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Compensatory constitutionalism prepared by the IDH court as discourse in matter of human rights: consequences for national legal systems

Abstract

Article on compensatory constitutionalism as a human rights discourse. Through a bibliographical review, the objectives were to examine whether compensatory constitutionalism is the appropriate instrument for strengthening human rights; analyze the features of human rights, recognizing the role of the IHR Court precedents in their construction; finally, verify the consequences of compensatory constitutionalism in the States, paying attention to the democratic deficit and the strengthening of social movements. As a hypothesis, compensatory constitutionalism is elaborated as a discourse on human rights, by the Inter-American Court, in response to the lack of human rights protection by States. As a result, compensatory constitutionalism proves to be important in the relationship between the Inter-American Court and the States. State resistance is the main obstacle to the implementation of compensatory constitutionalism, making it necessary to reflect and discuss the possibility of greater openness by States to the implementation of human rights constructed by the Inter-American Court, to strengthen social movements.

Keywords: compensatory constitutionalism, IDH court, human rights discourse, implementation by states, strengthening social movements

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André Pires Gontijo
Professor at CEUB and Professor at Euro-American University Center (Centro Universitário Euro-Americano - UNIEURO), Brazil

Correspondence: André Pires Gontijo, Professor at CEUB and Professor at Euro-American University Center (Centro Universitário Euro-Americano - UNIEURO), PhD in Law at Brasília University Center (Centro Universitário de Brasília - CEUB), Law and International Relationship (FAJS), Graduated and Master of Law and International Law Relationship at CEUB, Brazil, Tel +5561984832726,
Email andre.gontijo@ceub.edu.br, andre.gontijo@gmail.com

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Introduction

Compensatory constitutionalism presents itself as one of the main is instruments of interpretation developed by the Inter-American Court of Human Rights (herein after IDH Court), responsible for the implementation of human rights within the Latin American States. This is the constitutional compensation carried out by the Inter-American Court due to the deficit in the protection of human rights presented by these national legal systems. This compensation has legal repercussions at different levels. At the international level, another process of expansion of international law is revealed. At the national level, it presents itself as another possible element of protection of the human person, to be accepted by the legal system of the States. It takes care of a differentiated process, which presents itself in the form of discourse for the approach to human rights. It reveals important effects on the contemporary legal system, especially with the re-discussion of traditional concepts related to international law. At the basis of this process is the dilemma of the relationship between international law and national law. Arising from this dilemma, as a problem to be studied by research, the following question is presented: the discourse of compensatory constitutionalism – developed by the Inter-American Court – contributes to the expansion of the legal content of human rights within the scope of Latin American States, especially in the which concerns to the protection of democracy and social movements?

The hypothesis of this research is that compensatory constitutionalism is elaborated as a discourse in matters of human rights, by the Inter-American Court, because a large part of the States in Latin America are not capable of protecting human rights at the national level. Compensatory constitutionalism presents itself as a discourse to defend the application of human rights, through the judgments of the Inter-American Court. Thus, the institute aims to compensate for the lack of concreteness in the Democratic Rule of Law, with the non-compliance with fundamental rights and democratic standards at the national level. Like this,ensure thatthat the international dimension of compensatory constitutionalism – as a discourse on human rights – facilitates the interaction of the Inter-American Court with the States of Latin America, inspecial on themes that strengthen the quality of democracy, as well as the legitimization and expansion of social movements.

From this perspective, the research argues that the Compensatory constitutionalism occurs from the interaction of the judgments of the Inter-American Court with the States of Latin America. The importance of this interaction is verified due to the diversity of normative contexts presented by these States. In certain constitutions, there is text providing for the protection of the content of human rights, but there is no application by state actors. In a second scenario, the constitution does not provide for the protection of human rights in its normative text. From an advanced perspective, certain constitutions establish provisions contrary to the text of the American Convention on Human Rights (American Convention). In all scenarios, the Inter-American Court seeks interaction through the discourse of compensatory constitutionalism,forthat the State implements the protection of human rights. To defend and corroborate this hypothesis, the research uses dogmatic-instrumental methodology, using doctrine, legislative texts and treaties, as well as precedents from the Inter-American Court of Human Rights. As objectives, we seek to examine whether compensatory constitutionalism can be considered the appropriate interpretative instrument for strengthening human rights; Next, we intend to analyze the features of human rights and test the hypothesis, recognizing the role of the Inter-American Court's precedents in the construction of human rights, through compensatory constitutionalism; The next step is to verify the consequences of compensatory constitutionalism in national legal systems, especially with the dilemma of the democratic deficit and the strengthening of social movements.

