the State adopting international decisions handed down in international human rights cases in which it has been a defendant. In this case, the State is obliged to comply with the internationalist interpretation given by the international body that issued the decision.

The IACtHR has decided that "when an international judgment that has the status of *res judicata* exists with respect to a State that has been a party to the case submitted to the jurisdiction of the Inter-American Court, all of its organs, including judges and organs connected with the administration of justice, are also subject to the treaty and to the judgment of this Court, which obliges them to ensure that the effects of the provisions of the Convention and, consequently, of the decisions of the Inter-American Court are not undermined by the application of rules contrary to their object and purpose or by judicial or administrative decisions" (INTER-AMERICAN COURT OF HUMAN RIGHTS, *Gelman v. Uruguay*, supervision of compliance with sentence, March 20, 2013, p. 68).

Therefore, international human rights law is composed of two inseparable parts: (i) the list of rights, on the one hand; and (ii) the international processes that interpret the content of these rights and monitor that States fulfil their obligations, on the other hand.

However, such international human rights processes are regarded as subsidiary to national jurisdictions. An individual can only sue a quasi-judicial or judicial



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body at the international level after having previously exhausted domestic remedies, according to the provisions of several treaties, such as the American Convention on Human Rights (art. 46.1.a). Thus, the complainants must appeal to the national jurisdiction and, if the State fails to protect their rights, they may then take action before the competent international human rights jurisdiction.

3 THE SUBSIDIARITY OF INTERNATIONAL JURISDICTIONS

There are two types of subsidiarity of international mechanisms for investigating human rights violations: proper (or procedural) subsidiarity and improper (or substantive) subsidiarity.

Proper (procedural) subsidiarity consists of recognising the primary duty of the State to prevent violations of protected rights, or at least to repair the damage caused to the victims. Only after State failure can international protection be invoked. Therefore, victims of human rights violations should, in general, exhaust the available domestic remedies for the realisation of the protected right and, after the failure of the domestic attempt, seek remedy at the international level.

In international law, the rule of exhaustion of domestic remedies was developed within the scope of diplomatic protection, and is used to require that the foreign victim exhausts local remedies before the State of origin exercises protection over its national. Diplomatic protection is an institute of international law in which a State who's national has suffered harm due to conduct attributable to another State considers this harm as its own and seeks redress from the State responsible for the harmful act (CARVALHO RAMOS, 2004, p. 44).

In international human rights law, the subsidiarity of international jurisdiction – the result of the requirement to exhaust domestic remedies – is constant (MAIA and GARDOUNIS, 2022). The most varied systems for investigating violations of human rights (at the universal or regional level) require that victims

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seek to exhaust the available domestic means or resources as a condition for the admissibility of the analysis of the victim's claim, without which the international claim will be extinguished without examination of the merits.

The existence of the rule of subsidiarity (proper or procedural) in the international jurisdiction of human rights has several consequences.

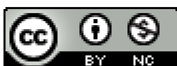
First of all, it establishes the initial responsibility of States for the protection of human rights, and does not overburden the international human rights system.

Second, the rule of exhaustion of domestic remedies helps convincing national leaders to accept international human rights jurisdiction. The subsidiary character of international jurisdiction and the preventive role of the rule (avoiding the international accountability of the State) have allowed States to adhere to human rights treaties, without the old appeal to national sovereignty being successful (CARVALHO RAMOS, 2004, p. 214).

Thirdly, the exhaustion of domestic remedies can also be interpreted to require States to provide domestic remedies to repair any damage caused to individuals. Thus, in addition to condemning the State for the violation of a certain protected right, the international body also condemns the State for not fulfilling its duty to provide adequate domestic remedies, which improves the internal protection of human rights. The fundamental aspect of this rule is, under international human rights law, positive, serving as a motivation for the State to reform its justice system, making it more effective in preventing or repressing human rights violations.

However, there is also a fourth unexpected consequence: the exhaustion of domestic remedies obviously sharpens the conflict between the national judiciary and international jurisdictions, since, after the exhaustion of remedies, there remains a national decision (often by the country's Supreme Court) that violated protected rights (by applying an inadequate law, by being slow, unfair, etc.).

