



Due process in the Neoconstitutionalism

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Introduction

The due process as we have done reference previously has been modified in its initial conception and now must be completed with the content that the Human Rights projected toward the domestic laws of each State.

Given to the last reform introduced in our national Constitution, Argentina gave constitutional rank to many human rights treaties, with which it is a imminent duty to bring its legislation into line with the new parameters required by the international community.

Currently reaffirms the idea of the Right of Access to Justice, with which the due process must be adjusted to this Law and achieve a truly effective protection.

That is why, in the following points we will discuss how the process was modified from this new perspective which we believe is the new paradigm of conflict resolution that is the paradigm Neoconstitucional.

We will develop as well as the basis for the judicial activism within that paradigm, and that is in the deepest part of the Neoconstitutionalism where lie the tools necessary to enable the judges to provide a process in accordance with the principles derived from the Human Rights.

We completed these opening words to enter as well to the matter development.

1. Due Process in the Neoconstitutionalism

There are many international treaties that were incorporated into our national Constitution after the reform of 1994, to the fact that even they have been given the same hierarchy of our Magna Carta.

After the victory meant that constitutionalism is opened a new stage of the (Neo) Constitutionalism that finds its beginnings in the crimes at Nuremberg. There began to analyze what the law does not always coincide with Right.

This is true also that "begins to take seriously the idea that there is an international community that recognizes fundamental rights belonging to all human beings by the fact of being such, and that cannot be violated with rules contrary sanctioned in the domestic law of each State because there are a widespread awareness about the protection of these rights and in the case of violation, the State incurs a responsibility in front of this international community"¹.

For its part, the recognition of fundamental rights in these international instruments, and the corresponding commitment on the part of States to comply with the same leads us to ask ourselves:

What is the use of having declared the fundamental rights that are inherent in every human being if we do not find efficient mechanisms in order to do so?

We affirm without place to doubts that the Neoconstitutionalism is a practical theory applied to the procedural law.

The basis of this claim lies in the fact that this paradigm is a new theory of law because the object of study are fundamental Rights, looking for identify them, place them in the Treaties and constitutions, analyze data and determine its scope.

On the other hand, and there the adjective of practice, is an active theory, critical of the current mechanisms but not only that, but that goes beyond fueling solutions that ensure an royal tutelage of the rights enshrined.

One of the fundamental rights is the pinnacle of effective judicial protection, hence the intimate connection of the Neoconstitutionalism with the procedural law.

To talk about due process there is to know first what are the rights and principles that this guardianship currently involves.

Now when we talk about due process we refer to an effective remedy, which "is realized through the implementation of various principles that are born in the international community, among those that we find the simplicity, immediacy, reasonable time, justice transparent and understandable"².

The humanitarian approach in the resolution of conflicts has become extremely necessary to counteract the social inequalities that brought the Legalitario State of Law. That is to say today, we wonder: "It is important to declare a process rights? Yes. But more importantly it is a process that would ensure to do so"³. That is why this paradigm comes to give specific answers of how lay their hands on new instruments, and that the judges are the main basis for their activism nothing more nor less than in the actual content of Human Rights.

In this way becomes completely necessary to legislate not only rights but their attendant guarantees.

Human rights? Yes. And their mechanisms? Too.

¹ REDONDO, MB. *El rol del Poder Judicial en la era de la Globalización*, Rosario, Juris, Cita: DJuris87, publicado el 25/03/2014.

² REDONDO, MB. *El consumidor y los avatares del beneficio de litigar sin gastos, ¿Se efectiviza el Derecho de Acceso a la Justicia?*, Rosario, Juris, Cita: DJuris135, publicado el 30/10/2014.

³ REDONDO, MB. *Tutela Preventiva en el paradigma del Juez Humanista*, Disertación en "II Encuentro de la Doctrina Procesal", "Preparatorias del IV Encuentro Anual de la FAEP y Preparatorias del XXVIII Congreso Nacional de Derecho Procesal", Corrientes, 26 y 27 de marzo del 2015.

2. Neoconstitutionalism as the basis of judicial activism

As stated previously it is important not only a process that enshrines rights, but that is even better one that the impacts may.

Is that the right to effective judicial protection arising from rights and principles that must be respected by all the States to be able to say that we are really in front of a due process.