The theoretical justification of the research is to compare different theoretical references, with different lines of thought, in the construction of a concept of compensatory constitutionalism, considered valuable and used by all actors in matters of human rights. For this reason, authors from different lines appear as theoretical references[1–4] who seek, in a dialectical perspective, to reach the importance of compensatory constitutionalism in the creation of human rights.[5,6]

Compensatory constitutionalism as a discourse on human rights

Different concepts and institutes relevant to international law are insufficient to serve as interpretative parameters of the legal order. Notions of autonomy and sovereignty, cogency and voluntarism, limits of legal expansion and State monopoly to take care of the implementation of human rights are some of the countless concepts in this perspective. Compensatory constitutionalism seeks to revisit traditional concepts of international law. State institutions mix with the logic of compensatory constitutionalism proposed by the Inter-American Court, in a diverse number of sources and interpreters of this legal phenomenon.

Compensatory constitutionalism as a discourse in matters of human rights presents itself as a new concept not yet accepted by the majority of States. There is no consensus in legal theory to accept it as satisfactory in terms of coherence or legitimacy to identify it as a new model of legal discourse. There are doubts – from this perspective – whether this proposed discourse model is sufficient to explain the phenomena that occur in the interaction between the Inter-American Court and the States. This speech is an attempt to describe a multilevel system with different normative sources in progress, with the objective of protecting human rights in Latin America and defending the construction of constitutional law beyond the State in the Inter-American System for the Protection of Human Rights (hereinafter Inter-American System). The collective demands of this proposal include the strengthening of the Democratic Rule of Law, democracy, responsibility and transparency in the exercise of public power in the region. Based on compensatory constitutionalism, the Inter-American Court begins to have its own dynamics, aimed at meeting demands in matters of human rights arising from States. This speech prepared by the Inter-American Court conflicts with the traditional logic of the legal system itself. In some cases, compensatory constitutionalism proves to be incoherent with the responses offered by States, which have opted for different solutions in matters of human rights. In this context, the situations of each State transform at their own speed, unlike other national legal systems.

Certain core legal categories need to be definedfor this search: speech, state,constitutionalism, and constitution. The term discourse belongs to the field of linguistics or as it is called today language sciences. Discourse can be conceptualized as a succession of sentences that constitute a unitlinguistics. It is the use of articulated sound signs to communicate with others about thoughts and opinions about things. It comes close to the idea of enunciation, which consists of the use – in a restricted field or positioning – of the language assumed by the person who speaks, in the condition of intersubjectivity that only the communicational relationshiplinguisticsmakes it possible. It involves the inclusion of a text in its context, that is, the examination of the conditions of production of that text and its structuring into a statement.[7] Discourse is oriented not only because it is conceived according to the purpose of the speaker, but above all because it develops over time. Discourse is constructed according to a purpose, which may vary throughout its course. It is interactive and must be contextualized, governed by standards in a given field. It does not acquire meaning unless it is inserted in the universe of other discourses, through which it must advance and open its own path.[7]

These features of speech make up the conceptual structure of compensatory constitutionalism, an instrument created by the Inter-American Court for the interpretation of human rights. The meaning of speech goes beyond the exposition of ideas, as an idea is not limited to a single formal representation of speech. It can be presented in different ways, without significant loss of meaning, so that an idea is never a prisoner of a certain discourse. On the contrary, when interpreting a given speech, one can produce a speech about the speech, and not just an examination of the object to which the speech refers.The discourse of compensatory constitutionalism can be a factor of transformation or, eventually, of semantic reduction of concepts related to human rights. In this research, the term compensatory constitutionalism as a discourse on human rights will appear as the instrument used by the Inter-American Court to define the interpretation of a certain provision contained in the American Convention. It consists of examining the conditions under which texts are produced by the Inter-American Court, with the aim of analyzing the structuring of these texts in a normative statement formulated by its judgments.[6] There are different definitions proposed for the idea of State. The currently recognized definition is that of an entity endowed with power as a unit of political action. This definition applies to certain types of limitations on its institutions (related to the performance of the Legislative, Executive and Judiciary powers). For this research, the State will not be considered only as the entity endowed with power as a unit of political action. It will also be considered through its entities, whether linked to the executive, legislative or judicial sphere, bearing in mind that compensatory constitutionalism can reach different levels of State institutions.[8]