Alongside this classic concept of subsidiarity (called proper or procedural subsidiarity) of international human rights jurisdictions, another concept is being



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developed, called improper or substantive subsidiarity, according to which international human rights bodies should refrain from deciding on a given human rights issue, allowing States a variety of options and alternatives, as we will see below in the study of the so-called theory of the national margin of appreciation and the fourth instance.

4 THE NEW SUBSIDIARITY OF INTERNATIONAL JURISDICTIONS: IMPROPER OR SUBSTANTIVE SUBSIDIARITY

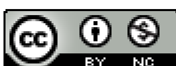
The construction of universalism through the internationalist interpretation of human rights is challenged by the existence of two theories concerning the limits on the actions of international human rights bodies, namely: (i) the theory of the margin of national appreciation; and (ii) the rule prohibiting action as a fourth instance.

Despite the differences between them, both serve to justify the abstention of the international judicial body in the analysis of a possible violation of human rights. Therefore, by preventing the internationalist interpretation, national interpretations regarding protected rights are allowed to survive, which can lead to a return to a world in which each State freely interprets the content of each human right, which would be similar to the situation that existed before the internationalisation of human rights.

5 THE NATIONAL MARGIN OF APPRECIATION

5.1 THE CONCEPT AND ITS DIFFERENTIATION FROM THE THEORY OF MITIGATED STATE FREEDOM

According to the theory of the national margin of appreciation, certain controversial issues related to State restrictions on protected rights should be discussed and settled by national communities, if there is still no consensus among



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the States on a certain international parameter of interpretation of the rights involved.

This is a theory that preaches the abstention of international control in certain cases of human rights in which there is no regional or international consensus on the resolution of the conflict between rights or even on the content of the protected right.

It is based, initially, on the subsidiarity of international jurisdiction in an improper sense, which goes beyond the mere exhaustion of domestic remedies (proper subsidiarity) and then affirms the preponderance of the local view on the delineation of a given right.

The full (or classic) national margin of appreciation, which prevents international scrutiny and allows State discretion, should not be confused with the so-called theory of mitigated (or controlled) freedom of the State, by which a given State has options for realising a given right or even for resolving the conflict of rights, under the scrutiny of the relevant international body.

The theory of the mitigated freedom of States originates from the recognition that there are different ways of implementing a human right, which can vary between States, and that international supervision should verify the respect, by the national choice, of internationally protected rights.

In this sense, in the *Castañeda Gutman* case, the IACtHR pointed out that the American Convention on Human Rights did not establish a single electoral system, as well as a single format for exercising the rights to vote and to be voted for, but international supervision was maintained with respect to the maintenance of the political rights as protected by the American Convention on Human Rights (INTER-AMERICAN COURT OF HUMAN RIGHTS, *Castañeda Gutman v. Mexico*, Merits, September 11, 2013).

Thus, by the theory of mitigated (or controlled) freedom, the international supervision of human rights continues to exercise its role, by verifying whether the local choice of the way to implement human rights respected – or not – the international parameters.

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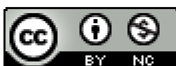
5.2 THE CLASSICAL MARGIN OF APPRECIATION

In the case of the full (or classic) national margin of appreciation, in principle, it would be up to the State itself to set the limits and restrictions on the enjoyment of human rights, inhibiting international control. It is based on the premise that decisions on human rights have a political component that goes beyond legal considerations, which leads the international body to refrain from acting on behalf of democratic national communities in situations where there is no consensus among the States (at the regional or global level) on the delineation of protected rights.

The national margin of appreciation has developed strongly in the European regional system of human rights protection. Interestingly, it was not in the original wording of the European Convention on Human Rights, being the result of the interpretation of the now defunct European Commission on Human Rights and then embraced by the ECtHR. Only in 2013, Protocol No. 15 introduced the expression "national margin of appreciation" in the preamble of the European Convention on Human Rights (see below).

One of the first cases of application of the margin of appreciation theory was the *Handyside* case (confiscation of copies and prohibition, in the United Kingdom, of the marketing of a book considered obscene published by Mr. Richard Handyside). In this case, the European Court used the margin of appreciation theory, considering that it was up to the British society, based on its moral values, to decide whether or not to adopt such restrictions on the right to freedom of expression, thus denying that the European Convention had been violated. The European Court recognised the defendant State's "margin of appreciation" regarding the content of Article 10 of the Convention (freedom of expression and its restrictions), because, for the judges, "by reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them" (EUROPEAN COURT OF HUMAN RIGHTS, *Handysde v. the United Kingdom*, judgment, December 12, 1976, p. 48).



