

АКТУАЛЬНЫЕ ВОПРОСЫ МЕЖДУНАРОДНОГО ПРАВА

INTERNATIONAL JURISPRUDENCE AND NATIONAL LAW

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The author offers two models of rethinking the society organization, and the place that law, especially international and human rights law, occupies in it.

Key words: law, society, human rights.

«No man is an island, entire of itself; every man is a piece of the continent, a part of the main; if a clod be washed away by the sea, Europe is the less, as well as if a promontory were, as well as any manner of thy friend's or of thine own were; any man's death diminishes me, because I am involved in mankind. And therefore never send to know for whom the bell tolls; it tolls for thee». (John Donne, 1571-1631)

«The integral development of people is the goal and measure of all development projects. That all people are at the centre of development is a consequence of the oneness of the human family; and this is irrespective of any technological or scientific discoveries that the future may hold». (Paul VI, 1967:43)

«We share the conviction that social development and social justice are indispensable for the achievement and maintenance of peace and security within and among our nations. In turn, social development and social justice cannot be attained in the absence of peace and security or in the absence of respect for all human rights and fundamental freedoms. This essential interdependence was recognized 50 years ago in the Charter of the United Nations and has grown ever stronger. We are deeply convinced that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development, which is the framework for our efforts to achieve a higher quality of life for all people». (United Nations, 1995:6)

I. In the beginning was the project

a. Concept of project

1. All building, before to be habitable, they need strong bases, structures, cement, cables. He needs a plan. «If we want a ship moored in the port, first we projected it and build it. Finally, the ship will come» (Etzioni, 1980:740). In the same

way, every society needs a design, a project, before being lived. Otherwise, there is a coexistence between people, but a chaos or a constant fight between them. This direction has already been treated in the sacred books, as we see in Genesis, the Gospel of St John and the Popol Vuh. In the layout of this project, the international jurisprudence is important, especially for America, coming from the Inter-American Court of Human Rights, which has discarded the project for a few and adopted the project for all.

b. A Project for few ones

b. 1. Description

2. Some economists, including those who have joined the neomarxism, departing from the project economic program as necessary and only for the growth, without being imported into absolute to the people who are outside the system. The economy is presented as the only organizer of the society, with the negative results of leproso-social (Kurz, 1994:20). It describes them is not necessary in this contribution because they are plain to see.

For these thinkers and those who follow them, on the one hand, the project creates products and, on the other hand, launches waste. The products are necessary, convenient or useful. The problem arises with the waste: where guard them? Taking into account that you cannot kill with impunity, since the ethical conscience of humanity or, in any case, the political convenience prevents or hinders the governments — Usually subordinated to the great designers worldwide — this practice openly, then the transnational companies invent wars, one after another, by enrolling their waste as soldiers.

The economy, thus glimpsed, and presented as the true «midwife in history», but not for all as he dreamed Marx, but for the few, generating products and waste. The project, thus understood, tends to dominate the human life, to reach the stem cells; biotechnology already does not speak of embryos (human beings in pregnancy), but pre-embryos, objects that are available because they are considered as non-human. When they are used, they are thrown into a simple container of garbage to be transported until the deposit corresponding. Once compacted, they will build entire neighborhoods without notice of which was raised on human lives, murdered by the project.

This is not about whether the Law is more important than the economy. The question is another, very different: what is the legitimacy of the project for a few? Was it developed democratically? As a response, and no, this project has no legitimacy, that no one in their right mind accept that waste substantiation for our civilization. Will someone be excited to sustain if the massacre of the American indians was fair, because it cannot be that «this great continent to pursue a hunting ground for dirty wild people»? (Roosevelt, 1889:90).