Constitutionalism implies the submission of the State to the normative regulation of Law. It presents itself as a constitutional movement, as the political-social dynamic responsible for legitimizing the existence of the constitution in a given legal system. This concept makes it possible to associate the processes developed by the Inter-American Court with the constitutional dynamics of the States. This constitutional dynamic – sometimes of reception, sometimes of recalcitrance – of States in relation to the approach to human rights by the Inter-American Court requires these States to adopt a certain type of constitution.[9,10] As a material order of values, the constitution transforms the reading of the real factors of power into its normative force. The material content of the real factors of power acquires cogency with the reading of the normative force of the constitution,[11] being responsible for modifying reality, making it a constitutional reality. This model of constitution reveals itself as an open normative text, which is updated by social desires, through the desire for constitution arising from constitutional reality.[12]

The constitution presents itself as a legal instrument endowed with different meanings. There are different concepts of constitution adopted by different States. However, the most appropriate concept of constitution is the one that involves its material meaning, which contains a set of normative elements (rules, principles and values) governing the social relations and political life of a community.[13] With this concept, the constitution assigns parameters and procedures that guide, impose limits and base the exercise of power, determining the creation and application of Law, as well as protecting essential values of a community, particularly fundamental rights, democracy and social movements.social entities.

Although the idea of constitution is commonly linked to the composition of the State, the current concept of constitution requires thinking beyond the state perspective. This is a conception that involves the complexity and interactivity of constitutional relations at the internal level and at the international level. Although the national sphere retains its importance, Law has become "post-national."[14] This expression denotes a period of transition, in which numerous legal processes are developed independently of the central bodies of States, responsible for constructing international law. This does not mean that the State ceases to be the center of international law, but rather that the perspective of constitutional thinking can be developed by other international actors, such as the Inter-American Court. Due to changes arising from the international scenario, the constitution was translated into the language of internationalists. After certain events, such as the Second World War, States began to worry about the content of international law. The constitution is the main legal norm of States, whether in relation to international law or domestic law. Currently, States are concerned with the structure of international law and express this concern in the text of their constitutions. With this, constitutions become support points for the construction of international law.

In this context, the international plan begins to acquire constitutional properties through constitutionalization in a process of feedback. Constitutionalization presents itself as a necessary and complementary connection between international law and constitutional law. It is situated as a common place, in the sense of a process of emergence, creation and identification of constitutional elements in the international legal order. This occurs because the term "constitution" and the characteristics of this institute were never reserved for State constitutions. The conceptual link between constitution and State has undergone a transformation, which allows the meaning of the term "constitution" to be expanded to different situations, allowing the opening of constitutions to the international community. From this perspective, the possibility of applying the constitutional narrative to situations different from those found in the States – in a multilevel perspective – opens the space for the development of constitutionalism beyond the State. It takes care of an evolutionary stage of the functional understanding of the constitution – currently presented – in contrast with the formal and traditional meaning of the constitutional text,[15] as a unique document cataloging fundamental rights by the State and regulating the political process and the division of powers in front ofconsideration of democracy and social movements.

The methodology adopted by compensatory constitutionalism explores the interaction between the different normative spaces of legal production, through the configuration of the processes of internationalization of Law. Through them, normative interpenetration is visualized in the different decision-making spaces of international law. In this context, certain environments use the experience demonstrated in other spheres of discussion. The limits established between national legal systems and the international level become more tenuous, due to the different processes of construction, implementation and control of norms carried out by the internationalization of Law.[16]