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In the *Cossey case*, the right of transsexuals to demand, based on the right to privacy (Article 8 of the European Convention), that the United Kingdom allow them to change their identity (change their sex on their birth certificate), with the consequent right to marry (Article 12, right to find a family), was discussed. The Court, based on the difference between European legislations ("little common ground between the Contracting States"), preferred to leave it to each State, according to its margin of appreciation, to decide on the issue. In this case, which shows the controversial nature of the margin of appreciation theory, there were eight dissenting votes. For instance, Judge Martens considered that the right of transsexuals to change their civil identity was the result of respect for human dignity and a legitimate desire for self-realization (EUROPEAN COURT OF HUMAN RIGHTS, *Cossey v. The United Kingdom*, judgment, September 27, 1990, p. 40).

Later, in the *Goodwin* case, the ECtHR restricted the margin of appreciation of the States, in another case of violation of transsexual rights. In this case, the defendant Christine Goodwin, after undergoing sex reassignment surgery (male from birth to female), appealed to the European Commission of Human Rights, accusing the United Kingdom of violating her private life (Article 8 of the Convention). The facts of the case were serious: the victim claimed that she could not register for social security with her new sex, nor benefit from the lower retirement age for women or the less onerous insurance premiums for women, nor invoke the criminal protection against rape (which would require, according to local interpretation, the original female sex) and, finally, that she could not marry her male partner (Article 12 of the Convention, right to marry).

The Court then dismissed the "margin of national appreciation" claim and condemned, in a July 2002 judgment, the United Kingdom for violation of Article 8 (right to privacy) and also Article 12 (right to marry).

In its change of position, the ECtHR initially pointed out that its precedents (the *Cossey* case already cited, among others) were not binding and, moreover, it was always necessary to update the interpretation of the provisions of the Convention, which is a living instrument. New legislation in the Netherlands, Italy, and Turkey recognising rights for transgender persons were important factors in the Court's

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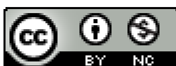
approach. Besides this, the Court pondered that in the 21st century (the decision dates from 2002) and with the advances in science, it was inconsistent to recognise, in medical terms, the possibility of surgery and psychological and hormonal treatment for sex change without recognising their legal effects. The Charter of Fundamental Rights of the European Union (2000) was also taken into consideration by the European Court, since its article 9[1] on marriage no longer mentions the traditional union of a man with a woman (EUROPEAN COURT OF HUMAN RIGHTS, *Christine Goodwin v. the United Kingdom*, judgment, July 11, 2002).

The *Goodwin* case established the use of the European regional consensus as a factor in controlling the valid invocation of the national margin of appreciation. In *A, B and C v. Ireland*, the Court summarised the factors that should be taken into consideration in order to determine the limit of a State's margin of appreciation in a given case: (i) weight of the right in question for the existence of the individual or his identity; (ii) consensus among the members States of the Council of Europe; (iii) existence of other means for the protection of the right; and (iv) ethically or morally sensitive issues. In this last factor, because of their deeper links with the "vital forces" in local societies, national authorities seem to be in a better position to give the exact content of a country's particular requirement (EUROPEAN COURT OF HUMAN RIGHTS, *A, B and C v. Ireland*, judgment, December 16, 2010, p. 232).

5.3 THE EUROPEAN REGIONAL CONSENSUS AND THE RISK OF A RETURN TO LOCALISM

The non-existence of a European regional consensus on the content of a given human right is a convincing factor for the use of the national margin of appreciation. The farther away from a consensus among the States, the more appropriate would be the absence of intervention by the international jurisdiction. The margin of appreciation, in these cases of absence of a "bottom-up" parameter, would protect the international

[1] Article 9: "The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights".



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body from accusations of undemocratic interventionism in internal social conflicts.

However, the use of the “margin of appreciation” can lead to a dangerous tendency towards relativism of human rights, accepting that a momentary majority of national communities can adopt a position offensive to protected rights, or that historical or religious practices can be used as justifications to prevent social change, especially in the sphere of the so-called public morality (FEINGOLD, 1978, pp. 21-43).

