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Transnational judicial dialogue on fundamental rights in the constitutional courts of Brazil and the United States*

Diálogo judicial transnacional sobre direitos fundamentais nas cortes constitucionais do Brasil e dos Estados Unidos

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Abstract: The article explores the vital role of transnational judicial dialogue in the constitutional courts of Brazil and the United States, emphasizing the exchange of legal ideas, practices, and the utilization of foreign precedents to enrich domestic legal reasoning and judicial decisions, especially concerning fundamental rights. The article underscores the pragmatic application of transjudicialism, fostering a broader, more inclusive perspective on legal interpretation and decision-making that transcends national boundaries. Through detailed analysis, it demonstrates how such dialogues contribute to the evolution of legal systems, highlighting the importance of considering diverse legal traditions and experiences to address global challenges effectively. This approach not only strengthens the protection of fundamental rights but also encourages judicial systems to adapt and learn from each other, thereby enhancing the quality of jurisprudence in a globalized legal landscape.

Keywords: Transnational judicial dialogue. Constitutional Courts. Transjudicialism. Fundamental rights. Foreign precedents.

Resumo: O artigo explora o papel vital do diálogo judicial transnacional nos tribunais constitucionais do Brasil e dos Estados Unidos, enfatizando a troca de ideias, práticas jurídicas e a utilização de precedentes estrangeiros para enriquecer o raciocínio e as decisões jurídicas domésticas, especialmente no que diz respeito aos direitos fundamentais. O artigo destaca a aplicação pragmática do transjudicialismo, promovendo uma perspectiva mais ampla e inclusiva sobre interpretação e tomada de decisões legais que transcende fronteiras nacionais. Por meio de análise detalhada, demonstra como tais diálogos contribuem para a evolução dos sistemas jurídicos, ressaltando a importância de considerar diversas tradições e experiências legais para enfrentar desafios globais de forma eficaz. Essa abordagem não apenas fortalece a proteção dos direitos fundamentais, mas também incentiva os sistemas judiciais a se adaptarem e aprenderem uns com os outros, melhorando assim a qualidade da jurisprudência em uma paisagem legal globalizada.

Palavras-chave: Diálogo judicial transnacional. Cortes constitucionais. Transjudicialismo. Direitos fundamentais. Precedentes estrangeiros.

Introduction

The cooperation of diverse actors, including both state and non-state entities, plays a crucial role in ensuring the effective protection of fundamental rights. To achieve this, it is essential to foster transnational judicial dialogue, aiming to find superior solutions to shared challenges faced by humanity. Such dialogue promotes high-quality jurisdiction and facilitates the implementation of judicial decisions.

The objective of this article is to demonstrate the importance of transjudicial communication in decision-making and compliance with decisions in the field of fundamental rights, particularly within constitutional courts.

In the context of legal globalization and transnational demands, any decision requires coherence in its assumptions and a consistent rationale.[1] The legitimacy of a decision is no longer sustained solely by its publication or disclosure of the outcome, but rather relies on an appropriate and comprehensive motivation, taking into account the factual context and its consequences. Considering diverse perspectives and experiences from different realities becomes a crucial step towards enhancing judicial decision-making.

In the first part of the article, the foundations for "transnational judicial dialogue" or "transjudicialism" are sought in the phenomenon of transnationality and the roots of transnational law. The importance of communication, exchange of ideas, and experiences between courts is highlighted as essential in qualifying decision-making. Characteristics such as deterritorialization and consensualism, born in the context of globalization, are mentioned as current and relevant circumstances for solving common human problems, such as protecting fundamental rights, which have a diffuse, transboundary nature and are related to the value of solidarity.

The second part examines the content of transjudicialism, starting from Anne-Marie Slaughter's conception of "transjudicial communication".[2] The advantages of this theory in the argumentative sphere are pointed out, while not neglecting the criticisms based on its apparent excessive optimism. Nevertheless, it is inferred that even in its simplest form, transjudicial communication, conducted as a monologue, clearly benefits the deliberation on common problems and the advantage of others' experiences to find the best solution for similar issues, provided that opinions of diversified courts with multiple conceptions and experiences are taken into consideration, abandoning the tendency to look only at courts in the developed world.

The third part explores transjudicialism in the practices of the constitutional courts of Brazil and the United States, with a focus on jurisdiction over fundamental rights. It begins by relating the persuasive authority sought in the use of foreign precedents with the foundations of pragmatic thinking, as the local court, by opening to international experience, builds on accumulated knowledge that foresees the viability of a particular legal solution for the specific case. It then mentions the debate in the US Supreme Court about the use of international and foreign law in the context of domestic constitutional interpretation, identifying a certain hesitation by the court regarding the use of transjudicial dialogue. The article subsequently

1 STAFFEN, Marcio Ricardo. *Interfaces do Direito Global*. 2. ed. Rio de Janeiro: Lumen Juris, 2018, p. 100.

2 SLAUGHTER, Anne-Marie. A Typology of Transjudicial Communication. *University of Richmond Law Review*, vol. 29, p. 99, winter, 1994.

analyzes the relevance of transjudicialism in Brazil's Supreme Federal Court (STF). It cites research on the court's use of foreign precedents during arguments and concludes that, given its significant importance for humanity, involving interdependence and solidarity among peoples, there is still limited use of foreign sources by the STF, leaving room for increased transjudicial dialogue.

1 Transnationality and Transnational Law

Traditionally, jurisdiction is an expression of the state's sovereignty. Territorial jurisdiction consists of the state's function to "speak the law" (*jurisdictio*) within its borders. It is only within its territorial limits that the state holds the monopoly of legitimate use of force, being authorized to apply the law through coercion. When a state exercises, or attempts to exercise, jurisdiction over a foreign territory, the concept of extraterritorial jurisdiction arises.[3]

In this sense, the territorial scope of validity of a legal system coincides with the territory of a state. However, the principle of territoriality does not exclude the possibility that the application of a norm may extend to the territory of other states. The principle of territoriality demands that each state respects the territory of other states and limits its jurisdiction to its own territory. Thus, the territorial expansion of the traditional limits of validity of national law constitutes a profound change in the concept of sovereignty.[4]

In a globalized world, the law can no longer be viewed solely through a purely national lens.[5] Understanding the law solely as a result of the hierarchical will imposed by the state does not meet contemporary demands.[6] Transnationalization, therefore, emerges in the context of globalization, characterized essentially by deterritorialization, capitalist expansion, weakening of sovereignty, and the emergence of a legal order generated outside the state's monopoly.[7] The modern concept of law without, or beyond, the state is referred to as transnational law (with the prefix "trans" meaning across or beyond), a term widely invoked but rarely precisely defined. It is neither the law of the nation-state nor international law, but

3 GERONTAS, Angelos S. Deterritorialization in Administrative Law: exploring transnational administrative decisions. *Columbia Journal of European Law,* vol. 19, p. 423, summer, 2013.