As a result of the failure of these principles derived from the Right of Access to Justice, is presented to the Interamerican Court of Human Rights the case "Furlan c/ Argentine state", in where is condemned the passivity with which the judiciary handling the issue by attributing responsibility for damage caused to give a response in an unreasonable time.

It was also argued that if the procedural remedies had been the previous victim had enjoyed a better quality of life of the being.

The omission or inactivity on the part of the powers of the State address this situation of overwhelming gravity can lead to what is known as International Responsibility of the State.

And that is why considering that of the deadlines for the duration of a process can derive similar damage, the response of justice must be expedited as determined by the American Convention on Human Rights.

It is here as the activism and effective judicial protection are its main basis and relationship to the Human Rights Treaties as determined by the American Convention in its article 8 paragraph 1.

We must also make it clear that the right of access to justice implies not only the opening of the court but that goes beyond: "With the establishment of this track is not enough, it also requires that the judicial process is simple, quick and effective, the same as independent and impartial, so that the existence merely formal does not reach to supply all its aspects"⁴.

As we stated previously, this effective judicial protection are projected certain principles that enable you to develop in practice a process according to the requirements of international origin aimed at protecting human rights.

⁴ REDONDO, MB. *Justicia Comunitaria de las Pequeñas Causas de Santa Fe, en el marco del Derecho de Acceso a la Justicia*, Rosario, Juris, 2014, p. 33.

3. Activism and legal principles

To understand this role of the Judge we must take into account what is happening in the comparative law.

Countries such as Spain are now bringing their laws to the new requirements arising in the international instruments, and in turn the strong role that exercised by the Constitutional Court of that State has made it clear in numerous faults that all judges, regardless of the range that deal with are the first and primary custodians of Constitutional Rights.

At the same time Spain in its Constitution has legislated specifically in its article 24 the right to an effective remedy, which reads as follows:

"Article 24: judicial protection of the rights:

1. All persons have the right to obtain the effective protection of the courts in the exercise of their rights and legitimate interests, without that, in no case be defenseless.
2. Likewise, all have the right to the ordinary judge predetermined by the law, to the defense and legal counsel, to be informed of the charges brought against them, to a public trial without undue delay and with all the guarantees, to use the relevant evidence for his defense, not to testify against themselves, to not plead guilty and to the presumption of innocence.

The law shall regulate the cases in which, for reasons of parentage or professional secrecy, it shall not be obliged to testify about allegedly criminal acts".

The Constitutional Court has said that in order to achieve solutions in a reasonable time is imminent that all judges control when a case comes to their dock if it has violated a fundamental right and not wait for the Constitutional Court ruling.

In this way is seen as the incorporation of human rights committed to all the judges for their judgments are respectful of the content that projected these rights.

In the case of Spain the judicial action was accompanied by a positive legislative activity. It is in its judgments that by drawing on the same international instruments, the judges can achieve protect effectively the rights referred to in them.

In this way the judicial activism and the due process understood in the terms of the Neoconstitutionalism are founded first in our national Constitution, supported by the requirements imposed in the international treaties to which the process is really a due process.

We can no longer think the Judge as a machine to resolve conflict, the reality exceeds many times on legislative activity and is where for the sake of protecting fundamental rights, the Judges must give answers in the here and now.

4. Conclusion

By way of conclusion we can say that it has been in evidence the intimate relationship that has the new paradigm Neoconstitucional, procedural law and judicial activism.

This activism finds its basis in the Constitution in article 75, paragraph 23 in commissioning the legislation and promotion of positive action measures that to enable the effective enjoyment of the rights enshrined in the same and in international treaties. The reality has exceeded the current legislation where the lack of necessary mechanisms is evident, and the legislative omission present.

From there, the passage of the State of legalistic law to the constitutional rule of law approach focuses on judicial activity by moving in this way the legislator when the remedies could arrive late or when not inadequate.

It is the duty of judges to comply with the requirements of international origin to safeguard any international responsibility that cannot be generated.

It is as well to talk about due process today in the paradigm Neoconstitucional implies not only resolve in response to the legislation, but also to all the rights and principles enshrined in the International Covenants that Argentina has ratified.

With which they will be the judges responsible for weighing the difficulties existing legislative and search for the necessary mechanisms to a judgment in accordance with a royal tutelage of rights.

It is as well as the Neoconstitutionalism as a practical theory reflects and based this activism in its deepest roots that are the fundamental principles and rights that all we have for the simple fact of being human beings.

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