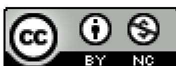
This dangerous acceptance of relativism in the protection of human rights is more dramatic because it comes from a specialised human rights court and not from an authoritarian State.

Basically, the theory of the margin of appreciation places enormous confidence on the European States, which would all be democratic defenders of human rights. However, a brief mention of some of the cases evoked above is enough to show that even democratic States may violate human rights, especially those of minorities.

In June 2013, Protocol No. 15 amending the European Convention on Human Rights was issued and made available for ratification by the States Parties.

The Protocol is concise, with nine articles, with the addition in the Preamble to the Convention of the mention of the principle of subsidiarity of international jurisdiction. According to this principle, States are primarily responsible for the protection of human rights and, enjoy a margin of national discretion. Thus, instead of abolishing the national margin of appreciation (which can jeopardises universalism), the European system reinforces it by expressly stating it in the Preamble of the European Convention on Human Rights.

With the mention of subsidiarity in Protocol No. 15, improper subsidiarity was consecrated, that is, international jurisdiction can only be resorted to in cases in which there is a violation, by a State, of a human right whose interpretation is already consensual. It is not up to the international body to innovate and replace the States.



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5.4 PROTOCOL NO. 15 AND THE FUTURE OF THE NATIONAL MARGIN OF APPRECIATION

The theory of the margin of appreciation in the European system is based on the deference that international jurisdiction should show to national decisions in cases in which there is no clear "European regional consensus".

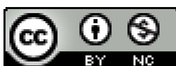
Proving this "European consensus" in jurisprudence requires vigorous research that will reveal agreement or at least the beginning of a change of position on a particular protected right. Unanimity is not required, as seen in the *Goodwin* case, but at least a tendency of acceptance of the interpretation to be adopted by the Court must be proven.

As Cançado Trindade rightly argues, "this doctrine could only have developed in a European system that believed itself to be exemplary, peculiar to a (pre-1989) Western Europe that was relatively homogeneous with respect to its perceptions of a common historical experience" (CANÇADO TRINDADE, 1999, pp. 124-125).

On the other hand, the appreciation of the merits of all cases by the international judge can be seen as "judicial discretion or decisionism" that would ignore national feelings and values.

Merrils rightly defined the dilemma by, stating that if an international human rights court overuses the "margin of appreciation", it will be considered conservative and unfit to fulfil its role as a guardian of human rights. If the court behaves in a radical way and takes into consideration all local laws and court decisions, it can be seen as "arbitrary" (MERRILS, 1994, p. 174). Thus, according to its supporters, the classical "margin of appreciation" theory allows international human rights courts to exercise their function of promoting human rights in a subsidiary and moderate way, preventing the arbitrariness of the international judge.

In an intermediate position, Benvenisti maintains that the problem lies not in the theory itself, but in its use by the ECtHR, which is done in an unsystematic and uncritical manner. According to him, the classical margin of appreciation theory cannot be applied in conflicts between majorities and minorities, which can be unfairly decided by majorities



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in democratic systems. It can, however, be used in cases where the entire population is affected, such as in cases involving property rights, civil liability, etc. (BENVENISTI, 1999, p. 843).

The subsidiarity of international jurisdiction in relation to national jurisdiction only means that the State itself, through its internal resources, must ensure respect for human rights (proper subsidiarity). Then, in case of failure of such internal means, the victim may explore international mechanisms. Subsidiarity does not imply reducing or restricting the competence of international bodies in assessing possible human rights violations.

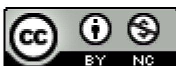
Thus, subsidiarity in international human rights law differs greatly from subsidiarity in an economic integration organisation, such as the European Union, in which supranational bodies have rigid competencies and must abide by the community framework.

International human rights treaties were designed precisely to provide a collective guarantee to all individuals, who have exhausted domestic remedies or means to prevent or repair human rights violations. After the exhaustion of domestic remedies (or in presence of an exemption from exhaustion) the international jurisdiction must be triggered and then, determine the respect for the international human rights treaties, and it cannot avoid this task by alleging the controversial character of some issues.

Otherwise, we would jeopardise the international human rights jurisdiction which was created precisely to allow the international appreciation of alleged human rights violations, even when the offending internal acts have clear majority support.