The internationalization of Law expands at different levels and through various perspectives – including economics and human rights. In each of these perspectives, important themes are developed, both in economic logic and across transversal themes, such asdemocracy and social movements, until human rights are achieved. In this theme, there are material discussions on restorative and transitional justice, in addition to the logic of humanitarian law and refugee law in the context of social movements. The procedural aspect is also addressed, such as the discussion of jurisprudential transpositions in matters of human rights.[17] Above all, in these processes of jurisprudential transposition – the interrelationship that occurs between precedents, also called cross-fertilization, cross-fertilization or normative interbreeding – the natural interactivity between regional human rights protection systems can be observed. The deepening of legal concepts in matters of human rights caused by cross-fertilization is responsible for the jurisprudential creation of new approaches and new interpretative elements.[18] By managing the meaning of the essential content of existing human rights, as well as creating new rights based on the judgments handed down, the Inter-American Court contributes to the expansion and evolution of international law.

Features of human rights: jurisprudential construction through compensatory constitutionalism

The proposed discourse on human rights takes on different types of features. To examine the compensatory constitutionalism adopted by the Inter-American Court, an examination of ascending and descending perspectives on human rights is adopted. These are discourse patterns that constitute sets of arguments that are presented individually. A given point about the international order may be a top-down argument or part of a bottom-up discourse. However, he is unable to be both at the same time. These are patterns that oppose each other.[5] The top-down perspective relates to aspects of universal morality, in which an international legal order takes precedence over the behavior of States. These would be linked to an objective legal order, based on the community argument. On the other hand, from the bottom-up perspective, the assumption is that the will of the States determines the formation of the international legal order. The prevalence would not be of the community aspect, but of the autonomy of States in the face of international law, to solve specific problems. The first perspective is criticized as utopian, as it approaches abstract concepts, such as the universal morality of humanity. The second receives the criticism of apology, due to the fact that the behavior of States allows infinite flexibility of the argument, believing that international law could solve all problems. These perspectives are under constant debate, allowing the constructiondynamicsof legal argument at the international level.[5]

The approach to the configuration of ascending and descending perspectives of the discourse on human rights before the Inter-American Court – using compensatory constitutionalism as an instrument – can affect traditional legal concepts, both at the international level and at the domestic normative level. Due to the influence of the discourse related to compensatory constitutionalism, the legal system opens up to the possibility of creating new or intensifying old processes of construction, implementation and control of legal norms in matters of human rights. This reconfiguration of the legal system is carried out by the Inter-American Court through the control of conventionality, the provision of which calls into question some classic foundations of the theory of international law.

This construction of human rights triggered by the Inter-American Court – through compensatory constitutionalism – can occur in two ways. Initially, the construction starts from the Inter-American Court for the States,[15] through the doctrine of conventionality control.[19] In the second moment, the construction can occur through the development of constitutionalism by the States, either in the development of their own constitutional competencies, or in the application of the normative content developed by the Inter-American Court, through the control of conventionality exercised by national judges.[20] It is not possible to dissociate the State from the construction of human rights.[1] The implementation of human rights is carried out by the State. Therefore, the development of these rights by the State – at the international level – occurs voluntarily. In the current

scenario, most of the Statesrevealbe open to interact with the network of legal ties presented at the international level. This occurs due to its intense juridification through the constitutionalization of international relations, which presupposes the projection of the elements thatmake upthe concept of constitution beyond the domes of the internal legal system. However, not all States are willing to place all dimensions of human rights defended by international courts on their institutional agenda. Thus, there are different levels of interaction between the State and the compensatory constitutionalism elaborated by the Inter-American Court in its judgments, as each national legal system creates its own way of interpreting international law. There are States that do not promote the opening of their legal system to human rights. Otherswho kept the relationship between the international and the national in operation, but backed away from opening up their legal system. Certain States gradually open up to the international level, while others seek to interact in a considerable way. Finally, there are States that recognize the importance of the human rights defended by the Inter-American Court and open their legal system fully to the sphere of international law and regional law.

