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Conventionality control in Argentine case law

O controle de convencionalidade na jurisprudência argentina

Lucía Bellocchio [*]
The George Washington University (Estados Unidos)
luciabellocchio@gmail.com

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Resumo

O artigo realiza uma abordagem do conceito de controle de convencionalidade, seus elementos e características, conforme foi definido pela Corte Interamericana de Direitos Humanos e cortes supremas latino-americanas, para depois analisar, em particular, o caso da jurisprudência da Corte Suprema de Justiça da Nação Argentina sobre o assunto.

Palavras-chave: controle de convencionalidade; direitos humanos; Corte Interamericana de Direitos Humanos; Corte Suprema de Justiça da Nação Argentina; jurisprudência argentina.

Abstract

The article addresses the concept of conventionality control, its elements and characteristics, as defined by the Inter-American Court of Human Rights and Latin American supreme courts, and then analyze, in particular, the case of the jurisprudence of the Supreme Court of Justice of the Argentine Nation on the subject.

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[*] MBA em Business and Big Data pela George Washington University (Washington D.C., Estados Unidos). Advogada pela Universidad de Buenos Aires – UBA (Buenos Aires, Argentina). E-mail: <luciabellocchio@gmail.com>.

Keywords: *conventionality control; human rights; Inter-American Court of Human Rights; Supreme Court of Justice of the Argentine Nation; Argentine case law.*

Contents

1. Introduction

With the constitutional reform of 1994, the International Law of Human Rights enters the Argentine legal system, granting rights in favor of persons and also establishing additional limits to the rights provided for in the 1853 Constitution.

In this reform, the constitutional hierarchy of certain international treaties was recognized, including the American Convention on Human Rights, which implied the constitutional recognition of the Inter-American Court of Human Rights' jurisdiction and, consequently, the binding nature of judgements condemning the State in the face of human rights violations as established in article 68.1 of the treaty. Accordingly, over time the case law of the Argentine Supreme Court of Justice has incorporated this commitment into the judgments of the Inter-American Court of Human Rights (IACHR).

Surprisingly, the Supreme Court changed its case law in 2007 in Fontevecchia and D'Amico vs. Argentina (hereinafter, the "Fontevecchia" case). Thus, it is evident that, although more than 20 years have passed since the 1994 constitutional reform, there are still differences of interpretation on the relationship between constitutionalism and international human rights law.

In this article, we will approach the concept of conventionality control, its elements and characteristics, as defined by the Inter-American Court and Supreme Courts, and then analyze, in particular, the Argentine case law.

2. Conventionality control

Conventionality control is understood as a check of compatibility made by judges in relation to the norms of domestic law with the American Convention on Human Rights (hereinafter ACHR), taking into consideration

the clauses of the Convention and the IACHR's interpretations in its decisions and advisory opinions.

Conventionality control seeks to establish whether the norm being revised is in accordance with the provisions of the American Convention on Human Rights, that is, whether it is "conventional" or not. In case it is considered "unconventional", the effect is nullity and, therefore, it cannot be applied, even if it is a norm of the National Constitution, as happened in its well-known decision "The Last Temptation of Christ"[1].

In this way, conventionality control has a dual role. First, it requires that judges disregard domestic rules (including constitutional ones) that are contrary to the Convention and the Court's interpretation of it. Also, it forces them to interpret the law.

We can then say that a norm being unconventional, it produces a specific judicial duty not to apply it. Apparently, the "conventionality control" is similar in its effects to the result of restricted constitutionality control to the concrete case, with inter-party effects.

We can highlight three important features of diffuse conventionality control:

Inter-American judges. The judges of the States Parties become the guardians of the conventionality of the laws by testing the compatibility of domestic law norms with the American Convention, reason why one may call them Inter-American judges.

Diffuse character. This control is entrusted to all judges, regardless of subject, hierarchy or whether they are ordinary or constitutional judges.

Ex officio. It is a control performed by the judges regardless of the party's request. Therefore, the obligation of judges is to harmonize internal rules with the one in the Convention, through a conventional interpretation of the national norm.

2.1 History of the term

As for the history of the term, we see that "conventionality control" was mentioned for the first time in the opinion of Judge Sergio García Ramírez, in the *Myrna Mack Chang* case[2], in 2003, but the Court had already

[1] INTER-AMERICAN COURT OF HUMAN RIGHTS. *The Last Temptation of Christ (Olmedo Bustos et al.) vs. Chile*. Sentence on February 5th, 2001.