There is a passage from Judge Martens' dissenting vote in the *Cossey* case of the European Court of Human Rights, analysed above, that effectively sums up the critique of the margin of appreciation theory: "if a collectivity oppresses an individual because it does not want to recognise societal changes, the Court should take great care not to yield too readily to arguments based on a country's cultural and historical particularities" (EUROPEAN COURT OF HUMAN RIGHTS, *Cossey v. the United Kingdom*, judgment, September 27, 1990, dissenting vote, p. 5.6.3).

Clearly, the decision of an international human rights court can be questioned



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or even altered after a change in the composition of its judges. Moreover, the criteria for choosing international judges can be rethought to endow their decisions with greater legitimacy, through the decisive participation of parliaments (representatives of national communities). Additionally, sincerity and total transparency should not be required as grounds for judicial decisions and in the exercise of the judgment of proportionality and weighting of values.

The important thing is to pursue the acceptance of international human rights supervision, perfecting its mechanism so as to guarantee a minimum standard of human rights protection for all, majorities or minorities, in every human community.

6 THE PROHIBITION TO ACT AS A FOURTH INSTANCE

6.1 CONCEPT

Within the inter-American human rights system, improper subsidiarity is revealed by the rule of the prohibition of acting as a fourth instance, by which the Inter-American Commission and Court of Human Rights cannot substitute the national decision, evaluating evidence and interpretations of fact or law, as if they were courts of appeal capable of correcting domestic errors and redressing injustices in national decisions. This is why the expression “fourth instance” was consecrated, which would exist after the failure of the victim in the three traditional instances of a State (first degree, second degree and Court of Cassation or even Constitutional Court).

This prohibition against acting as a “fourth instance” was created by the Inter-American Commission on Human Rights in the 1980s, precisely during the period of democratisation of the Organisation of American States member States, when there was an expectation of a strong flow of petitions to the Commission. Among the pioneer cases, the *Wright v. Jamaica* case stands out, in which the Commission pointed out that it was not its role to review the decisions of national courts.

In later cases, the Commission refined its position, pointing out that the basic

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premise of the rule was that it would not be possible to review national sentences, whose Courts had (i) acted within their sphere of competence and (ii) applied the due judicial guarantees, (iii) unless they had committed a violation of the American Convention of Human Rights. Thus, the prohibition to act as a fourth instance can be overcome, of course, if the national decision has actually violated human rights.

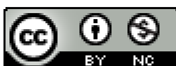
The rule of prohibition to act as a "fourth instance" is occasionally defended by defendant States in cases before the IACtHR, especially in cases where national court judgments are found to be offensive to human rights. In general, the State claims that the Court does not have jurisdiction in the case, since the national judicial sentence could not be "reviewed" by an international court, since this international body would not constitute a "court of review" of the justice or injustice of national decisions.

6.2 THE PROHIBITION OF ACTING AS A FOURTH INSTANCE AND IMPROPER SUBSIDIARITY

There are two interrelated grounds of the rule of prohibition of acting as a fourth instance: (i) lack of hierarchical superiority of the international court to point out the "unfairness" of a decision of a national court, even in cases involving human rights; and (ii) narrow view of the role of the international human rights jurisdiction.

For States that argue in favour of a prohibition of acting as a "fourth instance", international courts could not review the fairness or unfairness of a domestic court decision, because there is no provision for hierarchical review in international human rights treaties between the international court and the domestic court.

The "hierarchical argument" is based on the restricted view of the role of an international jurisdiction, which could not review cases already submitted to the local judiciary by reviewing the national decision. In essence, this is a derivation of improper subsidiarity, since the international body could not pronounce itself on the justice or injustice of the merits of the national judicial decision, even if such decision was in breach of human rights. For example, if a domestic court sentences a certain individual to a disproportionate criminal penalty that violates the due process of criminal law, the



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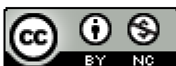
international jurisdiction would not be able to pronounce itself. Conversely, if the domestic court decides in favour of the extinguishment of punishment of an individual accused of having committed serious human rights violations (for example, by enforcing an amnesty law), the international court should rely on the national appreciation of the actual case, showing the subsidiary facet of international human rights jurisdiction.