4 GERONTAS, Angelos S. Deterritorialization in Administrative Law: exploring transnational administrative decisions. *Columbia Journal of European Law,* vol. 19, p. 423, summer, 2013.

5 MICHAELS, Ralf. State Law as a Transnational Legal Order. *UC Irvine Journal of International, Transnational, and Comparative Law,* vol. 1, p. 141, fall, 2016.

6 STAFFEN, Marcio Ricardo. *Interfaces do Direito Global*. 2. ed. Rio de Janeiro: Lumen Juris, 2018, p. 4.

7 STELZER, Joana. O fenômeno da transnacionalização da dimensão jurídica. *In*: CRUZ, Paulo Márcio; STELZER, Joana (org.). *Direito e transnacionalidade*. Curitiba: Juruá, 2009. p. 16.

rather a third category that lies somewhere in between.[8] It does not dismantle national law, ignores international law, or denies supranational law but engages in dialogue with each of them according to the phenomena to be regulated.[9] The subjects of transnational law are not only states but also individuals and private entities.

Philip Caryl Jessup (1897–1986), an American judge of the International Court of Justice in The Hague, was the first to define "transnational law" in his homonymous monograph published in 1956. He defined it as any law that regulates actions or events that transcend national borders, including public and private international law, as well as other rules that do not fit entirely into these categories.[10] According to Harold Koh,[11] transnational law represents a hybrid species between domestic law and international law, which can be "downloaded," "uploaded," or transplanted from one national system to another. It grows in importance as it increasingly regulates and influences legislative production and national policies, producing more satisfactory responses to contemporary global phenomena, given its ability not only to juxtapose institutions or overcome/transcend territorial spaces but also the possibility of the emergence of new multidimensional institutions.[12]

Currently, the concept of transnational law encompasses a variety of areas of law, with fruitful application in the realm of fundamental rights, where global standards have not only been recognized but also integrated and internalized into national legal systems.[13] The transnationalization of fundamental rights, therefore, is a distinct and subsequent process to their internationalization.

Another important characteristic of transnational law in the decision-making process regarding fundamental rights is consensus, which is present when sufficient information and the participation of all interested parties are provided. By dispensing with imposition by force, the construction in the transnational space relies, in a society of uncertain, global, and future risks, on the participation and cooperation of those involved. Participation is, in this aspect, the starting point for the effective protection of relevant legal interests.[14] Therefore, the dialogue

8 GIARO, Tomasz. Transnational law and historical precedents. *Studia Iuridica*, Warsaw, v. 38, 2016. p. 74.
9 STAFFEN, Marcio Ricardo. *Interfaces do Direito Global*. p. 59.
10 KOH, Harold Hongju. Why transnational law matters. *Penn State International Law Review*, v. 24, n. 4, 2006, p. 745.
11 KOH, Harold Hongju. Why transnational law matters. p. 753.
12 CRUZ, Paulo Márcio; BODNAR, Zenildo. A transnacionalidade e a emergência do Estado e do direito transnacional. *In*: CRUZ, Paulo Márcio; STELZER, Joana (org.). *Direito e transnacionalidade*. Curitiba: Juruá, 2009. p. 57.
13 KOH, Harold Hongju. Why transnational law matters. p. 746.
14 STAFFEN, Marcio Ricardo. *Interfaces do Direito Global*. p. 116.

among involved actors, both state and non-state, with a focus on the protection of fundamental rights as a relevant good to be pursued by humanity, confers greater legitimacy to decisions and increases the chances of their compliance, especially when based on consensus.

In summary, when examining the decision-making process in hard cases related to fundamental rights, it is important to highlight, firstly, the participation of non-state actors in the decision-making process, such as NGOs, economic blocs, multinational corporations, and international organizations, voices that have an impact on the contemporary world and influence decision-making at various levels. Secondly, topics such as publicity, transparency, governance, deterritorialization, and even the derogation of classical attributes of public administration are issues to be considered in the new model of decision-making at the global level,[15] which must take into account other fields of human knowledge, in an interdisciplinary and pragmatic approach. Thirdly, from a normative perspective, the increase in global interdependence and its effect on the legal field demand an increase in comparative analysis between decisions from foreign courts, not only due to the persuasive effect they may have but also due to the potential for better managing global legal relations.[16]

Regarding this last point, the dialogue between courts from different jurisdictions, conventionally referred to as "transnational judicial dialogue" or "transjudicialism," gains strength with the deterritorialization stemming from transnational law. Therefore, when comparing judicial decisions in Brazil, the United States, and other countries, the importance of communication, exchange of ideas, and experiences between the respective courts is highlighted.

2 Transnational judicial dialogue or "transjudicialism"

The term "globalization" signals more the image of corporations than that of courts. The reduction of distances and the dissolution of borders driven by globalization have proven to be more effective in creating global markets than in achieving "global justice." The word "jurisdiction" still sounds inherently national. However, despite this perception, judges are also becoming globalized, with significant implications for domestic, comparative, and international law.

[15] STAFFEN, Marcio Ricardo. *Interfaces do Direito Global*. p. 103.

[16] GLENSY, Rex D. The use of international law in U.S. constitutional adjudication. *Emory International Law Review*, vol. 25, p. 197, 2011.

