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ABSTRACT

The study analyzes compliance with legal decisions made by the Inter-American Human Rights System (IAHRS), particularly those of the Inter-American Court of Human Rights (Court) in Brazil. In light of prior findings of generalized shortcomings in the execution of Court sentences, sentences against the Brazilian State are considered and, through comparative analysis, the internal institutional process of sentence implementation is evaluated. In this undertaking, the difficulties of classic Law are problematic in attending to expectations of legal efficacy in the context of plural norm implementation and production.

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KEYWORDS

Compliance – Sentences – Inter-American Court of Human Rights – Brazil

INTER-AMERICAN SYSTEM OF HUMAN RIGHTS: CHALLENGES TO COMPLIANCE WITH THE COURT'S DECISIONS IN BRAZIL*

Elisa Mara Coimbra**

1 Introduction

The reciprocal interactions between the Inter-American Human Rights System (IAHRS) and the National Legal System, more than a promise, currently constitute a reality, which must, however, be perfected. With the growing profusion of legal norms and modification of classic legal structures, human rights represent an effort toward a "truly common law" (DELMAS-MARTY, 2004), whose purpose is not to compromise the cultural and legal identity of each State, nor empty them entirely of sovereignty, since important global actors are involved. On the contrary, a "truly common law" responds to the need to coordinate regulation imposed by globalization, safeguarding pluralism and prioritizing the protective character of human rights in raising the visibility of groups marginalized by national structures. Thus, "the IAHRS offers institutional bases for the construction of a transnational public sphere[1] that can contribute to the broadening of Brazilian democracy" (BERNARDES, 2011, p. 137).

In this way, the improvement of mechanisms for complying with decisions of the IAHRS corresponds to a movement at the heart of the formal structures of the State, to make viable public policies affecting the most vulnerable groups, oftentimes invisible on the internal plane, whoever they are. "Subjects that haven't found

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Notes to this text start on page 72.

space in the national political agenda can be highlighted in these transnational spaces and, afterwards, included in the domestic political debate within a new configuration of power" (BERNARDES, 2011, p. 137). It is the boomerang method of influence, in which, for a national political objective to be met, it may be necessary, when opportunities are blocked in the national sphere, to launch mobilizations in international spheres which can apply pressure to national States (KECK et al., 1998, p. 12).

The enforcement of the decisions of the IAHRS, however, represents a challenge. Two important quantitative studies can be cited on the effectiveness of the IAHRS (BASH et al., 2010; GONZÁLEZ-SALZBERG, 2010). The first includes in its analysis the enforcement of decisions by both the Inter-American Commission on Human Rights (IACHR) as well as the Court, while the second focuses on just compliance with Court decisions, especially on refining (or improving) national mechanisms for implementing decisions, mainly in the current context of IAHRS reform discussions.[2]

With that in mind, the aim of this text is to investigate future impediments to the execution or implementation of decisions, by way of a comparative analysis of five cases related to Brazil heard by the Court, identifying, afterwards, potential institutional partnerships capable of effectively implementing them. Therefore, a documentary analysis of the Court's judgments of merit and eventual supervisions of the corresponding sentences was realized.

To have an adequate understanding of the problem, the work is divided in two moments. In the first, an initial discussion is presented about the needs and tendencies of a globalized, modern law – which, if not observed, will hamper interaction between internal law and the IAHRS even more. Based on articles 68.1 and 68.2 of the Pact of San José, Costa Rica, it presupposes that in some situations or circumstances, certain agents will be better situated for decision-making than others. In this discussion, national States would be better situated than an international judge to determine enforcement mechanisms for a ruling, in this case, of the Court. In the second moment the question is this: how to apply this criterion so that it bolsters the implementation of IAHRS rulings, considering recent legal trends? To that end, two cases are comparatively described, in an attempt to identify possible difficulties for enforcement and, finally, with this in mind, Law 4.667-C of 2004, which went through the Congress and currently sits in the Senate, under the number 170 of 2011, is evaluated.

2 National and international jurisdictions

In her work *Pour un Droit Commun* or *Towards a Truly Common Law*, Mireille Delmas-Marty (2004) defends the necessity of overcoming classic Law, or non-globalized state law, based on the premise of singularity and hierarchical organization. This need is due to alterations to the global environment caused by globalization, which shortened time and space, introducing a reality incompatible with an orthodox notion of the Nation-State, the mode of organization that is key to classic Law. In this sense, the Nation-State was no longer self-sufficient in

solving traditional state problems, such as environmental and economic issues, which led, according to the author, to a "denationalised" space, where supranational organisms and civil society act, and a "destabilised time", in which permanent and temporary sources co-exist simultaneously (in contrast to past codes, whose main claim was stability). These two factors derailed the classic Kelsian pyramidal legal organization. Thus discussions on prevalence, whether of international law over internal law (monist theories), or internal law over international law (dualist theories) came to be outdated.

How then would a new legal organization be structured? It is a question later developed by Delmas-Marty (2012) in the text *Résister, responsabiliser, anteciper*. According to the author, the legal fragmentation resulting from the globalisation process would demand an interactive effort, whether vertical (national and international system) or horizontal (Penal Law, Constitutional Law, among others), increasingly accentuated and complex, in order to minimally guarantee normative coherence. The proposal is to consider human rights as politico-democratic tools in the globalization process, capable of re-balancing the forces among States, through identification of contradictions, in terms of these rights, in the performance of States (economic and social rights, environmental and development rights, among others), leading to the attribution of responsibility and the anticipation of risks inherent to the process.