[2] INTER-AMERICAN COURT OF HUMAN RIGHTS. *Myrna Mack Chang vs. Guatemala*. Sentence on November 25th, 2003.

been comparing two models (constitutional control and conventionality control), highlighting the primacy of supranational norm. After *Myrna Mack Chang* case the Court began to expressly use the term "conventionality control".

Likewise, when analyzing the evolution of the case law, we see that conventionality control was introduced in the Inter-American Court's case law in *Almonacid Arellan*[3] in 2006. In this first approach, the basic rules were set for identifying the procedure of compatibility between domestic law and international human rights law.

Subsequently, in the Dismissed Congressional Employees (*Trabajadores Cesados del Congreso*) case[4] in 2006, the Court assigns to *judicial authorities* the task of guaranteeing the effectiveness of international treaties, establishing an unrestricted link between constitutionality control and conventionality control.

A few years later, the Court expanded the concept of conventionality control in the *Boyce Case*[5], in which it established that the objective of conventionality control is to determine whether the norm being processed is "conventional" or not. If the norm is contrary to the convention, that is, "unconventional", the judicial duty is to not apply it.

In *Cabrera García and Montiel Flores*[6] (2010) the Court established that the obligation to exercise conventionality control belongs to *judges and bodies related to the administration of justice at all levels*.

In *Gelman*[7] (2011), there is an imposition of control beyond the judges, since that "when a State is a party to an international treaty such as the American Convention, *all its organs*, including its judges, are subject to it".

Later, in 2012, in the case *Diario Militar*,[8] the conventionality control parameter *is extended to other human rights treaties* and since 2014, after

[3] INTER-AMERICAN COURT OF HUMAN RIGHTS. *Case Almonacid Arellano et al. vs. Chile*. Sentence on September 26th, 2006.
[4] INTER-AMERICAN COURT OF HUMAN RIGHTS. *Dismissed Congressional Employees Case (Aguado Alfaro et al.) vs. Peru*. Sentence on November 24th, 2006.
[5] INTER-AMERICAN COURT OF HUMAN RIGHTS. *Boyce et al. vs. Barbados*. Sentence on November 20th, 2007.
[6] INTER-AMERICAN COURT OF HUMAN RIGHTS. *Case Cabrera García and Montiel Flores vs. Mexico*. Sentence on November 26th, 2010.
[7] INTER-AMERICAN COURT OF HUMAN RIGHTS. *Gelman vs. Uruguay*. Sentence on February 24th, 2011.
[8] INTER-AMERICAN COURT OF HUMAN RIGHTS. *Case Gudiel Álvarez ("Diario Militar") vs. Guatemala*. Sentence on November 20th, 2012.

the Advisory Opinion OC-21/14 [9], this extension includes the advisory opinions of the Court.

Briefly, since the *Almonacid Arellano* case,[10] the Inter-American Court has been specifying the content and scope of the concept of conventionality control, therefore constructing a complex concept that includes the following characteristics:

i) It consists of verifying the compatibility of norms and other internal practices with the American Convention on Human Rights, the case law of the Inter-American Court and the other Inter-American treaties to which the State is a party;

ii) It is an obligation that corresponds to all public authorities (not only judges) within the scope of their competences;

iii) In order to determine compatibility with the ACHR, not only the treaty must be considered, but also the case law of the Inter-American Court and other treaties to which the State is a party;

iv) It is a control that must be carried out *ex officio* by all public authorities;

v) Its execution may involve the suppression of norms contrary to the ACHR or their interpretation in accordance with the ACHR, depending on the powers of each public authority.

3. Argentine case law

The Argentine Supreme Court of Justice (hereinafter SCJ), as well as its lower courts, has carried out this conventionality control even prior to the country's last constitutional reform. Therefore, in general there has been considerable response to International Human Rights Law in the case law of Argentina. Also, the case law of the Inter-American Court of Human Rights has had a direct and significant influence on the transformation of domestic law through well-known SCJ sentences, such as "*Kimel*"[11], which led to the reform of the Penal Code in 2010, in the chapter dealing with slander;

[9] INTER-AMERICAN COURT OF HUMAN RIGHTS. Advisory Opinion *CO-21/14 of August 19th, 2014*, requested by Argentina, Brazil, Paraguay, and Uruguay. Rights and guarantees of children in the context of migration and/or in need of international protection.