Depending on the level of openness of the State, the interaction of the dimensions of human rights defended by international courts and by different dispute settlement bodies may occur through general clauses, generally provided for in constitutional texts. In this aspect, constitutions with greater openness in their texts allow for a greater incidence of human rights protection built at the international level. The openness of the constitutional text will vary from country to country. For example, in the Brazilian case, the constitutional text allows the interpretation in the sense that the rights and guarantees expressed therein do not exclude others from the international treaties to which Brazil is a party (Constitution, article 5, § 2). With the constitutional reform of 2004, § 3 was added to article 5, which restricts this interpretative hypothesis, in the sense that in order to enjoy constitutional status, human rights treaties must be internalized with a procedure similar to that of the proposed amendment to the constitution , whose amendment proves to be more solemn than common legislation.[6]

In states such as Colombia, human rights treaties ratified by the Colombian parliament prevail over the domestic legal order, including the constitutional text, as the rights and duties contained in the Colombian constitution will be interpreted in accordance with these ratified treaties. On the other hand, the constitutional reform carried out in Argentina gave constitutional hierarchy to certain human rights treaties, in addition to allowing parliament to approve others of this nature in the future. In all cases, this general opening clause allows the formation of the constitutionality block.[21] These elements of international law contribute to the idea of the normative force of the constitution.[11] Even if in a limited way, the constitution contains its own force, motivating and ordering the life of the State. The implementation of this normative force is in the performance of various tasks by state agents, which comply with constitutional provisions, as well as in the implementation of fundamental rights by different instances of the State.

The problem arises precisely when the State – through its agents – is unable to implement the normative force of the material content contained in its constitution. The reality involves the loss of constitutional normative force, especially with regard to aspects related to fundamental rights. Space is created for the need to promote compensation for this constitutional loss of protection of the human person. The research questions whether compensatory constitutionalism - as a discourse on human rights - constitutes the process responsible for modifying legal logic, with the aim of demonstrating the importance of protecting human rights - especially related to social movements - within the scope of the States of Latin America.

Compensatory constitutionalism carried out by the Inter-American Court

In this aspect, it is believed that constitutional compensation can be carried out by the Inter-American Court, since the international level exerts an important influence on the national level. It is responsible for inspiring standards, encouraging the creation of integrative standards and even imposing common legal rules, especially in matters of human rights. It is believed that the discourse of compensatory constitutionalism makes it possible to compensate for the loss of this constitutional normative force through the influence between the contents of the legal orders of the States and the Inter-American Court. Through conventionality control, this influence can be verified through the use of common legal logics between national courts and the Inter-American Court, a result of the process of constitutionalization of international law. This makes it possible to verify the interaction between national courts, between them and the Inter-American Court.[15]

Adelimitactionof discourse related to compensatory constitutionalismreachesndifferent levels of protection and interaction. The proposal to be studied at the inter-American level differs, to a certain extent, from European constitutionalism, both in terms ofconcerns the dilemmas faced with the democratic organization of national States, as well as the various social movements, whose impact of protection the judgments of the Inter-American Court reach.In turn, Europeaims to establish and consolidate a constitutioncommon, forstrengthening relations between national legal systems and the supranational environment. Although Europe has also been marked by different historical experiences (Nazism, fascism, communism and nationalist dictatorial periods), compensatory constitutionalism – in the Inter-American System – presents itself as an attempt to correct the excesses practiced with the state apparatus in decades of military regimes and serious human rights violations.

The Inter-American System is experiencing a dynamic process of building common constitutional law through its judges – both at the national and inter-American levels. The Inter-American Court develops a diffuse system of "conventional review" – through control of conventionality – and determines to national judges the need to implement the norms of the American Convention within the scope of national legal systems. This interaction of the Inter-American Court takes the form of jurisprudential dialogues with the constitutional courts, as well as the implementation of legislative measures – or of another nature – such asoutlinedby the American Convention.[22]

This system allows the expansion of legal content through the production, application and interpretation of human rights in Latin America. This expansion transcends the jurisdiction of the national legal system andinstallin the space of interpretative interaction, in which national judges interact, influence and are influenced by others. The application of the material content of the American Convention at the level of States leads to a greater convergence of regional norms with domestic constitutional norms. This allows for the respective conditioning of the dialogue between the Inter-American Court and the constitutional courts, whose jurisprudential interaction plays an important role in the process of building a common constitutional law at the inter-American level.[6]