Herein lies the challenge of co-existence among distinct legal systems that are relatively autonomous, that is, not based on any classic hierarchical pyramidal structure, undertaking a partnership that is not always harmonious, but necessary to strengthen democratic guarantees, until recently non-existent and ineffective in the history of Latin America. That is the case of the relationship observed between the IAHRS and the internal legal order.

The IAHRS is composed of the IACHR and the Court, specialized organs linked to the Organization of American States (OAS). This is a regional system that follows an inter-state logic. The IACHR originated from a resolution, not a treaty: Resolution VIII of the 5th Meeting of Consultation of Ministers, approved in Santiago in 1959, despite only later gaining conventional status. The Court, on the other hand, grew out of a signed international treaty in 1969 – the American Convention on Human Rights, or "Pact of San Jose, Costa Rica" – which went into effect in 1978, when the eleventh instrument of ratification was enacted. Despite their different constitutional trajectories, both organs enjoy autonomy in relation to national legal systems. And despite the States having been responsible for their creation, it is they who, in the majority of cases, are the promoters and the violators of human rights condemned by these organs. On the one hand, they are promoters because they ratify human rights protection treaties and take responsibility for the enforcement of IAHRS decisions. On the other hand, they are violators because convictions for human rights violations fall on them. This is not, therefore, a discussion of the prevalence of one system over the other, but rather of complimentary structures that, on their own, have not made effective the basic rights for a democratic society.

The creation of the IAHRS coincides with an authoritarian era in Latin

American history, representing a contradictory initiative in the midst of repeated human rights violations in the national scope. As these contradictions were not only identified but became banner issues for social movements, the closure of national and regional spheres were challenged, bringing into question the notion of margin, based on article 68.1 of the Pact of San José, Costa Rica. That is, the criteria through which an exclusive space for action is attributed to individuals who are members of a state, fomenting a process of co-determination. Co-determination is understood as the process of consolidating the normative content of the sentence through the participation of individuals, who collaborate not only to identify the institutional mechanisms necessary to provide a full reparation, but also to evaluate the results reached through the reparation mechanisms, that is, whether the human rights violation was fully redressed.

The State and civil society thus presumably occupy a privileged place in the American Regional System, which means that the State must seek out an adequate institutional structure, without, however, refraining from or ignoring international interpretation.

Bearing this in mind, and with the objective of identifying existent institutional barriers, it is appropriate to analyze the cases taken to the Court against the Brazilian State.

3 Anamnesis of the five cases

The first Brazilian conviction issued by the Court came in a case known as *Ximenes Lopes vs. Brasil*. In October 2004, the IACHR submitted a complaint against the Federative Republic of Brazil to the Court, owing to alleged attacks by employees of the Guararapes Rest Home, a psychiatric clinic accredited by the Single Health System (SUS) in Sobral, Ceará, against Damião Ximenes Lopes, a mentally handicapped person, which resulted in his death. On July 4, 2006, a ruling was rendered, condemning Brazil for violations of Articles 1.1 (Obligation to Respect Rights) in relation to Article 4 (Right to Life), 5 (Right to Humane Treatment), 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection) of the Inter-American Convention on Human Rights. Among other measures, the State should: a) guarantee, within a reasonable period, that the internal process to investigate and sanction those responsible for the facts of the case is duly accomplished; b) publish parts of the sentence in the Official Gazette or another amply circulated publication; c) develop a training and competency program for medical personnel, in psychiatry and psychology, nursing and other areas, especially with regard to the principles that should guide the treatment of persons with mental deficiency, according to international standards on the matter and those referenced in the sentence; d) pay indemnities to the injured parties. On May 2, 2008, as part of the supervisory procedure stemming from the sentence, the Court released a sentence, declaring the publication and indemnity measures to be fulfilled, and all others, unfulfilled.

On September 21, also during the supervisory procedure, but in a different resolution, the remaining measures continued to be declared unfulfilled. Finally,

in the last resolution, dated May 17, 2010, the Court decided to maintain the supervisory procedure in relation to the two aspects of the sentence still considered unfulfilled.

The second case, known as *Nogueira de Carvalho e outros vs. Brasil*, resulted from the submission, in January, 2005, of a complaint from Jaurídice Nogueira de Carvalho and Geraldo Cruz de Carvalho about a supposed lack of diligence in the investigation and sanction of those responsible for the death of Francisco Nogueira de Carvalho, a lawyer and human rights defender who dedicated himself to exposing the crimes of a supposed extermination group composed of off-duty police officers in Rio Grande do Norte, known as the "golden boys." On November 28, 2006, the case was archived owing to insufficient factual evidence to demonstrate the alleged violations of the rights. For this reason, the case will not be compared to the rest.