Interactions between judges and foreign courts are not a new phenomenon in judicial practice. In academia, however, the term "transjudicial communication" is relatively recent and was coined by Anne-Marie Slaughter in her scientific article entitled "A Typology of Transjudicial Communication".[17] Other designations have emerged to describe the phenomenon of exchanging ideas and experiences between judges from different national jurisdictions, such as "international judicial dialogue", "global judicial dialogue", "transjudicialism" and "constitutional comparativism".[18] The term "transjudicialism" is chosen here because it best identifies the current of thought that advocates for the expansion of an empirically detected phenomenon.[19]

The transjudicial communication proposed by Slaughter can occur at a horizontal level, that is, between courts of the same level, such as supreme courts of two sovereign states, which are not obliged to follow or even take into account each other's precedents due to any formal relationship; or at a vertical level when there is hierarchical subordination, such as national and supranational courts.

Brazil, for example, only admits horizontal communication because, although it recognizes the jurisdiction of international courts, including advocating "for the formation of an international human rights court",[20] there is no subordination of the national judiciary to international courts, except for the submission of the country "to the jurisdiction of the International Criminal Court to which it has expressed adherence".[21]

The most common mode of transjudicial communication occurs in the form of monologues, consisting of constitutional borrowings and the use of foreign or international experience as useful illustrations to convince about the correctness of the decision.[22] In this situation, there is not strictly a dialogue since a court whose arguments or conclusions are used by foreign courts is not a self-conscious participant in an ongoing conversation.[23] The originating court may indeed have little or no awareness that its opinions have a foreign audience. In contrast, the

[17] SLAUGHTER, Anne-Marie. A Typology of Transjudicial Communication, 1994.

[18] KROTOSZYNSKI JR. Ronald J. "I'd Like to Teach the World to Sing (In Perfect Harmony)": International Judicial Dialogue and the Muses - Reflections on the Perils and the Promise of International Judicial Dialogue. *Michigan Law Review*, vol. 104, p. 1321, May 2006.

[19] LUPI, André Lipp Pinto Basto. A jurisprudência brasileira e a transnacionalidade: uma análise do transjudicialismo. *In*: CRUZ, Paulo Márcio; STELZER, Joana. *Direito e transnacionalidade*. Curitiba: Juruá, 2009. p. 124.

[20] Constitution of the Federative Republic of Brazil. Temporary Constitutional Provisions Act. Article 7: "Brazil shall strive for the creation of an international court of human rights".

[21] Constitution of the Federative Republic of Brazil. Article 5, Paragraph 4: "Brazil accepts the jurisdiction of an International Criminal Court to whose creation it has expressed its adhesion".

[22] LUPI, André Lipp Pinto Basto. *A jurisprudência brasileira e a transnacionalidade*: uma análise do transjudicialismo. p. 124.

[23] SLAUGHTER, Anne-Marie. A Typology of Transjudicial Communication. 1994.

receiving court employs such arguments without concern for the reaction of the court that issued them. The reasons are incorporated into the reasoning discourse, but without expecting repercussions of the decision itself in the opinion of the court that originated the cited precedent.[24]

Slaughter suggests the metaphor of "cross-fertilization," where the emitting court releases the arguments into the "transnational winds" without any particular knowledge or concern about where they will take root. It is up to the "listening" court to determine which parts of this monologue it will adopt, which only happens if it is persuaded to do so or if it concludes that the content of the decision will allow it to better persuade its own audience.[25]

In this sense, the mention of a foreign court's judgment as persuasive authority presupposes that the audience of a particular decision recognizes the foreign court as sufficiently similar to the domestic court. According to Slaughter, the verification that courts worldwide have arrived at similar conclusions on the same legal issue constitutes evidence that the decision in question is an appropriate solution. In other words, persuasion regarding a specific decision can be reinforced by a simple demonstration that others have followed a similar path.[26]

On the other hand, Luis Claudio Martins de Araujo identifies four models of dialogues between diverse legal systems, advocating for a quadripartite conception regarding argumentative practices in addressing common problems. The first model is one of submission, which involves complete deference to what comes from outside; a form of "judicial neocolonialism." He gives the example of the Commonwealth, where a sovereign country submits internal judicial demands to an English court as the final instance. The second model is the extreme opposite, which is a broad rejection of what comes from outside, resulting in judicial isolation in complex debates. The third model he refers to as decorative, where efforts are made to demonstrate deep knowledge of decisions from foreign courts, but often without any correlation with the issue under consideration. The foreign element becomes a mere argument of authority to support what the court has already decided, in other words, a form of cherry-picking, selecting only what is relevant to that particular rationale. The fourth model is one of interlocution, which the author considers the most appropriate. In this model, the debate is understood, reflected upon what was decided by the other court, and it is verified whether it fits the case

[24] LUPI, André Lipp Pinto Basto. *A jurisprudência brasileira e a transnacionalidade*: uma análise do transjudicialismo. p. 124.

[25] SLAUGHTER, Anne-Marie. A Typology of Transjudicial Communication. 1994.

[26] SLAUGHTER, Anne-Marie. A Typology of Transjudicial Communication. 1994.

under examination, understanding the foreign decision. It is a dialogical model that can lead to the acceptance or rejection of the foreign decision.[27]

Undoubtedly, transjudicialism offers numerous advantages, including collective deliberation on common problems and the valuable insights gained from foreign experiences, leading to a pragmatic approach to problem-solving. In this context, the significance of safeguarding fundamental rights becomes even more pronounced as courts can develop a pluralistic and contextually informed understanding of the issues at hand through increased transjudicial communication.[28]

The process of decision-making concerning fundamental rights benefits greatly from broad information and participation, as it enables the generation of relevant knowledge for sound judgments. Through the sharing of experiences and information, participating actors can coordinate their actions, fostering a cooperative and integrated decision-making system that involves public, diverse, and participatory processes. The interactions between national, regional, and international judges and courts give rise to a complex process often referred to as the "globalization of jurisdiction"[29] and reciprocal persuasion.

Additionally, referencing decisions from renowned foreign courts can serve as a protective measure for local courts against economic, political, and legal pressures, as pointed out by André Lupi.[30]

This interaction or cross-fertilization between national judicial decisions can, over time, harmonize the application of the law in the involved countries, leading to the emergence of a general and consistent practice among States. Consequently, national judicial decisions that represent the individual practice of different countries can collectively influence international law.[31] As a result, the quality of decision-making tends to improve worldwide, as courts that share insights with their counterparts are compelled to examine their own legal systems from a comparative perspective.

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27 ARAUJO, Luis Claudio Martins de. *Constitucionalismo transfronteiriço, direitos humanos e direitos fundamentais*: a consistência argumentativa da jurisdição de garantias nos diálogos transnacionais. Rio de Janeiro: Lumen Juris, 2017.