To mention a case involving Brazil, in the *Gomes Lund* case, the Brazilian State claimed, a few months before the judgment was rendered, that the Inter-American Court lacked jurisdiction because of the existence of a national judicial decision from the Supreme Court regarding the Brazilian amnesty law. This case involves the so-called "Araguaia guerrilla war", in which dozens of people involved in the armed struggle against the Brazilian military dictatorship of the time disappeared, and there was no punishment for those responsible for the facts as per the Amnesty Law, passed in 1979 in the middle of the military regime. In 2010, the Federal Supreme Court (FSC), in the Argument of Noncompliance with Fundamental Precept No. 153, decided that the Amnesty Law was compatible with the Brazilian Constitution and that the punishment of the perpetrators of serious human rights violations during the dictatorship was extinct.

After the FSC's decision, Brazil defended before the Inter-American Court the extinction of the process on the same issue (impact of the Amnesty Law on the right to truth and the right to justice of the victims' relatives), since the existence of a decision by the highest Brazilian court would lead the Inter-American Court to a prohibited role, of being a judicial "fourth instance", reforming the local judgment. For Brazil, if the international trial were to proceed, the IACtHR would become an instance of review of the judicial decisions of the FSC, as if it were a "fourth instance" and, worse, hierarchically superior to the highest court in the State.

We can thus see here the desire of the State to enforce its national interpretation of the American Convention's rights, in the hypothesis of the existence of a national judicial decision on the case.

For this reason, the rule prohibiting action as a fourth instance is inserted into the theme of improper subsidiarity of international jurisdiction, in a different way from the theory of the national margin of appreciation, as seen above. In the national margin



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of appreciation theory, the nationalist interpretation prevails in cases in which there is no "regional consensus" on international standards, which would prevent the adoption of an internationalist (or universalist) interpretation. In the rule prohibiting it from acting as a fourth instance, on the other hand, the national interpretation prevails in national judicial cases, since the international court would not be a revisional instance hierarchically superior to local courts.

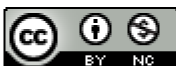
We will see below how the IACtHR positions itself on this desire of States to enforce a definitiveness of national decisions, even if they are offensive to human rights.

6.3 OVERCOMING THE RULE OF THE PROHIBITION OF ACTING AS A FOURTH INSTANCE

Traditionally, for international law, the judicial act is a fact to be analysed like any other (VERDROSS, 1957, p. 281). The international responsibility of the State for human rights violations caused by a judicial act can occur in two hypotheses: (i) when the judicial decision is late or non-existent (in the case of the absence of a judicial remedy) or (ii) when the judicial decision is considered, in its merit, to violate a protected right (CANÇADO TRINDADE, 1996, p. 216).

In the event of a delayed decision, it is argued that the delay prevents the judicial provision from being useful and effective. The doctrine established the expression denial of justice (or *déni de justice*) that encompasses both the inexistence or deficiency of the judicial remedy, which occurs, for example, in the inexistence of courts or the delay in rendering the judicial decision (DE VISSHER, 1935, p. 388). In the case of the review of final judicial decisions, it is not the revision of the final judgment that is sought, but rather the condemnation of the State for violation of protected human rights.

As for the case of a judicial decision that is unfair or contrary to human rights, it is common to claim respect for the *res judicata* as an excuse to hold the State accountable for human rights violations. This excuse is based on the definitive character that a final judicial decision acquires, which, by definition, cannot be changed



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by a new examination of the case.

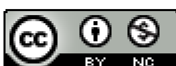
However, it is necessary to clearly point out that, for international law, there is a finding of international responsibility of the State for violation of human rights by any fact attributable to the State, whether judicial or not, and the State must implement the agreed upon reparation. Thus, the international body that finds the international responsibility of the State does not have the character of a court of appeal or cassation, against which the *res judicata* exception may be raised (INTER-AMERICAN COURT OF HUMAN RIGHTS. Case of the *"Street Children" – Villagrán-Morales et al. v. Guatemala*, Preliminary Exception. Judgment of September 11, 1997, p. 18).

Even when the body charged with assessing the international responsibility of the State is called a "court" or a "tribunal", the legal nature of the body under international law cannot escape the observant eye. These international courts are created by international treaties (such as the IACtHR, the ECtHR and the African Court on Human and Peoples' Rights), or they can be organs of international organizations (such as the International Court of Justice, an organ of the UN) and even international organisations *tout court*, as is the case of the International Criminal Court, created by the Rome Statute, which has legal personality under international law.