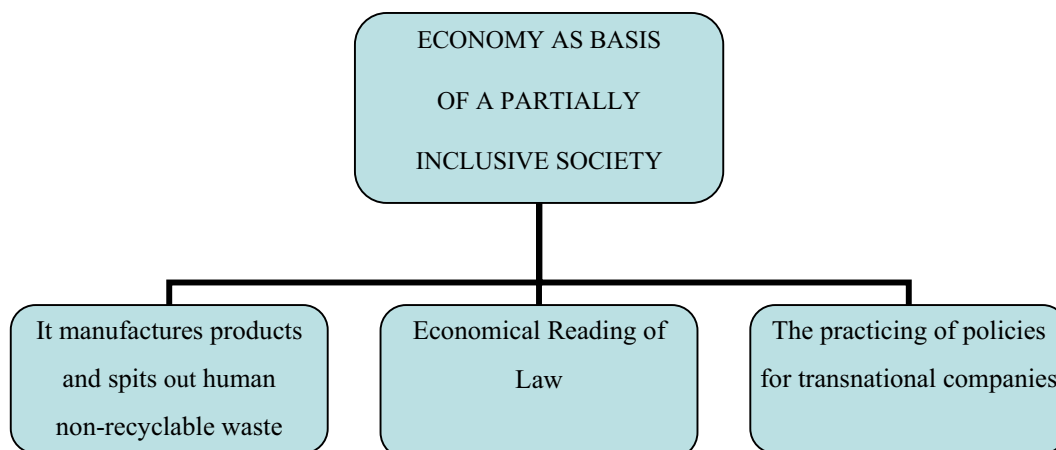
Would someone applaud the ethnic cleansing that meant the «Conquest of the Desert» with the argument put forward by Roca on the need to «submit, by reason or by force, this handful of wild that has destroyed our wealth and prevented us from dealing with definitively, in the name of the law, of progress and our own security,

the richest and fertile lands of the Republic»? Neighborhoods closed with vigilance, dogs, watchtowers, they do not resemble, by chance, the concentration camps of the bourgeoisie, with fear that the remains, which still remain the successive social cleansing of plans for adjustment, move on them?

b.2. Summary

3. This project can be summarized in:

- The economy is the basis of a partially inclusive society.
- The economical reading of Law works as a justifying ideology.
- The partially inclusive society manufactures products, but it but spits out human non-recyclable waste.
- The partially inclusive society puts policies in service of transnational companies.



b.3. Conclusion

4. Since the project for the few is not tenable and with the time it will be destroyed by the existing waste, it should be considered if the democratic system there is another project, this time for all.

c. Project for all

c.1. General view

5. Globally, a general outline of the Project for All of them is especially in the Universal Declaration of Human Rights, whose writing influenced powerfully Jacques Maritain. The standard recognizes several fundamental rights related to the life and establishes duties for the States and to the people.

It affirms in its preamble:

Freedom, justice, and peace in the world are based on the recognition of the intrinsic dignity and of the equal and inalienable rights of all members of the human family. Disregard and contempt for human rights originated acts of barbarism outrageous for the con-

science of humanity. The advent of a world in which human beings, free from fear and misery, keep the freedom of expression and freedom of belief was proclaimed, as the highest aspiration of the man. It is essential that human rights must be protected by a system of Law, to which the man not to see compelled to supreme appeal of rebellion against tyranny and oppression.

It can be summarized as the content of art. 28: «Everyone has the right to the establishment of a social and international order in which the rights and freedoms set forth in this Declaration can be fully put into practice».

This global vision is perfectly embodied in international jurisprudence, which for the whole of America emanates from the Inter-American Court of Human Rights, which interprets the Pact of San José, Costa Rica. For this reason, the *global* awareness is on the case law.

c.2. Local View

6. Within this guidance for the assessment of our *local* reality, the National Constitution, the *foundation* of the regional planning normative has drawn up a project for all, arguing in art. 75, which competes for the Congress (and not for the transnational companies):

- Regulate trade with the foreign nations and with the provinces amongst themselves.

- Provide the safety of the frontiers.

- Recognize the ethnical and cultural pre-existence of the Argentinian indigenous peoples.

Ensure compliance with their identity and to the right to bilingual education and intercultural; recognizing the legal personality of their own communities and the possession and ownership of land that traditionally occupy; regulate the delivery of other suitable and sufficient for the human development; none of them will be sold, transmitted, or susceptible to liens or embargoes; ensuring their participation in the management with respect to its natural resources and other interests that affect.