28 SLAUGHTER, Anne-Marie. 40th Anniversary Perspective: Judicial Globalization. *Virginia Journal of International Law Association,* vol. 40, p. 1103, summer, 2000.

29 BERMAN, Paul Schiff. The globalization of jurisdiction. *University of Pennsylvania Law Review*, vol. 151, p. 311, December 2002.

30 LUPI, André Lipp Pinto Basto. *A jurisprudência brasileira e a transnacionalidade*: uma análise do transjudicialismo. p. 133.

31 MOREMEN, Philip M. National court decisions as state practice: a transnational judicial dialogue. *North Carolina Journal of International Law & Commercial Regulation,* vol. 32, p. 259, winter, 2006.

Critics of this movement consider Slaughter's vision of creating a "transnational legal community" utopian and overly optimistic.[32] They argue that judges generally lack the time, expertise, and language skills to conduct meaningful and comparative research on foreign judicial decisions. This increases the possibility that judges may use foreign judicial decisions in a random and selective manner, choosing only those that favor their inclinations. This may lead to reliance on the most readily available decisions, which are likely to be from developed countries and in more accessible languages.[33] Moreover, there is a potential danger of eradicating the filter established by States to prevent direct impositions from external political movements, which could lead to unintended consequences resulting from the power politics of major nations.[34]

However, the intention is not for foreign law to formally replace domestic law but to interpret it in a way that avoids normative conflicts with international law. Transjudicialism is, in fact, the driving force through which national courts collectively engage in a dynamic process of creating and harmonizing international law and ensuring that international norms shape and inform national norms.[35]

Therefore, transjudicial communication should not be seen as a mode of standardization but rather as a filtering, mediating such pressures on the domestic legal system, granting freedom to the national interpreter to translate the norm into their own legal system.[36]

Cross-border constitutionalism, at this point, should move away from a model of submission, where there is complete deference to transnational jurisprudence, and should always seek dialogue with openness for discussion and utilization of transnational decisions as persuasive authority, considering the perspective, peculiarities, and reasons for deciding the domestic case.[37]

Furthermore, successful foreign experiences in addressing and resolving common problems of humanity should not be disregarded merely because they are non-binding in the domestic legal system. Considering that decisions must be

[32] KROTOSZYNSKI JR. Ronald J. "I'd Like to Teach the World to Sing (In Perfect Harmony)". 2006.

[33] MOREMEN, Philip M. National court decisions as state practice: a transnational judicial dialogue. 2006.

[34] LUPI, André Lipp Pinto Basto. *A jurisprudência brasileira e a transnacionalidade*: uma análise do transjudicialismo. p. 132.

[35] WATERS, Melissa A. Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law. *Georgetown Law Journal*, vol. 93, p. 487, January 2005.

[36] LUPI, André Lipp Pinto Basto. *A jurisprudência brasileira e a transnacionalidade*: uma análise do transjudicialismo. p. 134.

[37] ARAUJO, Luis Claudio Martins de. *Constitucionalismo transfronteiriço, direitos humanos e direitos fundamentais*: a consistência argumentativa da jurisdição de garantias nos diálogos transnacionais. Rio de Janeiro: Lumen Juris, 2017. p. 91.

convincing to evoke compliance,[38] the national court's decision gains legitimacy when it turns to foreign decisions to seek different perspectives on similar issues. To achieve this, it is essential to consider opinions from diverse courts with multiple conceptions and experiences, avoiding the tendency to only look at courts in the developed world. Only through this can the debate on common themes be enriched, refraining from using foreign references solely to confirm and sophisticate discourse in the form of an argument of authority.

3 Transjudicialism in Practice in the Constitutional Courts of Brazil and the United States

Unlike the Constitution of South Africa, which mandates that the country's Supreme Court use international law to interpret its own Bill of Rights and advocates consulting foreign domestic law in similar circumstances,[39] the Constitutions of Brazil and the United States do not have a similar provision. However, both the Brazilian Supreme Federal Court and the US Supreme Court occasionally rely on international and foreign law as persuasive authority to interpret provisions of their own Constitutions.

In this regard, considering that a decision of one supreme court does not bind the judgment of another, the willingness to cite foreign precedents suggests that the courts recognize the relevance and persuasive nature of each other's precedents. Constitutional courts turn to comparable institutions when confronted with challenging or novel cases, especially in situations where there is limited domestic precedent.

An interesting study conducted by Jonathan S. Hack on transjudicial citations among state supreme courts in the U.S.[40] found that references occur more frequently when there is geographic proximity and ideological similarity between the courts. According to the research, judges in these courts tend to refer to "external" precedents from geographically distant courts when the cited court has a similar ideological inclination. Drawing from this observation, the author deduced that although one could argue that seeking out courts of equal standing is, essentially,

[38] SLAUGHTER, Anne-Marie. A Typology of Transjudicial Communication. 1994.

[39] GLENSY, Rex D. The use of international law in U.S. constitutional adjudication. *Emory International Law Review*, vol. 25, p. 197, 2011.

[40] HACK, Jonathan S. Looking to peers: transjudicial citations behavior among state supreme courts. *North Dakota Law Review*, vol. 95, p. 291, 2020.

a learning process, the findings imply that judges perceive their peers as a means to bolster their own decisions.

Based on this premise, one can argue that utilizing international precedents in domestic decisions with the intention of reinforcing the conclusions of the receiving court is conceptually pragmatic. Pragmatism assesses the success of a philosophy not in its alignment with eternal truths, but by its practical utility in generating improved and more satisfying outcomes.[41]

Thus, the pragmatic thinking that underpins the use of international materials as persuasive authority merely reflects a philosophy based on actions, experiments, and viable solutions, rather than theoretical constructions.[42] It emphasizes action, experimentation, and concern for what "works" in human experience.