[10] INTER-AMERICAN COURT OF HUMAN RIGHTS. *Case Almonacid Arellano et al. vs. Chile*. Sentence on September 26th, 2006.

[11] INTER-AMERICAN COURT OF HUMAN RIGHTS. *Case Kimel vs. Argentina*. Sentence on May 2nd, 2008.

"*Badaro*" [12] (leading case on pensions), which mentions the case "*Cinco Pensionistas vs. Peru"*; as well as "*Mazzeo*"[13] (regarding acquittals), which mentions "*Almonacid Arellano*" and "*Dismissed Congressional Employees vs. Peru*", among others.

In 1992, in "Ekmekdjian c/Sofovich",[14] the SCJ determined "that ACHR interpretation must also be guided by the case law of the Inter-American Court". In other words, the Court recognizes the supralegal hierarchy of treaties in relation to national law.

With the Constitutional Reform of 1994, the National Constitution includes international human rights treaties as treaties within the same hierarchal level as the Constitution, establishing what Bidart Campos and other jurists call a "*constitutional bloc*" (BIDART CAMPOS, 2000. p. 371).

In 1998, in "*Acosta"*[15], the SCJ reviews the process of recognizing the binding nature of the Inter-American Court of Human Rights' judgments, arguing that its case law cannot affect *res judicata* at the domestic level.

In 2004, a new composition of the Court began a period of recognition of international case law with "*Esposito*"[16], stating that the case law of the Inter-American Court is an essential guide for interpreting all the duties and obligations arising from the ACHR.

In 2007, in "*Mazzeo*"[17], the SCJ confirmed the *Almonacid* doctrine in that courts must exercise a kind of conventionality control, considering not only the ACHR, but also the interpretation that the Inter-American Court has carried out.

In 2012, in "*Rodríguez Pereyra*"[18], the SCJ states that "*the courts of the countries that have ratified the ACHR are obliged to exercise an ex officio conventionality control"*, invalidating the internal rules that oppose the treaty.

[12] ARGENTINA. Corte Suprema de Justicia de la Nación (Supreme Court of Justice). Badaro, Adolfo Valentín c/ ANSeS s/ reajustes varios. Sentence on November 26th, 2007. B.675.XLI.

[13] ARGENTINA. Corte Suprema de Justicia de la Nación (Supreme Court of Justice). Mazzeo, Julio Lilo y otros s/ rec. de casación e inconstitucionalidad. Sentence on July 13th, 2007. M2333XLII.

[14] ARGENTINA. Corte Suprema de Justicia de la Nación (Supreme Court of Justice). Ekmekdjian, Miguel Ángel c. Sofovich, Gerardo y otros. Fallos 315: 1492.

[15] ARGENTINA. Corte Suprema de Justicia de la Nación (Supreme Court of Justice). Acosta, Claudia Beatriz y otros s/ hábeas corpus. Sentence on December 22nd, 1998. T. 321, P. 0.

[16] ARGENTINA. Corte Suprema de Justicia de la Nación (Supreme Court of Justice). Espósito, Miguel Ángel s/ incidente de prescripción de la acción penal promovido por su defensa. Sentence on December 23rd, 2004.

[17] ARGENTINA. Corte Suprema de Justicia de la Nación (Supreme Court of Justice). *Mazzeo, Julio Lilo y otros s/ rec. de casación e inconstitucionalidad*. Sentence on July 13th, 2007.

[18] ARGENTINA. Corte Suprema de Justicia de la Nación (Supreme Court of Justice). *Rodriguez Pereyra, Jorge Luis otra el Ejército Argentino s/ daños y perjuicios.* Sentence on November 27th, 2012.

Notably, in this analysis of the evolution of the case law, in 2017, the Supreme Court decides the *Fontevecchia* case, a significantly different judgement with regards to the reception of inter-American case law. Given its importance, it is worth analyzing the arguments used by the Court to reach this decision and its repercussions.