This process demonstrates how the Inter-American Court views the characteristics of international law, as well as presenting

its handling of concepts traditionally established in the theory of international law. This highlights how the Inter-American Court expands the methods of creating, implementing and controlling human rights, which gain greater density through the creation of compensatory constitutionalism as a discourse, through the control of conventionality. Therefore, we seek to demonstrate that – in the face of globalization – the human rights treated by the Inter-American Court now have different operating logics, modifying the structure of the legal content as the relationship with the States of Latin America advances. Thus, we arrive at the discussion of how the Inter-American Court imposes new ideas on the traditional theory of international law or how it re-discusses old ideas in the light of new facts. The debate on the expansion of international law to national legal systems does not appear to be a new discussion. Numerous concepts are revisited by contemporary authors in the light of a new perspective, so that if the discourse of compensatory constitutionalism intends to be based on the alteration of concepts traditionally outlined by international law, presenting itself as one of the differentiated connection links between the Inter-American Court and national legal systems.

In this relationship between its judgments and the legal plan of the States, initially the Inter-American Court considers that the control of conventionality must occur at the internal level, based on the obedience of the States Parties to articles 1, item 1, and 2 of the American Convention. Then, if there is any non-compliance with these provisions, in addition to other conventional provisions, the Inter-American Court exercises its jurisdiction, through dynamic and complementary control, with the aim of achieving constitutional compensation for the implementation of human rights at the level of States. Parties. However, with the systemic violation of human rights by States, there is a peculiar movement carried out by the Inter-American Court, which inverts the logic of this control of conventionality. With this movement, the interpretation of its judgments becomes more important, so that States must implement the jurisprudence constructed by the Inter-American Court through the control of conventionality exercised by it. Through this, the Inter-American Court promotes the interpretative development of rights and guarantees relating to the American Convention, strengthening the text of the Convention with the construction of its constitutional status based on its judgments. Thus, the Inter-American Court develops a type of inter-American judicial constitutionalism.[15]

As a consequence of this compensatory judicial approach, and in similarity to the structuring functions of constitutional courts,[23] through the judicial creation of Law,[24–26] the Inter-American Court gives its own logic to the material content of human rights, through its own block of constitutionality,[27] when assessing the cases submitted to it. It is not just about making the judgment itself, but about constructing arguments that, together (that is, as a block), play a normative role. This paper represents a new interpretation of a certain right provided for in the American Convention,[28,29] the creation of new human rights – as in the case of the right to truth[30,31] and issues relating to indigenous communities[32] – or regulation of a specific specific situation.[33] This "inter-American constitutionality block"[4,27] has an implementation interface within the scope of the State constitutions. This relationship can occur through general clauses, present in the constitutions, through the dignity of the human person,[34] or even through jurisprudential interaction, based on the level of authority granted to the judgments of the IHR Court by national constitutional courts. This determines whether normative convergence seeks to build coherence and uniformity of interpretations of the material content contained in the American Convention, in accordance with the creation of the Inter-American Court.[15]

Consequences of compensatory constitutionalism in national legal systems

The power of penetration that the Inter-American Court has within national legal systems reinforces the argument that its judgments contribute to the development of international law. This involves revisiting concepts related to normative sources, moving beyond traditional concepts referring to customs, treaties and general principles of international law. The discussion on jurisprudence is highlighted, in which it stops being just a subsidiary source and becomes a material source of greater importance. As a material source of international law, the precedents of the Inter-American Court may contribute to the construction of the normative body at the international level.[1]

In this possibility of legal creation by the Inter-American Court, possible points of conflict for compensatory constitutionalism are identified. This possibility emphasizes the relationship between compensatory constitutionalism as a discourse on human rights and international law, as well as presenting the behavior of domestic law in the face of the effects exerted by this instrument. This innovation and reconfiguration of the judgments of the Inter-American Court concerns the way in which national legal systems interact with compensatory constitutionalism. In general, there is the possibility of this relationship developing in three ways (i) indifference of national legal systems; (ii) divergence of States Parties regarding the decision-making content and (iii) convergence of States in the material implementation of compensatory constitutionalism.[15]

Even though compensatory constitutionalism does not have the necessary influence in all Latin American States, its importance is gauged by the specific transformations it can bring about in these legal systems. The potential of the discourse of compensatory constitutionalism can reach the essential content of human rights and their material implementation in States, especially to benefit social movements. This is because these changes made by the Inter-American Court would be unlikely to be adopted by the States in their legislative process. With this, compensatory constitutionalismdemonstratesthe various legal issues that involve the application of the judgments of the Inter-American Court in national legal systems through conventionality control. Among these issues are the difficulties that arise from this interaction.