Likewise, the expansion of persuasive authority sources to include transnational law serves to encourage a jurisprudence that advances based on past experiences without relinquishing the progressive impulse of cautious experimentation. As former US Supreme Court Justice Oliver Wendell Holmes Jr. stated, "The life of the law has not been logic, it has been experience".[43] Experience is shaped by time and can be both individual and collective, with the collective dimension being more comprehensive than the individual one. Each moment's experience has its limits but is enriched by the accumulation of experiences of others who lived in the same or earlier times. In this way, each individual can experience a common world of experiences, extending it beyond their own observations.[44]

However, as extensive as this common world may be, it also has its horizon, and within these limits, new experiences always emerge. By embracing international experiences that have already addressed issues confronted for the first time, the national court draws from accumulated knowledge that foresees the viability of a particular legal solution, which, in turn, reassures the judge about potential consequences of their decision.[45]

Furthermore, decisions resulting from the comparative analysis of precedents from other courts, enriching the range of options available to promote fundamental

41 GLENSY, Rex D. The use of international law in U.S. constitutional adjudication. *Emory International Law Review*, vol. 25, p. 197, 2011.

42 ANGELO, Mary Jane. Embracing Uncertainty, Complexity, and Change: An Eco-pragmatic Reinvention of a First-Generation Environmental Law. *Ecology Law Quarterly,* vol. 33, p. 105, 2006.

43 HOLMES JR., Oliver Wendell. *The Common Law*. Available at: https://www.gutenberg.org/files/2449/2449-h/2449-h.htm (Accessed: 29 Jul. 2023).

44 GLENSY, Rex D. The use of international law in U.S. constitutional adjudication. *Emory International Law Review,* vol. 25, p. 197, 2011.

45 GLENSY, Rex D. The use of international law in U.S. constitutional adjudication. *Emory International Law Review,* vol. 25, p. 197, 2011.

rights, have the potential to acquire some domestic legitimacy that decisions of international tribunals, distant from the general population, do not possess.[46] Here too, there is a certain dose of pragmatism because the greater the internal legitimacy, the higher the likelihood of compliance with decisions and acceptance within the international community.

3.1 United States Supreme Court

The issue of how and when foreign law and international law should be used as persuasive authority in the context of constitutional interpretation has gained significance in the United States. In recent years, several Justices of the Supreme Court have shown a growing interest in considering foreign legal sources in constitutional analysis. According to Melissa Waters, this has primarily occurred as a response from judges to an emerging transnational judicial dialogue, reflecting a desire to become active participants in a kind of judicial conversation with their foreign colleagues.[47]

In *Lawrence v. Texas*,[48] the United States Supreme Court considered foreign jurisprudence when invalidating a law that prohibited sodomy. Justice Anthony Kennedy, now retired, cited similar cases where the European Court of Human Rights invalidated laws prohibiting consensual homosexual conduct. He noted that foreign jurisprudence was evidence that the right to engage in consensual homosexual conduct was accepted as an integral part of human liberty in many other countries. However, the use of foreign precedents for domestic constitutional analysis received strong criticism from Justice Antonin Scalia (1936-2016), who argued that constitutional guarantees in the country do not arise from foreign nations decriminalizing conduct, warning against imposing foreign fashions, habits, or moods on Americans.

In *Roper v. Simmons*,[49] Kennedy and Scalia engaged in another debate over the appropriate relationship between American courts and foreign and international law. In declaring state laws that authorized the death penalty for individuals under eighteen unconstitutional, Kennedy cited international treaties and foreign practices

[46] GLENSY, Rex D. The use of international law in U.S. constitutional adjudication. *Emory International Law Review*, vol. 25, p. 197, 2011.

[47] WATERS, Melissa A. The Supreme Court, constitutional courts and the role of international law in constitutional jurisprudence: Justice Scalia on the use of foreign law in constitutional interpretation: unidirectional monologue or co-constitutive dialogue? *Tulsa Journal of Comparative & International Law*, vol. 12, p. 149, 2004.

[48] 539 U.S. 558 (2003).

[49] 543 U.S. 551 (2005).

as evidence of the "overwhelming" weight of international opinion against juvenile death penalty. He argued that foreign decisions, although not controlling, provide respected and relevant foundations for the conclusions of the U.S. Supreme Court. He further observed that:

> It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.

Scalia, in a dissenting opinion, objected, arguing that the agreement of other nations and peoples should not be the basis for the commitment of the United States Supreme Court to national principles, just as disapproval by other nations and peoples should not weaken that commitment. Mentioning other contexts where the court's decision differs from the approach of foreign courts, Scalia pondered that resorting to foreign law when it aligns with one's own thinking and ignoring it when it does not, is not a principled decision-making process but sophistry. He concluded: "What these foreign sources affirm' [...] is the Justices' own notion of how the world ought to be, and their diktat that it shall be so henceforth in America".

Subsequently, in *Graham v. Florida*,[50] the Court decided that sentencing a minor to life imprisonment without the possibility of parole for a non-homicide offense violated the Eighth Amendment's prohibition against cruel and unusual punishment. The decision cited an international treaty that prohibited the imposition of life imprisonment without parole for crimes committed by individuals under eighteen. Although the majority's opinion observed that there was no international agreement binding the United States on this issue, it understood that the question was not about the binding nature of international law but whether the punishment examined by the Court was compatible with its current interpretation of the Eighth Amendment. In this field, as informed by Rex Glensy, it is where the use of foreign law as persuasive authority by the U.S. Supreme Court occurs most frequently, considering the international opinion regarding the acceptability of a particular punishment.[51]

It becomes evident, therefore, that the growing interest of the U.S. Supreme Court in transjudicialism is not without internal criticisms, based on an alleged affront to democracy and the country's sovereignty, as well as the lack of

[50] 130 S. Ct. 2011 (2010).
[51] GLENSY, Rex D. The use of international law in U.S. constitutional adjudication. 2011.

coherence, method, and context in referencing foreign judgments. In Scalia's opinion, comparative study would be useful as a source of example and experience to democratically change the country's laws and Constitution but not as a means of reinterpreting the Constitution.[52]

However, this approach fails to consider that transjudicial communication is a "two-way street". It is not merely about absorbing and applying foreign views on constitutional issues in a strictly passive role of the court. Participation in transnational judicial dialogue does not need to be a one-way process in which courts simply apply foreign precedents. Transjudicialism has an interdependent nature,[53] where not only foreign and international law can influence and shape domestic law, but, at the same time, through participation in the dialogue, national courts can ensure that their precedents inform and shape the development of foreign and international law.