The third case*, Escher e outros vs. Brasil*, was submitted by the IACHR to the Court on December 20, 2007, against the Federative Republic of Brazil, on behalf of members of several organizations including COANA (an agricultural cooperative) and ADECON (Community Association of Rural Workers), among them Arlei José Escher, Dalton Luciano de Vargas, Luciano Vargas and 32 others, for supposed illegal intercepts of telephone calls by these members. These actions would, in theory, violate Articles 1.1 (Obligation to Respect Rights) in relation to Article 11 (Right to Privacy), 16 (Freedom of Association), 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection), in addition to violation of Article 28 (federal clause, not recognized by the sentence) of the American Convention on Human Rights. On November 20, 2009, the sentence was handed down. Among the adjudicatory mandates, the State was obliged to: a) investigate the facts that generated the violations in the present case; b) publish parts of the sentence in the Official Gazette or another widely circulated publication in the state of Paraná; c) pay indemnities to the aggrieved parties. In relation to the first item, there was a request for interpretation of the sentence, made by Brazil, in order to clarify the extent of the investigation of the facts. Furthermore, on May 17, 2010, in a supervisory procedure, there was a declaration of the absence of any error in the description of the sentence and how the State should publish it, and thus the State was required to fulfill its obligation in the mold prescribed by the court order. Thus, the publication of the sentence occurred in the newspaper *O Globo* on July 23, 2010, issue number 28.109.

On December 24, 2007, the IACHR submitted a complaint against the Federative Republic of Brazil to the Court on behalf of Iracema Cioato Garibaldi, widow of Sétimo Garibaldi, and their six children (*Garibaldi vs. Brasil*), for the failure to fulfill its obligation to investigate and sanction those responsible for the death of Sétimo Garibaldi on November 27, 1998. The event occurred as a result of an extrajudicial operation to remove families of landless workers who had been occupying a farm located in the town of Querência, in the north of Paraná, in violation of Articles 8 (Right to a Fair Trial) and 25 (Judicial Protection) of the American Convention on Human Rights. In this fourth case, on September 23, 2009, a ruling was delivered, which stipulated, among its adjudicatory measures,

that the Brazilian State must: a) publish parts of the sentence in the Official Gazette or a widely circulated publication in the state of Paraná; b) conduct, effectively and within a reasonable time period, an inquiry and any consequent legal process to identify, judge and, eventually, sanction those responsible for the death of Mr. Garibaldi; c) indemnify the aggrieved parties.

On February 22, 2011, during the supervisory process of the sentence, the obligation of reparations was declared fulfilled, while the duties to investigate and pay indemnities were declared unfulfilled. In the resolution of February 20, 2012, on the other hand, the obligation of indemnities was declared fulfilled, while the investigation, despite progress realized in its development, was not.

The final case, known as *Gomes Lund e outros* ("Guerrilha do Araguaia") *vs. Brasil*, involves the submission from the IACHR to the Court, against the Federative Republic of Brazil, on behalf of the families of those who disappeared during the Araguaia guerrilla conflict during the Brazilian dictatorship, due to supposed arbitrary detentions, torture and the forced disappearances of 70 people, among them, members of the Communist Party and local peasants, occurred on March 26, 2009. It alleged violations of Articles 1.1 (Obligation to Respect Rights), 2 (Domestic Legal Effects), 4 (Right to Life), 7 (Right to Personal Liberty), 8 (Right to a Fair Trial), 13 (Freedom of Thought and Expression) and 25 (Right to Judicial Protection) of the American Convention on Human Rights. On November 24, 2010, the verdict was delivered, condemning Brazil to: a) investigate the facts, judge and, if necessary, punish those responsible and to determine the whereabouts of the victims; b) take rehabilitation measures (medical and psychological assistance for the families of disappeared or executed victims), apology (publication of the verdict, public, international recognition of responsibility, institution of a special day and memorial for political activists who have disappeared in Brazil) and guarantees to avoid repeating the outcome (education in human rights for the Armed Forces; classification of the crime of forced disappearance; access to, systematization and publication of documents held by the State; creation of a truth commission); c) pay indemnities, costs and legal fees. Being the most recent of the cases, there still has not been a supervisory procedure following the verdict.

4 Possibilities for comparison

According to the González-Salzberg study (2011) previously mentioned, the difficulty of internal institutional coordination to guarantee that adjudicatory sentences are followed is not only a Brazilian problem, but generalized, since it is left to national States to choose how they will execute the decisions of the IAHRS. In fact, a comparative analysis of the cases reveals that in none of them was there complete compliance with the Court's decisions, though some measures were more commonly acted upon than others. The hypothesis of the current text is that current internal institutional coordination does not make the complete execution of Court sentences possible, by failing to consider the co-determination inherent in the implementation of the decision in the internal legal structure.

To begin with, consider the least problematic measures: those of indemnity and publication, since they are the most frequently enacted. Both are present in all cases, except *Nogueira de Carvalho e outros vs. Brasil* which, having been archived, did not result in a condemnation of the Brazilian State. In the *Ximenes Lopes vs. Brasil* case, the Court declared that the indemnity and publication measures had been met in its first supervisory procedure (Resolution 2 of May 2, 2008). In the *Garibaldi vs. Brasil* case, there was also a similar declaration. In the *Escher e outros vs. Brasil* case, despite the Court not having expressly proffered on the payment of indemnities, these were realized via order 7.158/10. Finally, in the *Gomes Lund e outros vs. Brasil* case, which also was not the target of an expressed declaration of enactment, there was payment of indemnities, even prior to the sentence, as materialized in Law 9.140/95, which was taken into account by the Court, which imposed only certain complements to these indemnities. As for publication of parts of the sentence, there has also been widespread implementation of the measures.