The provinces may exert concurrently these tasks.

- Provide the necessary for the prosperity of the country, for the progress and welfare of all the provinces and the progress of education, dictating plans for general education and university; and to promote the industry, immigration, the construction of railways and waterways, the colonization of land of national property, the introduction and the establishment of new industries, the importation of foreign capital and the exploitation of the rivers interiors, by protective laws for these goals and for temporary concessions to privileges and rewards of stimulus.

- Provide the necessary for human development and for the economic progress and social justice, for the productivity of the national economy, for the genera-

tion of employment, for the professional training of workers, for the defense of the value of the currency, for the research and scientific and technological development, for its dissemination and use.

- Provide the harmonious growth of the nation and the settlement of their territory; promote policies which are different for balancing the unequal development of the provinces and regions. For these initiatives, the Senate will be the House of origin.
- Sanction laws of organization and basis for education that will consolidate the national unity, while respecting the peculiarities provincial and local, that will ensure the responsibility cannot be delegated by the State, the participation of the family and society, the promotion of democratic values and the equality of opportunities and possibilities without any discrimination; and ensure that the principles of the gratuitousness and equity of education public state and the autonomy and the municipality of national university.
- Enact laws that protect the identity and cultural pluralism, the free creation and circulation of works of the author, the artistic heritage and cultural spaces and audiovisual media.
- Approve or reject treaties concluded with other countries and with international organizations and agreements with the Holy See. The Treaties and Agreements have superior hierarchy regarding laws.
- The American Declaration of the Rights and Duties of Man; the Universal Declaration of Human Rights; the American Convention on Human Rights; the International Covenant on Economic, Social and Cultural Rights; the International Covenant on Civil and Political Rights and its Optional Protocol; The Convention on the Prevention and Punishment of the Crime of Genocide; the International Convention on the Elimination of all forms of Racial Discrimination; the Convention on the Elimination of all forms of Discrimination against Women, the Convention against torture and other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child: under the conditions of its validity, it has constitutional hierarchy, it does not repeal any article of the first part of this Constitution, and should complement the rights and guarantees recognized by it. It May only be denounced, if necessary, by the Executive Power, subject to the approval of two-thirds of all members of each Chamber.

Other treaties and conventions on human rights, after being approved by the Congress shall require the vote of two thirds of the total of members of each Chamber to enjoy constitutional hierarchy.

- Legislate and promote measures to positive action to guarantee the effective equal opportunities and equal treatment, and the full enjoyment and exercise of the rights recognized by the Constitution and by international treaties in force on human rights, in particular with respect to children, women, the elderly and people with disabilities.

- Dictate a particular social security system and full protection of children in a situation of abandonment, since the pregnancy until the period of elementary education, and the mother during the time of pregnancy and lactation.
- Approve treaties of integration that delegating powers and jurisdiction for supranational organizations under conditions of reciprocity and equality and respect the democratic order and human rights. The regulations issued in consequence of it have superior hierarchy than the laws.

7. The Supreme Court, in «Province of San Luis vs. National State», of 03.05.2003, affirms:

The Constitution is the law of the laws, which is the foundation of the entire order positive law, it has the virtue needed to govern the legal relationships arising from social circumstances different from that which existed when the penalty.

In «Czajka, Anita Elizabeth vs. Curtiembre Arlet S.A. s/ Accident, Law 24,557 and res.int.», the Labor Court no 1 of Avellanada-Lanus, it says:

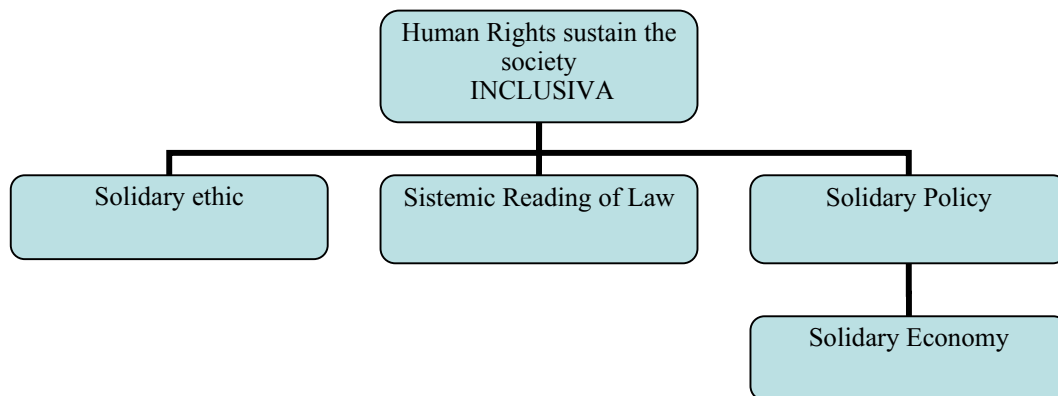
Before being used, the entire standard should be welcomed in the test of concordance with the Human Rights Treaties signed by the country, *jus cogens* and the case-law of the Inter-American Court of Human Rights. This will be the control of eschews convention (an expression used by this Court in full in 2006, in the Case Almonacid De Arellano) and constitutionality. Both the controls, given the importance it has the protection and the guarantee of human rights, are diffuse (they must be done by all and for each one of the judges of the courts) and must be exercised *ex officio* as an application of the principle *iura novit curia*. The mentioned criteria, reminds me the humanizing lessons that Dr. Capon Chapon Queues haug will shed no tears in his Labor Law (Plata, La Plata, 1998, p. 55), as representing the legal order. He knew how to explain here that both the National Constitution as the Treaties on Human Rights may not be seen as «a purpose for which the standards must strive», as at the peak of the kelsenian pyramid, if not as the basis on which to base-if the legal system, by providing the necessary strength and cohesion for the universe human that the rules should be directed. I agree with this view, noting that as a philosophical and transcendental stance. In the kelsenian diagram, the top of the pyramid appears as a 'something' which is inaccessible to aspire attain (curiously similar to the representation of a structure religious) from which they emanate all other rules of the legal system, and should «respect» the standard higher. On the other hand, the investment operated under the thought of Capon Filas, who puts the Treaties on Human Rights and the Constitution on the basis of the scheme, is that the whole legal construction that does not respond to it is overturning, or to put it another way, the standard issued in contradiction with the basis of the legal order is «unconstitutional» or «unconventional» since its birth and may not be ratified or consent, because it affects human rights admitted as minimal irrevocable. In line with what I am saying, the human rights, in the sense that I interpret as the International Court sees them, they are the nutrients of the legal system,

whose base consists of treaties, jus cogens, and the international jurisprudence that receives them, recognizes and guarantees with a sense prospective (not a regressive) and that I put together, are the result as a fruit or as a recognition of the struggle of humanity throughout history. In this way, the judicial work, according to the evolution that it is supposed to be both the international and the national, must ensure that the judicial respect for this group of human rights recognized, and it is the «control of controls». It has been said, with respect to human rights contained in international conventions, to respect the «useful effect» of the Treaty, as a derivation of the maximum of the law contained in the expression *pacta sunt servanda* principle of Roman law. The pacts are (concluded) to be completed and to be sure a standard of living; even more, these covenants were concluded/signed/ratified by Member States to recognize minimum and irrevocable human rights.

c.4. Summary

8. This project summarizes that

- the Human Rights sustain the inclusive society;
- the inclusive society must be read systemically;
- the inclusive society demands ethic, a solidary economy and policy.



c.5. Conclusion and the Earth Charter

9. As shown, the image is clear.

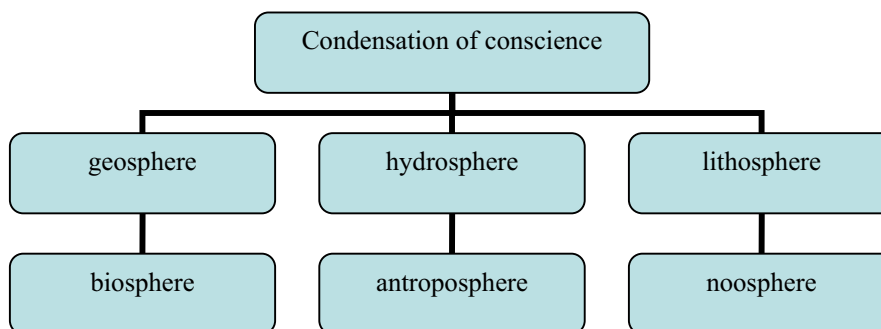
The project for all shapes the common good, concept real-social, expressed in public order in its four elements: social, cultural, political, and economic, the first two being fundamental and the last two instrumental.