Thus, from a mutually constructed perspective, the consideration of foreign legal sources does not entail automatic deference to decisions from other courts. What should exist is a learning process through reciprocal observations between systems, discarding both the model of "pseudo-internationalist universalism" and "statist provincial conceptions" that disregard other perspectives on the same issue.[54] In this environment, national courts create a new identity as mediators between international and domestic norms.

Melissa Waters warns that the hesitation of the United States Supreme Court to engage in transjudicial dialogue, particularly on human rights issues, is contributing to its increasing isolation and diminishing influence. The tendency to look only inward may render the judgments of U.S. courts less relevant internationally. She considers this decline in the influence of the U.S. Supreme Court as "unfortunate and unnecessary".[55]

Similarly, retired U.S. Supreme Court Justice Sandra Day O'Connor had previously urged American judges to broaden their intellectual horizons, looking beyond American borders in search of persuasive legal foundations. She highlighted that, while U.S. judges have become "more inward-looking", "other legal systems

[52] WATERS, Melissa A. The Supreme Court, constitutional courts and the role of international law in constitutional jurisprudence. 2004.

[53] WATERS, Melissa A. The Supreme Court, constitutional courts and the role of international law in constitutional jurisprudence. 2004.

[54] ARAUJO, Luis Claudio Martins de. *Constitucionalismo transfronteiriço, direitos humanos e direitos fundamentais.* p. 97.

[55] WATERS, Melissa A. The Supreme Court, constitutional courts and the role of international law in constitutional jurisprudence. 2004.

continue to innovate, to experiment, and to find new solutions to the new legal problems that arise each day, from which we can learn and benefit".[56]

On the other hand, if the U.S. Supreme Court were to adopt an interdependent approach to transjudicial dialogue, it could regain its position as an influential constitutional court in the world, especially concerning the protection of fundamental rights and guarantees.[57]

3.2 Brazil's Supreme Federal Court

> I am certain that this publication is a relevant contribution to the constructive dialogue regarding the experience of constitutional jurisdiction in many nations.

This is how the President of the Brazilian Federal Supreme Court (STF) at the time, Justice Luiz Fux, presented the second edition of the compilation of precedents of the Court on the Covid-19 pandemic,[58] demonstrating the significance he places on transjudicial dialogue between constitutional courts.

Similarly, the Brazilian National Council of Justice (CNJ), under the presidency of the same Justice, established an International Program called "Global Vision of the Judiciary", aimed at foreign judges interested in learning about the reality of the Brazilian judiciary. In line with transjudicial communication, the program's objectives include "promoting mutual knowledge of the activities of the courts, focusing on the sharing of best practices and innovative solutions in administrative and judicial areas"; "encouraging knowledge of the legal reality of other countries"; "supporting the development of lines of cooperation in the field of management and judicial activity"; "establishing and strengthening ties of friendship and partnerships with organisms and institutions of the global justice system"; "giving visibility to successful practices that contribute to the efficiency of the Brazilian Judiciary"; and "facilitating the exchange of experiences and information among Brazilian and

[56] HELFER, Laurence R.; SLAUGHTER, Anne-Marie. Toward a Theory of Effective Supranational Adjudication. *Yale Law Journal*, vol. 107, p. 273, November 1997.

[57] WATERS, Melissa A. The Supreme Court, constitutional courts and the role of international law in constitutional jurisprudence. 2004.

[58] BRASIL. Supremo Tribunal Federal (STF). *Case law compilation*: Covid-19. 2 ed. Brasília: STF, Secretaria de Altos Estudos, Pesquisas e Gestão da Informação, 2021. Available at: http://www.stf.jus.br/arquivo/cms/publicacaoPublicacaoTematica/anexo/case_law_compilation_covid19_2.pdf (Accessed: 29 Jul. 2023).

international justice bodies, promoting improvement, modernization, and efficiency of the Judiciary".[59]

The relevance of transjudicialism in STF was the subject of an interesting research conducted by Luiz Magno Pinto Bastos Junior and Alini Bunn,[60] which sought to define the discursive patterns of the Court regarding the use of foreign precedents in judicial arguments. The research was based on data available on the STF's institutional website, analyzing 123 judgments rendered between 1998 and 2008 that contained the following search expressions: "cited foreign decision", "cited foreign legislation" and "comparative law". The authors observed an increase over time in the use of comparative law arguments by the Court, and that the vast majority of the Justices employ this discursive strategy, to a greater or lesser extent. The most cited foreign jurisprudences were from the United States and Germany, followed by Portugal, Spain, and Italy, indicating a preference of Brazilian doctrine to "dialogue" with major or leading nations. They also concluded that in the vast majority of citations, there was a mere reinforcement of the argumentation (mere reference), using the foreign precedent as an argument of authority without a context, seeking to give the decision a "more noble appearance". Thus, they suggested that the foreign precedent was usually used to support a decision already made by the judge within the normative context and was rarely cited in the factual context.

The authors of the study concluded that, similar to many civil law countries, the Brazilian Supreme Federal Court relies on foreign law to support its judicial reasoning, albeit to a certain extent, serving as an ancillary role in the Court's decisions. However, a discernible trend of increased receptivity towards considering foreign law can be observed in the STF's rulings. This observation is supported by the fact that the highest number of decisions citing foreign elements occurred from 2005 onwards. This gradual shift indicates that the foreign element has been gaining significance within the national context, resulting in a broader range of legal sources, offering alternative avenues for conflict resolution, and fostering the internationalization of judicial practice and constitutionalism.[61]

Using comparable research parameters, specifically focusing on transjudicialism and searching for the term "cited foreign decision" in judgments

[59] NATIONAL COUNCIL OF JUSTICE (CNJ), Resolution No. 411, dated August 23, 2021. Available at: https://atos.cnj.jus.br/atos/detalhar/4074 (Accessed: 29 Jul. 2023).

[60] BASTOS JUNIOR, Luiz Magno Pintos; BUNN, Alini. Abertura e diálogo entre as cortes constitucionais: identificação dos padrões de utilização pelo STF do argumento de direito comparado. *Revista do Direito Público*, Londrina, v. 12, n. 3, p. 85-114, dez. 2017.