These two obligations commonly levied on condemned States, publication and indemnification must be executed directly by the Union; this is the aspect they share. In these cases, a more hierarchical internal institutional coordination is sufficient to guarantee that the measures are enacted, since they are of a more normatively dense degree. Therefore a more complex coordination involving participation of organs of distinct legal nature, as well as civil society, is not necessary for the definition of the content and scope of the obligation proffered in the sentence. This does not mean, however, that the State has a choice between a classic model and a model of relatively autonomous systems, since the latter better fits the possibilities afforded by contemporary conditions. Indemnification and publication measures are more often met because they do not depend on a more complex institutional structure.

Despite the obligation of publication not being difficult in relation to the institutional capacity to generate its enactment, the procedure can still be prone to disturbances. Imagine, then, when implementation of a measure is more complex and depends on joint efforts; the necessity of management grows in order to ensure the full reparation of the violation.

The measures of prevention of repeated instances of the violation, beyond publication, are the most complex to realize, both in terms of investigation and with regard to public policies. And the reason for this is that absence of any internal institutional mechanism capable of bolstering the normative content of what would be the full reparation of the human rights violation in each obligation imposed by the Court's sentence. The immediate consequence is the necessity of relativization of rigidly hierarchical structures, since they cannot be made flexible enough to allow for co-determination. The measures that require the formation of public policies, especially, depend, in order to be effective, on coordination between different organs, both in terms of their competencies and their organization and structure, which vary in accordance with the policy to be implemented.

The Ximenes Lopes case is illustrative in this respect, since it involves the right to health, provided in Article 23, Item II of the Federal Constitution, as a common

competency of federative entities. These duties demand the coordination of a range of institutions that often have never worked together and, when they associate, do so through cooperation agreements or accords, fragile mechanisms that complicate the process of determination of the reparation content imposed by the sentence.

Coordination through cooperation agreements or accords, despite the advantage of permitting institutional interaction without the need for complex legislative or administrative reforms, is based on the political will of the organ to participate, as well as acceptance of commitments, which can be insufficient to fulfil the determinations of the IAHRS. To execute the decision of the Court, the association of organs may be necessary, and not discretionary, as is the present status of Brazilian legal organization. Thus, guaranteeing this association is an internal challenge that complicates even the attribution of responsibility to each organ, in cases of non-compliance with the measures provided in the sentence. Despite referring to a measure related to the duty of investigation, in the scope of the sentence for the *Gomes Lund e outros vs. Brasil* case, the Inter-ministerial Decree number 1 MD/MJ/SDH-PR, from 5/5/2011, created in order to coordinate and execute the activities necessary to locate and systematize information and the identification of bodies of the deceased in the Araguaia guerrilla conflict, exemplifies the absence of institutionalized mechanisms capable of investigating the facts in a cooperative manner, since it had to demand political, discretionary action.

As for the duty to investigate, another measure meant to prevent repetition, one observes that in all cases, Brazil violated the legal guarantees and legal protection rights provided in the American Convention on Human Rights and, in all, did not wholly comply with the corresponding duty to investigate, which reveals structural gaps in the interaction among organs that, traditionally, in classic law, work together: police, public prosecutors and the judiciary. In this case, besides the problems relative to the absence of institutional paths responsible for the co-determination of the norm, emanating from the Court, problems theorized long ago emerge, such as the separation of powers, the impartiality of criminal prosecution, among others.

In the Ximenes Lopes case, the criminal suit, begun in February, 2000, is still inconclusive at the present time.[3] In fact, this process highlights a peculiarity in relation to the other cases heard by the Court. It was brought to the IAHRS prior to exhausting all internal legal resources, contrary to Article 46.1 of the American Convention on Human Rights. Meanwhile, since this requirement of admissibility was not argued by Brazil at the opportune procedural moment, contradicting the alleged situation, the process followed its course until the pronouncement of the adjudicatory sentence, which demonstrates the technical and administrative lack of preparation in dealing with IAHRS issues. Despite this peculiarity, the fact is that Brazil was sentenced to investigate and sanction those responsible for the events, but still has not been able to meet this requirement. According to Irene Ximenes, Damião Ximenes Lopes' sister, who was responsible for taking the case to the IACHR, in accounts taken from the work of Nadine Borges (2009), it is possible to identify a series of irregular procedures in the investigations, which disrespected the rule of impartiality in favor of local political power:[4]

> *The chronological order of the facts recounted by Irene was impressive, and for this reason, when she spoke about the antics of the clinic owner to put off any legal decisions, Damião's sister had full conviction of what she was affirming. "In 2002 he began to sell everything he had, including an aquatic park, half of a mansion and other things." Irene's repulsion was so great in describing these facts. According to her lawyer, the judge in Sobral authorized the sale, expediting nine permits, even as the lawsuits against Mr. Sérgio were underway. At this point in the conversation, Irene explained that seven months passed before she was able to hire the first lawyer for the Damião case.*
>
> (BORGES, 2009, p. 36-37)

In the *Escher e outros vs. Brasil* and *Garibaldi vs. Brasil* cases, similar difficulties can be identified. In the first, the investigation of how the data obtained through illegal telephone intercepts was divulged on television news was never conclusive. Furthermore, state agents responsible for the intercepts never responded for their actions, despite their solicitation having originated with a military police officer without ties to the district of Loanda and who, therefore, was not presiding over criminal investigations of the supposed crimes of Landless Movement (MST) workers. In the Garibaldi case, the Court's sentence pointed to a series of failures and omissions in relation to Inquiry number 179/98, which disrupted the collection of facts and investigation of those responsible for the same: lack of indispensable prima facie witness testimony, absence of clarification of contradictions in the testimony, non-use of and omissions in relation to evidence, lost evidence, non-compliance with mandated diligence, error in the petition of Inquiry archival. Even with the re-opening of the Inquiry in 2009, in an attempt to meet the IACHR recommendations, the investigation of those responsible was not conclusive. Finally, the *Gomes Lund e outros vs. Brasil* case also points to the institutional difficulty of the State in investigating facts related to supposed infractions by State agents.