It is up to the social sectors and the political parties to combine the guidelines on Human Rights and the guidelines constitutional so that the social goal is transform society so that everyone can attain a place existential insurance, in which consists, basically, in social justice.

Only thus, with a project for all concerned, a house can be built for everyone.

10. It appears once again to the inclusion of the men in the ecosystem and its incidence in social system.

For the Systemic Theory of Social Law, as an evolutionist (of Teilhard de Chardin, 1967:38), the access to better conditions of life is a continuous process of *awareness*:



1. geosphere (earth),
2. hydrosphere (water),
3. lithosphere (continents),
4. biosphere (life),
5. antroposphere (human being),
6. noosphere (the meeting of all intelligences in one place, the planet Earth, with a common planetary awareness).

11. The *Earth Charter* expressed clearly and succinctly the global challenge which we have to solve.

c.6. Planetary Dimension and hypo sufficiency

12. This need, ontologically contrary to freedom, has been further aggravated by concrete social circumstances that it is not just the remains, but that, even the exponential, concentrating the capital of the power active or enough in properties of fewer and fewer people, or expanding without restrictions on the shares of transnational companies. This concentration is accelerating in the cybernetic society, putting in few spheres the technology necessary for the development, generating a power of hegemonic intentions social, cultural, economic, and political, destroying or even reducing the Nation-State.

c.7. The cultural imperialist penetration

13. The models to apply function as instruments of political and economic domination of the capitalist center. Even some post-graduate or undergraduate, promoted in Europe, especially in Latin America, led by alleged «progressives», working in that direction.

Those who serve such project hide their reasons behind their vague statements such as «modernity» or «relocation of labor relations», without warning that, and it is so obvious its maneuvers, of nothing is worth the effort dialectic employed because any careful observer discovers them in a little time.

c.8. The need of a development model

14. The distinction between Model and Programs is structural. The first projects the world and the country, and it is appropriate that it is fully completed between the State and the social sectors. The seconds were implementing the model and may be prepared only by the State or in conjunction with the social sectors.

If there is a Model of Development and appropriate Programs, all the goals can be achieved at the same time. Facing the absence of the first, the laws do not reach their goal, since the flexibility programmed, subsidized by social funds, will insecure jobs at the expense of the working conditions of the rest of the workers and the funds mentioned. In view of the worsening of Conditions and Working Environment (CYMAT) and the growth of social marginalization, the State must intervene actively, ensuring the effective equal opportunities. In front of the oppression there should be no neutrality of the State. The desired separation and complicity with who enjoys strong positions.

The ILO is trying to increase simultaneously the level of employment and improve the working conditions and the environment. This behavior indicates that both energy vectors work together. The World Program of Employment (SMES) and the International Program for Improving the Working Conditions and the Environment (many concepts, in French, one of the official languages of the Organization) allowing the interpreter and the social actors consider the merits or flaws of industrial relations in the country. Therefore, the analysis of labor law should consider it in the same working conditions and increase the level of jobs, because the latter may not increase by sacrificing the first ones.

d. Law presence

d.1. United Nations

15. The United Nations launched the Global Compact in 1999, in order to preserve the sustainable growth in the context of globalization, through the promotion of a basic set of universal values, which are essential to meet the socio-economic needs of the global population. It is an effort to give the world economy to a «human face».