[61] BASTOS JUNIOR, Luiz Magno Pintos; BUNN, Alini. *Abertura e diálogo entre as cortes constitucionais*, 2017, p. 112.

related to fundamental rights on the STF website[62] over the last ten years (from 2013 to 2023), a total of 274 relevant judgments were discovered. These judgments demonstrate how the STF has drawn upon foreign precedents in their decision-making processes regarding matters concerning fundamental rights.

The research confirmed the trends observed by Bastos Junior and Bunn: an increase in the use of foreign material in recent years; more references to legislative sources than precedents, possibly due to the Brazilian tradition in the civil law system; no differentiation between international law and foreign law; and more frequent citations of courts from developed countries, such as Germany and the United States.

For instance, regarding the right to an ecologically balanced environment, a right inherently marked by transnational implications[63] and recognized as a fundamental right by the Brazilian Constitution,[64] the STF stated that the Executive Branch has the constitutional duty to operate and allocate the resources from the Climate Fund annually for the purpose of mitigating climate change, and their budgetary withholding is prohibited due to the constitutional duty of protecting the environment, the rights and international commitments assumed by Brazil, as well as the constitutional principle of separation of powers.[65]

In his opinion, Justice Luís Roberto Barroso asserted that treaties on environmental law constitute a species of the genus human rights treaties and enjoy, for this reason, a supranational status.

Additionally, the realm of environmental protection highlights the growing necessity to move away from an isolated approach, perceiving the environment not as a collection of disconnected elements but rather through a new paradigm that views the world as a unified, interconnected, and interdependent entity.[66]

According to Ingo Sarlet and Tiago Fensterseifer, with this decision, the Supreme Court engaged in a dialogue with recent precedents of the Inter-American Court of Human Rights on environmental issues, such as Advisory Opinion No. 23/2017 on Environment and Human Rights and the *case Indigenous Communities*

62 Available at: https://jurisprudencia.stf.jus.br/pages/search (Accessed: 29 jul. 2023).

63 GARCIA, Marcos Leite. Direitos fundamentais e transnacionalidade: um estudo preliminar. *In*: CRUZ, Paulo Márcio; STELZER, Joana (organizadores). *Direito e transnacionalidade*. Curitiba: Juruá, 2009. p. 175.

64 Constitution of the Federative Republic of Brazil. Article 225: "All have the right to an ecologically balanced environment, which is an asset of common use and essential to a healthy quality of life, and both the Government and the community shall have the duty to defend and preserve it for present and future generations".

65 ADPF n. 708 (2022), citing the Canadian Supreme Court, German Federal Constitutional Court, and Inter-American Court of Human Rights.

66 FERRER, Gabriel Real; DANTAS, Marcelo Buzaglo; BONISSONI, Natammy Luana de Aguiar. O processo de internacionalização da proteção ambiental e dos direitos humanos. *In*: CRUZ, Paulo Márcio; DANTAS, Marcelo Buzaglo (org.). *Direito e transnacionalização.* Itajaí: UNIVALI, 2013. p. 169.

Members of the Association Lhaka Honhat (Nuestra Tierra) v. Argentina (2020). Moreover, the STF attributed to international treaties on environmental issues the same special status and normative hierarchy that international treaties on human rights in general have, that is, a "supralegal" hierarchy.[67]

The opinion also cited a precedent from the German Federal Constitutional Court, in the case *Neubauer and Others v. Germany* (2021). In this decision, the German Court concluded that the measures taken by the government in response to the climate crisis were insufficient and needed improvement. The Court recognized that the Federal Act on Climate Protection of 2019 violated the state duties of environmental and climate protection because it unequally distributed the burden of restrictions on fundamental rights, especially the right to freedom, between present and future generations.

In the case *Orleir Messias Cameli and others v. Ministério Público Federal and Fundação Nacional do Índio* (2020),[68] the STF ruled that civil claims based on environmental damage are not bound by the statute of limitations. In reaching this conclusion, Justice Alexandre de Moraes referred to a judgment of the Inter-American Court of Human Rights in the case of the *Indigenous People Kichwa of Sarayaku*. This case involved Ecuador permitting oil extraction in the territory of the indigenous community without their prior authorization. Drawing from the decision of the Inter-American Court, Justice Alexandre de Moraes emphasized that while the indigenous community is directly affected, the environmental impact extends to the entire society. Furthermore, he highlighted that the consequences of such environmental damage may only become evident years later.

Nevertheless, considering that this is a topic of great importance to humanity, involving interdependence and solidarity among peoples, it is evident that the use of foreign sources by the STF remains somewhat limited. There is indeed significant room for increasing transjudicial dialogue in matters related to fundamental rights, aiming to enhance decision-making. However, for such a dialogue to be meaningful, it must encompass diverse perspectives from different realities, allowing for a high-quality exchange of ideas. In the context of transjudicialism, this implies embracing and acknowledging the contributions of multiple nations.

[67] SARLET, Ingo Wolfgang; FENSTERSEIFER, Tiago. Guardian of the Amazon On the Brazilian Supreme Court's "Climate Fund Case" Decision. *Verfassungsblog on Matters Constitutional.* Avalilable at: https://verfassungsblog.de/guardian-of-the-amazon/ (Accessed: 20 jul. 2023).

[68] RE n. 654833 (theme 999).

Conclusion

The legitimacy of a judicial decision depends, to a large extent, on the judges' ability to present compelling reasons for their rulings through persuasive arguments that go beyond mere personal preferences.

In formulating a persuasive argument, judges can draw valuable insights from the experiences of others in addressing similar issues, even when those experiences originate from different contexts or nations than their own.[69] Furthermore, based on the premise that a qualified decision cannot be insensitive to its effects, the judge's comprehensive understanding of its consequences, extending beyond the legal sphere and inspired by experiences from other nations, enriches the decision-making process.

From this perspective, the influence of foreign legal sources on the interpretation and application of national legal sources, even if non-constitutive and non-binding in domestic law, underscores the value of acquainting judges with the content of foreign law and the reasoning employed by foreign courts regarding the matter at hand.

In the context of fundamental rights, this understanding becomes even more apparent as it encompasses matters concerning the quality of human life, shared challenges among states, and frequently involving transnational aspects. Additionally, constitutional courts play a significant role in inspiring local judges to explore alternative conceptions of the content and interpretation of these rights.