In all of these cases, the Court, attentive to the co-determination process, does not specify which particular institutional mechanisms should implement its decisions in Brazil. Now it is necessary to reflect on which mechanisms would be most efficient, and who should be the recipient of the decision, in order to build an institutional structure capable of honoring international commitments, through joint, coordinated action by various organs and branches.

There is yet another difficulty especially related to one of the potential recipients of Court decisions, the Brazilian judiciary, which ignores its role in executing Court decisions, to the negligence of international interpretations of the treaties. This reinforces the classic, hierarchical legal structure, impervious to current trends, especially by neglecting to systematically control the conventionality of all its decisions, that is, the verification of conformance of internal norms to international treaties that were ratified by the government and valid in the country. Understanding this reality, the Court dedicated numerous pages of its sentence in the *Gomes Lund* case to discussing the incongruity of the Amnesty Law in relation to the American Convention on Human Rights, despite the declaration of its constitutionality by the Federal Supreme Court (STF).

In this sense, thinking about an internal bureaucratic structure capable of

meeting these new necessities is extremely complex. Therefore later discussions study the current legal framework and the attempts to obtain greater efficiency in sentence execution promised by Law 4.667 of 2004.

5 Internal process

According to Article 21 of the Brazilian Federal Constitution, the Union is responsible for maintaining relations with foreign States and participating in international organizations. In this sense, the competent organs for the representation of the Brazilian State at the IAHRS, the elaboration of documents in response to solicitations by the IACHR or Court and for the initiation of compliance with IAHRS decisions, more specifically those of the Court, are composed of, in particular, the Foreign Ministry (MRE), the Attorney General of the Union (AGU) and the Secretariat of Human Rights (SDH), connected to the Presidency of the Republic since 1999, with Ministry status, according to the law and respective statutes 7.304/10, 7.392/10 and 7.256/10.

Despite the SDH being the competent organ to promote internal institutional coordination – according to statute 7.256/10, which establishes the competency to take initiative and support projects on human rights issues in national affairs – it has only meagre tools to institutionally coordinate all the bodies involved.

Firstly, the SDH cannot attribute responsibility to instances of government (both federal state and the legislative and judiciary branches) who might be the only competent bodies to meet the conditions laid out in Court sentences.

Furthermore, the diversity of eventual obligatory actions imposed by a Court decision hampers the elaboration of a list of prior procedures, demanding constant debate case by case, as broadly as possible, so that the sentence's adjudicatory measures are complied with.

The structure described above, highly hierarchical, works well for compliance with measures that do not depend on a gamut of recipients collaborating in the co-determination process in order to be effectively implemented. However, when full compliance of a particular IAHRS decision goes beyond the competency of any one of these organs, which occurs in the majority of cases, especially in terms of obligations requiring action, successive impasses are created.

In this context, it is necessary to look more closely at Law 4.667-C of 2004, the main initiative whose aim is to meet the continuing need for the Brazilian State to comply with Court sentences and uphold international commitments.

5.1 Law 4.667-C of 2004

Authored by Congressman José Eduardo Martins Cardozo, the normative proposal sought to provide for the legal effects of decisions by International Human Rights Protection Organizations, and represented, in truth, an attempt to rescue Law 3.214 of 2000 by then-Congressman Marcos Rolim, archived before it was voted on.

The project by Marcos Rolim basically sought to regulate the nature of executive legal actions against the Federal Treasury, relative to the indemnities

set by IAHRS decisions. José Eduardo Cardozo, in turn, repeated the tenor of the original bill, adding the possibility of the Union interposing regressive actions against any persons or corporations responsible for the offenses that might give rise to a condemnation by the Court.

It is noteworthy that neither bill mentions other modalities of obligations arising from condemnations against Brazil, especially obligations to prevent the repetition of offenses, which are predominately obligations involving "dos" and "don'ts." Due to this gap, congressman Orlando Fantazzini, the Human Rights and Minority Commission's rapporteur, proposed a global amendment-by-substitution, the result of debates with the legal community connected to human rights.

The amendment's main innovation refers to the creation of an organ to accompany the implementation of decisions and recommendations made by international human rights protection organizations (thus broadening the scope of application of the eventual law to go beyond just decisions of the IAHRS), containing inter-ministerial representation and civil society representation. Among the attributions provided was that of accompanying negotiations among the federal entities involved and the plaintiffs; that of management together with the organs of the judiciary, public prosecutor and police, to give greater agility to investigations and findings in cases being examined by international human rights protection organizations; and to oversee the proceedings of legal actions.

However, the novelty of the measure is not merely the creation of an organ to manage the implementation of decisions, since many attributions provided in the bill are already covered by the SDH. The innovation comes from the 5th Article of the amendment-by-substitution, which institutes the necessity of notification of the competent organ for the execution of the obligation mentioned in the adjudicatory decision, so that a plan of compliance is created with a preview of the actions and identification of the authorities responsible for its execution. This is because the identification of the competent organs can facilitate the future identification of those responsible for non-compliance with the international decision, even including attribution of penalties for those guilty of retrogressions. Meanwhile, there are doubts about the constitutionality of the proposal, since the initiative to create a new administrative structure should belong to the executive branch.