4. The Fontevecchia case

In the "*Fontevecchia*" case,[19] the majority of the Supreme Court of Justice changed its position regarding the mandatory nature of the Inter-American Court's sentences condemning the Argentine State. Jurists such as Abramovich consider that the decision can also have consequences for the constitutional value of human rights treaties, which generated manifestations from the most prominent Argentine jurists in the matter.[20]

The precedents for this controversial decision are "Esposito"[21] and "Derecho"[22]. In "Esposito", which dealt with the execution of the judgment of the Inter-American Court in the "Bulacio" case, [23] the Court had established that the margin of decision of the Argentine courts was limited by the country's integration into a system of protection of International Human Rights Law, which obliged it to comply with the decisions of the Inter-American Court, which were binding, and that this obligation existed despite disagreement with the decision and even if there was a contradiction with the constitutional order.

In the "Derecho" case, which corresponded to the execution of the "Bueno Alves" sentence[24], the Court also upheld this interpretation, and on these grounds did not execute a sentence that had declared the statute of limitation expired in a case investigating a police officer for torture.

The case law established by the Court in these cases was built, on the one hand, on the recognition that inter-American judgments were

[19] ARGENTINA. Corte Suprema de Justicia de la Nación (Supreme Court of Justice). *Ministerio de Relaciones Exteriores y Culto s/ informe sentencia dictada en el caso "Fontevecchia y D'Amico vs. Argentina*" por la Corte Interamericana de Derechos Humanos.
[20] See ABRAMOVICH, 2017; ALEGRE, 2017; FURFARO, 2017.
[21] ARGENTINA. Corte Suprema de Justicia de la Nación (Supreme Court of Justice). *Espósito, Miguel Ángel s/ incidente de prescripción de la acción penal promovido por su defensa.* Sentence on December 23rd, 2004.
[22] ARGENTINA. Corte Suprema de Justicia de la Nación (Supreme Court of Justice). *Derecho, René Jesús s/ incidente de prescripción de la acción penal* –causa n° 24.079.
[23] INTER-AMERICAN COURT OF HUMAN RIGHTS. *Bulacio vs. Argentina*. Sentence on September 18th, 2003.
[24] INTER-AMERICAN COURT OF HUMAN RIGHTS. *Case Bueno Alves vs. Argentina*. Sentence on May 11th, 2007.

mandatory for the Argentine State (Article 68.1, ACHR)[25], reason why the Argentine Court, in principle, had to subordinate the content of its decisions to those of the Inter-American Court.

On the other hand, the Court had declared in the Derecho case that, in order to strictly comply with the command of the Inter-American Court, it would be necessary to open space for the annulment of the sentence, to have the decision of the appeal annulled and to return the case to the lower court, so that the guidelines established in the inter-American decision were complied with.

In the decision of February 17th, a new composition of the Court said that the judgments of the Inter-American Court are "in principle" mandatory.

Next, we will analyze the court's arguments that led to this conclusion.

4.1. Arguments in the Fontevecchia case

Due to the importance of the matter, it is worth deepening in the analysis of this decision. The court's reasoning will be divided in the following premises:

The judgments of the Inter-American Court are mandatory by article 68.1 ACHR only if they are issued within the framework of its revisional competences;

The Inter-American Court's understanding of whether or not something is within its review competences is not authoritative;

The Inter-American System of Human Rights (hereinafter IASHR) is subsidiary, and the Inter-American Court is not a fourth instance that can revoke judgments of supreme courts;

Article 63 of the ACHR does not provide for the possibility for the Inter-American Court of Human Rights to revoke judgments of supreme courts as revisional competence;

In "Fontevecchia", the Inter-American Court delivered this sentence outside the scope of its review competences when determining that a sentence of the SCJ be annulled;

The principles of *res judicata* and the supremacy of the SCJ form part of article 27 of the Argentine Constitution and the "Fontevecchia" case violates these principles;

[25] ACHR, Article 68. 1. The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties.

Thus, the SCJ concluded that the operative part of the "Fontevecchia" judgment, which orders the annulment of the SCJ judgment, is not mandatory.

We will see that the problem lies in premises 2, 3, 4, 5 and 6 and, consequently, in the conclusion. However, premise 1 is the only one that, in my understanding, is correct.

Premise 1 is correct. Every court is grounded on a rule of competence that defines the scope of its jurisdiction and the possibility of establishing reparations. The problem lies in the assumptions in which interpreters describe the scope of revisional competence. It is then necessary to discuss whether the Court's decision on the scope of the revisional competence should be obeyed or not (premise 2). This discussion has an additional complexity when an international court such as the Inter-American Court lacks the compulsory means to execute its decision.