Transjudicialism, in this scenario, may not necessarily lead to uniformity in global practices or perfect unanimity among courts, but it can aid decision-makers in effectively expressing the values of the communities they serve. By fostering a pluralistic and context-sensitive comprehension, transjudicial dialogue requires judges to consider a wide range of factors related to the establishment, interpretation, and enforcement of fundamental rights.

References

ANGELO, Mary Jane. Embracing Uncertainty, Complexity, and Change: An Eco-pragmatic Reinvention of a First-Generation Environmental Law. *Ecology Law Quarterly*, vol. 33, p. 105, 2006.

ARAUJO, Luis Claudio Martins de. *Constitucionalismo transfronteiriço, direitos humanos e direitos fundamentais*: a consistência argumentativa da jurisdição de garantias nos diálogos transnacionais. Rio de Janeiro: Lumen Juris, 2017.

[69] KROTOSZYNSKI JR. Ronald J. "I'd Like to Teach the World to Sing (In Perfect Harmony)". 2006.

BASTOS JUNIOR, Luiz Magno Pintos; BUNN, Alini. Abertura e diálogo entre as cortes constitucionais: identificação dos padrões de utilização pelo STF do argumento de direito comparado. *Revista do Direito Público*, Londrina, v. 12, n. 3, p. 85-114, dez. 2017.

BERMAN, Paul Schiff. The globalization of jurisdiction. *University of Pennsylvania Law Review*, vol. 151, p. 311, December 2002.

BRASIL. Supremo Tribunal Federal (STF). *Case law compilation*: Covid-19. 2 ed. Brasília: STF, Secretaria de Altos Estudos, Pesquisas e Gestão da Informação, 2021. Available at: http://www.stf.jus.br/arquivo/cms/publicacaoPublicacaoTematica/anexo/case_law_compilation_covid19_2.pdf (Accessed: 29 jul. 2023).

CRUZ, Paulo Márcio; BODNAR, Zenildo. A transnacionalidade e a emergência do Estado e do direito transnacional. *In:* CRUZ, Paulo Márcio; STELZER, Joana (organizadores). *Direito e transnacionalidade*. Curitiba: Juruá, 2009.

FERRER, Gabriel Real; DANTAS, Marcelo Buzaglo; BONISSONI, Natammy Luana de Aguiar. O processo de internacionalização da proteção ambiental e dos direitos humanos. *In*: CRUZ, Paulo Márcio; DANTAS, Marcelo Buzaglo (organizadores). *Direito e transnacionalização*. Itajaí: UNIVALI, 2013.

GARCIA, Marcos Leite. Direitos fundamentais e transnacionalidade: um estudo preliminar. *In*: CRUZ, Paulo Márcio; STELZER, Joana (organizadores). *Direito e transnacionalidade*. Curitiba: Juruá, 2009.

GERONTAS, Angelos S. Deterritorialization in Administrative Law: exploring transnational administrative decisions. *Columbia Journal of European Law*, vol. 19, p. 423, summer, 2013.

GIARO, Tomasz. Transnational law and historical precedents. *Studia Iuridica*, Warsaw, v. 38, p. 73, 2016.

GLENSY, Rex D. The use of international law in U.S. constitutional adjudication. *Emory International Law Review*, vol. 25, p. 197, 2011.

HACK, Jonathan S. Looking to peers: transjudicial citations behavior among state supreme courts. *North Dakota Law Review*, vol. 95, p. 291, 2020.

HELFER, Laurence R.; SLAUGHTER, Anne-Marie. Toward a Theory of Effective Supranational Adjudication. *Yale Law Journal*, vol. 107, p. 273, November 1997.

HOLMES JR., Oliver Wendell. *The Common Law*. Available at: https://www.gutenberg.org/files/2449/2449-h/2449-h.htm (Accessed: 29 Jul. 2023).

KOH, Harold Hongju. Why transnational law matters. *Penn State International Law Review*, v. 24, n. 4, 2006.

KROTOSZYNSKI JR. Ronald J. "I'd Like to Teach the World to Sing (In Perfect Harmony)": International Judicial Dialogue and the Muses - Reflections on the Perils and the Promise of International Judicial Dialogue. *Michigan Law Review*, vol. 104, p. 1321, May 2006.

LUPI, André Lipp Pinto Basto. A jurisprudência brasileira e a transnacionalidade: uma análise do transjudicialismo. *In*: CRUZ, Paulo Márcio; STELZER, Joana. *Direito e transnacionalidade*. Curitiba: Juruá, 2009.

MICHAELS, Ralf. State Law as a Transnational Legal Order. *UC Irvine Journal of International, Transnational, and Comparative Law*, vol. 1, p. 141, fall, 2016.

MOREMEN, Philip M. National court decisions as state practice: a transnational judicial dialogue. *North Carolina Journal of International Law & Commercial Regulation,* vol. 32, p. 259, winter, 2006.

SARLET, Ingo Wolfgang; FENSTERSEIFER, Tiago. Guardian of the Amazon On the Brazilian Supreme Court's "Climate Fund Case" Decision. *Verfassungsblog on Matters Constitutional*. Available at: https://verfassungsblog.de/guardian-of-the-amazon/ (Accessed: 20 Jul. 2023).

SLAUGHTER, Anne-Marie. A Typology of Transjudicial Communication. *University of Richmond Law Review*, vol. 29, p. 99, winter, 1994.

SLAUGHTER, Anne-Marie. 40th Anniversary Perspective: Judicial Globalization. *Virginia Journal of International Law Association,* vol. 40, p. 1103, summer, 2000.

STAFFEN, Marcio Ricardo. *Interfaces do Direito Global*. 2. ed. Rio de Janeiro: Lumen Juris, 2018.

STELZER, Joana. O fenômeno da transnacionalização da dimensão jurídica. *In*: CRUZ, Paulo Márcio; STELZER, Joana (org.). *Direito e transnacionalidade*. Curitiba: Juruá, 2009.

WATERS, Melissa A. Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law. *Georgetown Law Journal*, vol. 93, p. 487, January 2005.

WATERS, Melissa A. The Supreme Court, constitutional courts and the role of international law in constitutional jurisprudence: Justice Scalia on the use of foreign law in constitutional interpretation: unidirectional monologue or co-constitutive dialogue? *Tulsa Journal of Comparative & International Law*, vol. 12, p. 149, 2004.

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