In fact, it is not only the idea of material implementation of the judgment of the Inter-American Court that is presented, but also the adaptation of this material content to different national legal systems. This is because each national legal order has its ownown readingof how to interpret international law. For this reason, each State gives different meanings to the authority of the judgment of the Inter-American Court and its respective judicial bodies.

In this sense, applying the judgment of the Inter-American Court via control of conventionality could be seen as a form of interference in the freedom to conform to the law on the part of national institutions, especially resulting in a negative efficiency democratic. From another perspective, compensatory constitutionalism arising from inter-American control of conventionality can deepen the performance of national judges, leading them to disregardthe skillsof other internal normative bodies and to build the material implementation in matters of human rights, for the benefitbeginning of social movements.

In this way, the legal consequences of compensatory constitutionalism prove to be important in the relationship between the Inter-American Court and the States. The resistance of States appears to be the main obstacle to the implementation of compensatory constitutionalism as a discourse on human rights. On the other hand,

States reflect on the judgments carried out by the Inter-American Court and the risks of abuse with regard to the exacerbated defense of human rights. Based on this perspective, it is necessary to reflect on the discourse of compensatory constitutionalism, in order to discuss the possibility of greater openness of States to the material implementation of human rights constructed by the Inter-American Court, especiallyforthe strengthening ofsocial movements.

Final considerations

The various forms of interactions between national legal systems and the Inter-American System based on the judgments of the Inter-American Court highlight the complexity and breadth of compensatory constitutionalism as a discourse on human rights. In this context, democracy presents itself as a relative concept, not an absolute one. As an institution, it is not responsible for defending absolute values. However, respect for democratic principles and democratic practice cannot be relativized. In its formal aspect, democracy presents itself as a method of forming public decisions. The source of democratic legitimation comes from "autonomy", a Rousseauian concept arising from positive freedom, which means "self-government."[35] The relationship between the democratic deficit of regional systems for the protection of human rights is connected with the constitutional values of States. Within these values is democracy. In this aspect, the criticism made of the Inter-American Court is valid, insofar as there is a democratic deficit in its judgments. However, it is necessary to understand how this democratic deficit of the Inter-American Court relates to the perception of democracy in Latin American states.[36]

International courts are marked by criticism of the democratic deficit in their decisions. Decision-making processes are not always representative and transparent. This criticism also applies to the Inter-American Court. The argument expands when anti-democratic tendencies are seen in the assessment of those judged. Within the scope of the Inter-American System, part of the doctrine criticizes the behavior of the Inter-American Court, considering its anti-democratic and anti-liberal practices. The Inter-American Court introduces a set of new human rights, which were not agreed upon by the States.[26] Among these rights, the victim of human rights violations is benefited by the Inter-American Court, while the fundamental rights provided for in the constitutions of the States are relativized in relation to those accused of these violations. Through its reparatory sentences, the Inter-American Court enters into activities carried out by state entities, causing (or accentuating) the imbalance between the State's power functions.[25] Thus, reflecting on the discourse of compensatory constitutionalism translates into the possibility of carrying out a constructive criticism of the judgments of the Inter-American Court. Criticism can extend to States, when addressing human rights in their respective domestic orders. This is because the critical examination of precedents emanating from the Inter-American Court and which contain the material content of human rights, also presents itself as a way of exercising compensatory constitutionalism.

Therefore, it is believed that resistance to compensatory constitutionalism as a discourse on human rights, within the scope of the Inter-American Court, represents a high cost for the human person. and for social movements, as it means a refusal to implement human rights outlined in the jurisprudence of the Inter-American Court. The refusal of interaction between national legal systems and the Inter-American Court serves interests other than those of the human person, the main recipient of the material content of human rights. It is evident that the discourse of compensatory constitutionalism does not present itself as the legal solution to all problems of incoherence and ineffectiveness of human rights. However, the theoretical proposal developed is that the discourse of compensatory constitutionalism can contribute to improving the material implementation of human rights in national legal systems.[37–55]

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Conflicts of interest

The author declares there is no conflict of interest.

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