The United Nations say that companies and implement publicly nine universal principles:

- Support and respect the protection of human rights internationally recognized;
- Not to be complicit in human rights abuses;
- Support the principles of freedom of association and trade union and the effective recognition of the right to collective bargaining;
- Delete all forms of forced and compulsory labor;
- Abolish child labor;

- Eliminate discrimination in employment and occupation;
- Support a preventive approach to environmental challenges;
- Undertake initiatives to promote greater environmental responsibility;
- Encourage the development and diffusion of environmentally friendly technologies.

16. The companies which accept the principles of the Pact World must: Publicly advocate the Global Compact and its principles, through their statements of objectives, of its annual reports and other similar means.

Submit each year on the web page of the Global Compact (www.unglobalcompact.org) practical examples of progress or the lessons learned to put into practice the principles and demonstrate their willingness to join the UN for specific projects related to the Global Compact, both at the political level as in the practical aspect.

e. Human Rights

e.1. The meaning of Human Rights

17. The Systemic Theory, since always and long before the Argentinian constitutional reform of 1994, considers that the values mentioned were received for Human Rights.

In addition to the scientific content of this statement, it is worth mentioning its functional range, as it leads more operative argue with human rights, avoiding very hard discussions, perhaps, but ineffective on what each one meant by social justice, solidarity or cooperation.

e.2. The Deepening of ethical awareness media of Humanity

18. It is common to mention generation of Human Rights in three steps (Cancado Trindade, 2003:50) as if they had appeared one after another. This conceptualization almost biological question the article 5 of the Declaration and Program of Action of Vienna, the World Conference of Human Rights, 1993.

Art. 5°. All human rights are universal, indivisible, interdependent and are related among themselves. The international community must deal with human rights in global and of fair and equal manner, on an equal footing and giving everyone the same weight. It should be take into account the importance of national and regional peculiarities, as well as the various historical monuments, cultural and religious, but Member States have the duty, whatever their political systems, economic and cultural, to promote and protect all human rights and fundamental freedoms.

19. The issue is another and refers to the deepening of ethical awareness media of humanity that, like a corkscrew, it penetrates *reality*.

Regardless of religious aspects, this awareness has recognized for the person and for the various social sectors rights that match them by biological situation and social. Such powers are previous to the State, and do not come of any positive legal order.

In a first level of ethical conscience and humanity felt the political rights, provided that the horrors and sufferings of the Second World War were made to understand that real human could not be raging by the State.

In a second level, it was recognized the economic, social, cultural rights, because that man lives in a determined society.

In a third level, the overall duties are being recognized (peace, development, free determination of the peoples, to a healthy environment and ecologically balanced, the benefits of the common heritage of humanity).

e.3. Human Rights and values

20. The Human Rights cover the social justice, solidarity and cooperation.

That penetrates all planning formal legal through the general principles, regardless of state ratification of international documents that recognize them. To the extent that condenses the conscience, if it intuits new rights or the subsequent content that can recognize them. This intuition is part in human evolution in the direction of better living conditions, or in the terminology already mentioned of Teilhard de Chardin, «go ahead» and «for the high».

Some political constitutions typify them as immediate, surpassing the discussion between operational and programmatic standards.

21. Every country seriously respects and promotes Human Rights. In this light we must assess the structural adjustment, so that serves for all and not just for privileged few. According to them, each country has to transform their structures, within an appropriate model of development with a human face, ensuring not only the respect of these rights as well as its promotion. If the country do not face such a task, it may be labelled under the pattern in the area of human rights, with serious economic and political consequences, which, although ineffective compared to the pragmatism which prevails, cease to be the from the moment of the humanity react.

f. Conclusion

22. We Have Human Rights, standards based on them, in various Programs of the ILO and the Paradigm of Decent Work.

We have the possibility to act in order to build a fair and supportive society. It will be our future if we activate this. That is why we have to think and feel overall, but act locally.

Global-Local: this is the way forward.

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**ЮРИСПРУДЕНЦИЯ МЕЖДУНАРОДНОГО ПРАВА
И НАЦИОНАЛЬНОЕ ПРАВО****Родольфо Капон Филас**

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Автор предлагает две модели осмысления организации общества и места, которое в нем занимает право, особенно международное и право прав человека.

Ключевые слова: право, общество, права человека.