Another of the bill's innovations concerns the participation of civil society in the process of decision implementation and specification of necessary measures for compliance with the sentence, democratizing the co-determination space set in Article 68.1 of the Pact of San José, Costa Rica, since compliance with the Court's sentences and, consequently, compliance with human rights treaties, is associated with intense activity of non-governmental organizations (NGO). Cases where a person individually secured the protection of the IAHRS without legal assistance from these organizations are rare. Even the Ximenes Lopes case, in which there was more expressly individual action, because Irene Ximenes without assistance sent a petition to the IACHR, she later received support from the NGO *Justiça Global* (Global Justice). Still, as the *Ximenes Lopes vs. Brasil* case progressed, the NGO solicited its inclusion in the suit as co-plaintiff, which was

important for the success of the complaint and for the individual case to take on a collective aspect, mainly in relation to the condemnation of preventative measures. In all other cases, NGOs participated since the initial petition, creating the practice of strategic litigation, which seeks, through the "use of the judiciary and paradigmatic cases, to achieve social change," as theorized by Cardoso (2008 p. 366), since the non-profit sector relies on a privileged cognitive perspective, in relation to the bureaucracy, on the obstacles to the protection of human rights.

However, despite the bill having being approved unanimously by the Human Rights and Minorities Commission, it was rejected by the Constitution, Justice and Citizenship Commission, even with the immediate prior approval by the Foreign Relations and National Defense Commission, which blocked the execution of the draft. The justification for the rejection of the amendment-by-substitution was that it would harm the sovereignty of the country in contradiction with the Constitution, considering the inexistence of a provision on the necessity of the Brazilian State to recognize the purview of international organizations, which occurred in the original bill proposed by congressman Eduardo Cardozo.

There were still small alteration proposals presented to the Constitution, Justice and Citizenship Commission, approved and introduced into the bill. That way, the draft that entered the Senate was practically identical to the initial proposal, ignoring the proposals of then congressman Orlando Fantazzini:

THE NATIONAL CONGRESS decrees:

> *1st Art. The decisions of International Human Rights Protection Organizations whose competency is recognized by the Brazilian State will produce immediate legal effects in the scope of the respective internal order.*
>
> *2nd Art. It will be left to the federal entity responsible for the human rights violation to comply with the obligation of reparation for its victims.*
>
> *Single paragraph. The avoid the non-compliance with the obligations of monetary character, it will be left to the Union to provide the due reparation, with the originating obligation remaining that of the violating entity.*
>
> *3rd Art. The Union will assess regressive action against persons or corporations, public or private, responsible directly or indirectly for the acts that caused the decision of monetary character.*
>
> *4th Art. This Law becomes valid on the date of its publication.*
>
> (BRASIL. Projeto de lei da Câmara dos Deputados nº4.667-D de 2004)

Thus, if the bill is approved on these terms, the central legislative measures to enable full compliance with IAHRS decisions would not be implemented, especially those related to making compliance with active obligations possible.

6 Conclusion

Studying the cases decided by the Court against the Brazilian State, it was possible, through comparative analysis, to evaluate the internal institutional process of compliance with these decisions. In this sense, reasons that justify the compliance, to a greater or lesser degree, with measures set in the Court sentence were sought, allowing for the identification of deficiencies in internal administrative organization.

First, the text pointed out the inexistence of an internal institutional path to consolidate the content of obligations imposed by Court sentences, which, currently, is necessary to obtain the relativisation of rigidly hierarchical structures, since these cannot be flexible enough to reach the co-determination norm expected by the Court. The effectiveness of measures that demand the formulation of public policies depends on coordination between organs that differ both in their competencies and their organization and structure, varying in accordance with the policy to be implemented – entity or federation, courts, legislature, state governments, among others.

Moreover, classic institutional difficulties still have not been resolved. Repeated non-compliance with obligations to investigate, present in all of the rulings analyzed, indicates an ineffective police and investigative apparatus, as well as a lagging judiciary and deficient training program for State human rights agents.

Also to be pointed out are the repeated omission of the judiciary in recognizing the binding character of decisions by the IAHRS, which hinders even more the formation of an institutional network capable of adequately complying with the adjudicatory measures laid out in the sentences. The *Gomes Lund* case is definitive evidence of this conclusion.

In this sense, it is noted that the same institutional collaborations that failed to block human rights violations now jeopardize compliance with Court decisions, mainly those of repetition prevention which denotes the necessity of institutional reforms, especially with the participation of civil society, holder of a privileged cognitive position, facilitating the choice of efficient public policies for compliance with Court decisions.

Regrettably, the congressional bill 4.667-D of 2004, if the draft sent to the Senate is approved, wastes the opportunity to take central legislative provisions, in the sense of enabling full compliance with IAHRS decisions, particularly related to making possible compliance with obligations to act.

REFERÊNCIAS

Bibliografia e outras fontes

BASCH, Fernando. 2010. A eficácia do Sistema Interamericano de Proteção de Direitos Humanos: uma abordagem quantitativa sobre seu funcionamento e sobre o cumprimento de suas decisões. **SUR**, São Paulo, ano 7, n. 12, p. 9-35, Jun. Available at: <http://www.surjournal.org/conteudos/getArtigo12.php?artigo=12,artigo_02.htm>. Last accessed on: 23 Mar. 2013.