Under international law, international courts only deal with subjects of international law, which results in the absence of hierarchy between the local court and the international body. Therefore, when they analyse the international responsibility of the State, they are not subject to the limitations of a national court (which must respect the domestic *res judicata*), but only to the limitations imposed by international law itself.

International human rights protection bodies only analyse the international responsibility of the State, without determining which national authority should be responsible for the reparation, nor the instruments of reparation.

The international decision constitutes an obligation of result, leaving the State free to choose the internal means of enforcing the content of the international judicial decision. It is up to each State to choose the means to implement the international decision. If it does not implement it, it breaches the international obligation to comply, in good faith, with international decisions on the international responsibility of States



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(RUIZ MIGUEL, 1997, p. 28).

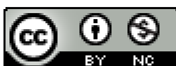
When a State is condemned to repair the violation of a protected right, it is irrelevant whether the agent that caused the conduct was a specific body or even authority and it is up to domestic law itself to seek legal solutions for the best fulfilment of the content of the international deliberation. Therefore, there is no substitution of the offending State in the internal execution of international decisions.

In the hypothesis of the IACtHR hearing the case, reparations can be demanded that overly affect the national jurisdiction (such as the release of a prisoner, the elimination of the "bad record", etc.). However, even when the Inter-American Court demands that a prisoner – whose conviction has become final – be released, it is not up to the Court to rescind the domestic judgment or to review it. It is up to the national State to choose the means of complying with the international judgment, which may, of course, involve repealing the domestic judgment or another method of choice.

In another case the IACtHR has held that for the "fourth instance" exception to be admissible it is necessary for the petitioner to request the Court to review the judgment of a domestic court based on an allegedly incorrect assessment of the evidence, facts, or domestic law, without at the same time alleging that such judgment violated international treaties over which the Court has jurisdiction (INTER-AMERICAN COURT OF HUMAN RIGHTS. Case *Amrhein et al. v. Costa Rica*, Merits. Judgment of April 25, 2018, p. 84). When a treaty violation is alleged, the Court then has jurisdiction over the alleged facts (even if already heard in the national judiciary) and can condemn the State.

It is in this sense that an international body does not have the power to revise a domestic judicial sentence, derogate from a law, or even revoke an administrative act. It is the State itself that, using its own legislation, will make the complete reparation and will comply, through its own mechanisms, with the international decision. In this way, the international decision can be brought into line with the internal legislation, at the State's own discretion.

Therefore the objection made by some States that a given international court (the Inter-American Court, for example), by considering that a national judicial decision



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was offensive to a given right would end up becoming a "fourth instance"- that is, a court of review of domestic decisions - is not applicable.

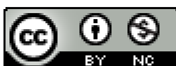
6.4 THE INTER-AMERICAN COURT OF HUMAN RIGHTS AND THE *FUJIMORI* CASE OF 2022

The overcoming of the rule of acting as a fourth instance is carried out by the Inter-American Court. The latter makes a subtle distinction between the action of a court of review (i.e., the essence of "acting as a fourth instance") and its action, which consists in condemning the State for having adopted a certain conduct, that could subsequently impose the modification of a domestic judicial decision.

The *Villagrán Morales et al.* case is an example of such a distinction. The Inter-American Commission on Human Rights sued Guatemala for a wrongful judicial decision. For the Commission, the acquittal of those accused of the murders of five Guatemalan "street children" demonstrated a serious violation of the duty to investigate and punish, which is included in the generic duty to guarantee human rights encompassed in the American Convention on Human Rights. While for Guatemala the domestic judicial act was immune from international review in respect of the national *res judicata*, the IACtHR did not accept the defendant State's claim. This confirms the principle that every judicial act can be subject to international appreciation within the scope of an action for international responsibility of the State (INTER-AMERICAN COURT OF HUMAN RIGHTS. Case of the *"Street Children" – Villagrán-Morales et al.* v. *Guatemala*. Merits. Judgment of November 19, 1999, para. 222).

In *Gomes Lund v. Brazil*, the Court again established that it judges States, even if the human rights violation was carried out by an act of the highest domestic court (INTER-AMERICAN COURT OF HUMAN RIGHTS. Case of the *Gomes Lund et al. – "Guerrilha do Araguaia" v. Brazil.* Merits. Judgment of November 24, 2010, para. 49).