In this part of the matter premise 2 becomes the main obstacle: are the decisions of the Inter-American Court of Human Rights over its own revisional competence authoritative? The SCJ considers not. According to the Argentine Court, the judgment that the Inter-American Court makes on its own revisional competence is not mandatory for the national courts.

As a criticism, the argument would not be valid given that, from the perspective of international law, the obligation to comply with the decisions of international courts derives from a basic principle of law on the international responsibility of the State, which requires States to comply with international obligations (*pacta sunt servanda*).

Furthermore, Argentina is a party to the Vienna Convention on the Law of Treaties, which, in Article 27[26], establishes that no State may refer to the provisions of its domestic law to justify non-compliance with a treaty.

The judgment of the Inter-American Court of Human Rights on the scope of its powers must prevail in the Argentine legal system, since the Argentine Constitution instituted a clause establishing that the ACHR has a constitutional hierarchy.

Moreover, the IASHR does not provide for the possibility for domestic bodies to review the inter-American court's review powers when they are the ones convicted of violating a human right.

[26] Vienna Convention, Article 27. *Internal Law and Observance of Treaties. A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.*

In other words, the Argentine Court is granting itself the power to decide whether the judgments of the Inter-American Court of Human Rights fall within its revisional competence, something that is not provided for in the constitutional order and that contradicts the literality of constitutional norms such as articles 67 and 68.1 of the ACHR (which enjoys a constitutional hierarchy) that recognize the authority of the decisions of the Inter-American Court regarding its competences. Therefore, premise 2 used by the Supreme Court is wrong. It is highly questionable that the SCJ is the final arbitrator who will decide whether the judgments of the Inter-American Court of Human Rights fall within its review jurisdiction, even when it determines that the violation of human rights had the SCJ as the protagonist.

The criticism to premise 3 relates to the fact that the subsidiarity of the IASHR is not a relevant argument to support that the judgment of the Inter-American Court on its own revisional competence is not binding and, thus, it is possible to disobey its decisions. It is not necessary to say much more on this matter.

Premises 4 and 5 have an intimate relationship that allows them to be analyzed together. In the same way that the Inter-American Court of Human Rights can order the Legislative Branch to modify a law and the Executive Branch to review an administrative act, it can also order the Constitutional Courts to review or annul a judgment that is in accordance with the domestic legal system of the State, if there is a violation of a right of the Convention. This happened, for example, in the cases *Tristán Donoso vs. Panama* and *Herrera Ulloa vs. Costa Rica*.

Regarding premise 6, the alleged problem of *res judicata* has no basis in the face of cases that reach international systems for the protection of human rights. When a State accepts the supervision of an international mechanism such as the Inter-American Court of Human Rights, the scope of the *res judicata* doctrine, as stated by Mónica Pinto (1997. p. 119 et seq.), has a different interpretation. In these cases, we have to assume that the *res judicata* has 2 levels:

i) The first takes place at a domestic level, when there is no possibility of filing any internal appeal against a sentence.

ii) The second level manifests when a sentence is challenged at an international level. In this case, the decision will become final when it is confirmed by the international mechanisms or when the procedure is concluded at the international level.

5. Brief closing remarks

The fight between the Argentine Supreme Court of Justice and the Inter-American Court of Human Rights over who has the last word is clearly a dilemma for judicial supremacy.

In the analysis of the "Fontevecchia" sentence, it is important to say that one of the SCJ judges, Dr. Rosenkrantz, who joined the Court in 2016, already held a view on the reception of International Human Rights Law by the Argentine Constitution as a loan of International Law that the 1994 constitution took, "with a merely expressive or aspirational purpose" (ROSENKRANTZ, 2003).[27]

The problem of the final word on the interpretation of the ACHR integrated in the Argentine Constitution admits three readings:

i) One of them understands that the SCJ has the last word, considering the principles of Argentine Public Law.

ii) Another approach, based on article 68.1 of the ACHR, understands that the Inter-American Court has the final word when a case is submitted to its jurisdiction for an alleged violation of the Convention by the Argentine State.

iii) A third approach calls for the need for greater dialogue between both courts to seek more legitimate solutions in cases, which I consider the best approach.

In my opinion, the example set by the SCJ for the rest of the Argentine judicial system and lower courts in interpreting that the judgments of the Inter-American Court of Human Rights are not mandatory is not a good construction.

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[27] According to FURFARO, 2017. p. 67.

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