BERNARDES, Márcia Nina. 2011. Sistema Interamericano de Direitos Humanos como esfera pública transnacional: aspectos jurídicos e políticos da implementação de decisões internacionais. **SUR**, São Paulo, ano 8, n. 15, p. 135-156, Dez. Disponível em: <http://www.surjournal.org/conteudos/getArtigo15.php?artigo=15,artigo_07.htm>. Último acesso em: 23 Mar. 2013.

BORGES, Nadine. 2009. **Damião Ximenes: primeira condenação do Brasil na Corte Interamericana de Direitos Humanos**. 1. ed. Rio de Janeiro: Editora Revan.

BRASIL. 1995. Lei 9.140 de 4 de dezembro de 1995. Reconhece como mortas pessoas desaparecidas em razão de participação, ou acusação de participação, em atividades políticas, no período de 2 de setembro de 1961 a 15 de agosto de 1979, e dá outras providências. Available at: <http://www.planalto.gov.br/ccivil_03/leis/L9140.htm>. Last accessed on: 23 Mar. 2013.

_____. 2004. Congresso. Câmara. Projeto de lei da Câmara dos Deputados n°4.667-D de 2004. Dispõe sobre os efeitos jurídicos das decisões dos Organismos Internacionais de Proteção aos Direitos Humanos e dá outras providências. Available at: <http://www2.camara.leg.br/>. Last accessed on: 23 Mar. 2013.

_____. 2010a. Decreto 7.158 de 20 de abril de 2010. Autoriza a Secretaria de Direitos Humanos da Presidência da República a dar cumprimento a sentença exarada pela Corte Interamericana de Direitos Humanos. Available at: <http://www2.planalto.gov.br/>. Last accessed on: 23 Mar. 2013.

_____.2010b. Decretos 7.256 de 4 de agosto de 2010. Aprova a Estrutura Regimental e o Quadro Demonstrativo dos Cargos em Comissão e das Gratificações de Representação da Secretaria de Direitos Humanos da Presidência da República, dispõe sobre o remanejamento de cargos em comissão do Grupo-Direção e Assessoramento Superiores – DAS, e dá outras providências. Available at: <http://www2.planalto.gov.br/>. Last accessed on: 23 Mar. 2013.

_____.2010c. Decreto 7.304 22 de Setembro de 2010. Aprova a Estrutura Regimental e o Quadro Demonstrativo dos Cargos em Comissão e das Funções Gratificadas do Ministério das Relações Exteriores, e dá outras providências. Disponible en: <http://www2.planalto.gov.br/>. Last accessed on: 23 Mar. 2013.

_____. 2010d. Decreto 7.392 13 de Dezembro de 2010. Aprova a Estrutura Regimental e o Quadro Demonstrativo dos Cargos em Comissão da Advocacia-Geral da União, aprova o Quadro Demonstrativo dos Cargos em Comissão da Procuradoria-Geral Federal e remaneja cargos em comissão para a Advocacia-Geral da União e para a Procuradoria-Geral Federal. Available at: <http://www2.planalto.gov.br/>. Last accessed on: 23 Mar. 2013.

CANÇADO TRINDADE, A. A. 1991. **A proteção internacional dos direitos humanos: fundamentos jurídicos e instrumentos básicos**. São Paulo: Saraiva.

_____. 1997. **Tratado de direito internacional dos direitos humanos**. Porto Alegre: Sergio Antonio Fabris Editor.

CARDOSO, Evorah. 2008. **Litígio estratégico e sistema interamericano de direitos humanos: análise de casos da Corte Interamericana**. 2008. 191p. Dissertação (Mestrado em Direito) – Departamento de Filosofia e Teoria Geral do Direito, Faculdade de Direito, Universidade de São Paulo, São Paulo.

DELMAS-MARTY, Mireille. 2004. **Por um direito comum**. Trad. Maria Ermantina de Almeida Prado Galvão. São Paulo: Martins Fontes.

_____. 2012. **Résister, responsabiliser, anteciper: ou comment humaniser la modialisation**. Paris: Seuil.

FAÚNDEZ LEDESMA, Héctor. **El Sistema Interamericano de Protección de los Derechos Humanos**: aspectos institucionales y procesales. 3. ed. revisada e atualizada. San José: IIDH.

GONZÁLEZ-SALZBERG, Damián A. 2011. A implementação das sentenças da Corte Interamericana de Direitos Humanos na Argentina: uma análise do vaivém jurisprudencial da corte suprema de Justiça da Nação. **SUR**, São Paulo, ano 8, n. 15, p. 115-133, Dez. Available at: <http://www.surjournal.org/conteudos/getArtigo15.php?artigo=15,artigo_06.htm>. Last accessed on: 23 Mar. 2013.

KECK, Margaret & SIKKINK, Kathryn. 1998. **Activist Beyond Borders: Advocacy Networks in International Politics**. Ithaca: Cornell University Press.

KELSEN, Hans. 1986. **Teoria Geral das Normas**. Trad. José Florentino Duarte. Porto Alegre: Sérgio Antônio Fabris Editor.