In 2022, there was another case involving former Peruvian President Alberto Fujimori and the Constitutional Court of Peru, in which the action of the Court as a "fourth instance" was discussed (CASTILLO CÓRDOVA, 2022). This was a March 17,



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2022, decision by the Constitutional Court of Peru, which restored the effects of a humanitarian pardon granted by the Executive Branch in 2017 to the former President of Peru, Alberto Fujimori and ordered his release, even after his conviction for serious crimes against human rights, thus extinguishing his criminal sentence.[2]

With such a decision, the Peruvian Constitutional Court prevented full compliance with the Inter-American Court's sentences in the *Barrios Altos* and *La Cantuta* cases, both against Peru (CARVALHO RAMOS, 2022, p. 498 and p. 502). In the *Barrios Alto* decision, the Peruvian State was ordered to investigate the facts to determine the persons responsible for the human rights violations referred to in the judgment. In the *La Cantuta* decision, Peru was condemned to carry out and conclude, within a reasonable period of time, the investigations and criminal proceedings opened on the serious facts of human rights violations proven in the trial. With the release and extinguishment of punishment of the former president, who is considered to be involved in these ascertained facts, Peru is not complying with such determinations of the IACtHR.

In reaction, the IACtHR adopted a Resolution by which it ordered the Peruvian State to refrain from implementing the sentence issued by the Constitutional Court of Peru on March 17, 2022, that restored the effects of the criminal pardon on humanitarian grounds granted to Alberto Fujimori Fujimori on December 24, 2017, "for failing to comply with the conditions established in the Resolution on the supervision of compliance with the sentences of May 30, 2018".[3]

Clearly, the IACtHR did not derogate nor declared null and void the Constitutional Court's decision. The international judgment did not, then, revise the

[2] See https://cdn.gacetajuridica.com.pe/laley/RESOLUCI%C3%93N%20SUPREMA%20N%C2%BA281-2017-JUS_LALEY.pdf. Accessed on: 6 August 2022.

[3] According to the original Spanish version: "El Estado del Perú debe abstenerse de implementar la sentencia dictada por el Tribunal Constitucional del Perú el 17 de marzo de 2022, que restituye los efectos al indulto 'por razones humanitarias' concedido a Alberto Fujimori Fujimori el 24 de diciembre de 2017, debido a que no cumplió con las condiciones determinadas en la Resolución de supervisión de cumplimiento de sentencias de 30 de mayo de 2018, en los términos de los Considerandos 12 a 20 y 37 a 42 de la presente Resolución". Available at: https://www.corteidh.or.cr/docs/medidas/barrioscantuta_02.pdf. Accessed on: 8 August 2022.

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national decision but, on the contrary, addressed the Peruvian State by ordering a duty to abstain. It is up to the Peruvian State to choose the means by which this duty of abstention and non-implementation of the Constitutional Court's decision is to be realised. Consequently, once again, the International Court did not act as an instance of review of judicial decisions, and a possible role as a "fourth instance" was not detected.

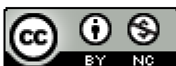
7 CONCLUSIONS: THE SUBTLE RESISTANCE

The internationalisation of human rights advanced with impressive speed after World War II, based on the universalism of human rights. Of course, there is still some resistance, as can be seen in the lack of ratification of human rights treaties by several States.

Besides this obvious resistance, there is also some sort of subtle resistance from those States that have already ratified these treaties and recognised the jurisdiction of international human rights courts. This subtle resistance is seen in the defence of the theory of the national margin of appreciation and the rule prohibiting acting as a "fourth instance".

The risk of international human rights courts accepting such theses is twofold: on the one hand, they do not fulfil their fundamental role of combating the deviations and failures of States, omitting themselves from the evaluation of domestic situations that have an impact on the enforcement of human rights standards; on the other hand, there is a risk of erosion of their own image and the function of international courts in the eyes of those vulnerable people who will not receive a proper response at the international level.

Thus, despite this subtle resistance of States, it is up to international courts to persist in their mission of protecting the vulnerable, consecrating universalism *in concreto* through the adoption of the internationalist interpretation of human rights, even if, to do so, they have to analyse controversial issues without regional consensus or even issues already submitted to the national judiciary.



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