_____. 2006. **Teoria Pura do Direito**. Trad. João Baptista Machado. 7. ed. São Paulo: Martins Fontes.

MIRANDA, Mariana Almeida Picanço de. 2009. **Poder Judiciário brasileiro e a proteção dos direitos humanos**: aplicabilidade e incorporação das decisões da Corte Interamericana de Direitos Humanos. 2009. 126p. Dissertação (Mestrado Profissional em Poder Judiciário) - Fundação Getúlio Vargas, Rio de Janeiro.

PASQUALUCCI, Jo M. 2003. **The Practice and Procedure of the Inter-American Court of Human Rights**. Cambridge: Cambridge University Press.

PIOVESAN, Flávia. 1997. **Direitos Humanos e Direito Constitucional Internacional**. 3. ed. São Paulo: Max Limonad.

_____. 2006. **Direitos Humanos e Justiça Internacional**: um estudo comparativo dos sistemas regionais europeu, interamericano e africano. São Paulo: Saraiva

RAMOS, André de Carvalho. 2008. A execução das sentenças da Corte Interamericana de Direitos Humanos no Brasil. In: CASELLA, Paulo Borba; MEIRELLES, Elisabeth de Almeida; POLIDO, Fabricio B. Pasquot (Org.). **Direito Internacional, Humanismo e Globalidade** - Guido Fernando Silva Soares Amicorum Discipulorum Liber. Rio de Janeiro: Renovar, p. 461-468.

ROSATO, Cássia Maria; CORREIA, Ludmila Cerqueira. 2011. Caso Damião Ximenes Lopes: mudanças e desafios após a primeira condenação do Brasil pela

Corte Interamericana de Direitos Humanos. **SUR**, São Paulo, ano 8, n. 11, p. 93-113, Dez. Available at: <http://www.surjournal.org/conteudos/getArtigo15.php?artigo=15,artigo_05.htm>. Last accessed on: 23 Mar. 2013.

Jurisprudence

CORTE INTERAMERICANA DE DIREITOS HUMANOS. 2005. Sentença de 30 de novembro, Ximenes Lopes v. Brasil.

_____. 2006a. Sentença de 4 de julho, **Ximenes Lopes vs. Brasil**.

_____. 2006b. Sentença de 28 de novembro, **Nogueira de Carvalho e outro vs. Brasil**.

_____. 2008. Resolução de 2 de maio. **Ximenes Lopes vs. Brasil**.

_____. 2009a. Sentença de 6 de julho, **Escher e outros vs. Brasil**.

_____. 2009b. Resolução de 21 de setembro. **Ximenes Lopes vs. Brasil**.

_____ 2009c. Sentença de 23 de setembro, **Garibaldi vs. Brasil**.

_____. 2009d. Sentença de 20 de novembro, **Escher e outros vs. Brasil**.

_____. 2010a. Resolução de 17 de maio. **Escher e outros vs. Brasil**.

_____. 2010b. Resolução de 17 de maio. **Ximenes Lopes vs. Brasil**.

_____. 2010c. Sentença de 24 de novembro, **Gomes Lund e outros vs. Brasil**.

_____. 2011. Resolução de 22 de fevereiro, **Garibaldi vs. Brasil**.

_____. 2012. Resolução de 20 de fevereiro, **Garibaldi vs. Brasil**.

NOTES

1. The public sphere is understood as the "non-state loci for deliberation, where collective formation of will, justification of previously settled decisions and the forging of new identities are possible" (BERNARDES, 2011, p. 137).

2. The start of this process is associated with the creation of a Special Workgroup for the study of Inter-American Commission on Human Rights, during the General Assembly of San Salvador on June 29, 2011.

3. The penal action (suit number 2000.0172.9186-1/0) began in March of 2000.

4. The only clinic accredited by the SUS for treatment of persons with mental deficiencies belonged to a cousin of the mayor of the city of Sobral (BORGES, 2009, p. 25).

RESUMO

O objetivo do estudo é analisar o processo de cumprimento das decisões do Sistema Interamericano de Direitos Humanos (SIDH), particularmente as decisões da Corte Interamericana de Direitos Humanos (Corte IDH) no Brasil. Diante da constatação prévia da existência de *deficits* generalizados nas execuções das sentenças da Corte IDH, tomam-se os casos sentenciados por ela em desfavor do Estado brasileiro e, a partir de análise comparativa, avalia-se o processo institucional interno de cumprimento das sentenças. Nessa empreitada, problematizam-se as dificuldades do Direito clássico em atender às expectativas de eficácia jurídica em um contexto de produção e implementação plurais da norma.

PALAVRAS-CHAVE

Cumprimento – Sentenças – Corte IDH – Brasil

RESUMEN

El objetivo del presente estudio es analizar el proceso de cumplimiento de las decisiones del Sistema Interamericano de Derechos Humanos (SIDH), particularmente las decisiones de la Corte Interamericana de Derechos Humanos (Corte IDH), en Brasil. Ante la previa constatación de la existencia de *déficits* generalizados en las ejecuciones de las sentencias de la Corte IDH, se abordan los casos en los que fuera emitida sentencia contra el Estado brasileño y, a partir del análisis comparativo de los mismos, se evalúa el proceso institucional interno para su cumplimiento. En este contexto, se problematizan las dificultades del derecho clásico para responder a las expectativas de eficacia jurídica, en un contexto de producción e implementación plurales de la norma.

PALABRAS CLAVE

Cumplimiento – Sentencias – Corte IDH – Brasil