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Enhancing Respect for Human Rights in the Americas

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Abstract

As an exploratory research, our paper aims to describe the role played by the Inter-American Court of human rights in standardising the interpretation of conventional human rights in the Americas. This is basic research. We use qualitative methods to understand the different ways applied by the Inter American Court to enforce not only its judgements, but the content of regional human rights instruments as well as its interpretation, over that of national tribunals. Results have implications for victims of human rights violations in the continent, since every national congress has a duty to apply and enact new legislation in order to comply with the Court's standards. Knowing the content of the Inter American Court's judgements is a first necessary step to apply its standards to every domestic decision.

Keywords: Human Rights, International Protection, Control of Conventionality, Constitutional Identities

1. Introduction

Three main ideas guide the reasoning behind this article. First, we will refer to the historical evolution of the protection of human rights in the three Americas. This is a vital element to understand the way in which in the Americas, human rights were first enacted at the regional level and -very slowly- they were incorporated by member States. This means that at present, each State needs to accommodate its judiciary to the conventional interpretation made by regional bodies. Second, we will comment on the complaint procedure filed by a victim of human rights violations in the regional system. The regional procedure for the protection of human rights, although it is highly symbolic, should not forget that it replaces State violations. Due to the principle of subsidiarity and complementarity, States are always the first authority obliged to protect the rights of victims of human rights violations. Third and last, we will briefly explain the development of the doctrine of conventionality control as elaborated by the Inter American Court of Human Rights. The doctrine of conventionality control is to some extent the heart of the system, since it privileges the interpretation made by the Inter American Court of Human Rights (IACtHR hereafter) over that of national courts.

2. Method

This is explanatory research using secondary data available in books, journals, court decisions, regulations as well as digital data collected through literature study. The approach used is a qualitative approach because this research can explain the relationship and influence of independent variables on attachment variables, both together and individually in the hypothesis.

3. Results

3.1. Human Rights in the Americas: from top to bottom

The Organization of American States (OAS hereafter) was born in 1948. It is a regional intergovernmental organisation which includes 35 Member States: the independent nations of North, Central and South America. The OAS has also granted Permanent Observer status to 57 States and to the European Union. The Organization's Charter is a multilateral treaty adopted in Bogotá, Colombia in 1948. It makes few express references to human rights. Article 3(l) of the OAS Charter establishes that the "*American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed, or sex.*" Article 17 OAS Charter provides that "*each State has the right to develop its cultural, political, and economic life freely and naturally.*"

Eleven years later -1959-, the Inter-American Commission on Human Rights (IAComm hereafter) started its work. This Commission is one of the organs through which the OAS accomplishes its objectives. (OAS Charter, Article 53). According to Article 106, the principal function of the IAComm is to promote the observance and protection of human rights, and to serve as a consultative organ of the OAS in this regard.

In 1969, the American Convention on Human Rights (ACHR hereafter) was adopted. It is a binding treaty that enshrines the fundamental rights of the inhabitants of the 3 Americas. The ACHR entered into force in 1978 and has the Inter-American Court of Human Rights (IACourt hereafter) as its enforcement body. At present, the American convention is a "living document" -as the IACourt itself has considered in its case law-, with strong statistics about the activity of both the IAComm and the IACourt.

The Inter-American system comprises a complex structure of adherence:

- a. First, we find a minimum level of adherence, in the form of compliance with the American Declaration. This is required of all OAS Member States and it is monitored by the IAComm.
- b. Second, there is another level that applies to States that have ratified the ACHR, but have not accepted the contentious jurisdiction of the IACourt. Those States must comply with their conventional obligations but they are not subject to rulings of the IACourt in contentious cases.
- c. Third, we have the highest level of adherence, which is required of those States that have ratified the ACHR and have also accepted the contentious jurisdiction of the IACourt. They must comply with their conventional obligations and are subject to binding Court judgments.

The Inter-American System is composed of two principal entities: the Inter-American Commission of Human Rights and Inter-American Court of Human Rights. Both bodies can decide individual complaints concerning alleged human rights violations and may issue emergency protective measures when an individual or a group is at immediate risk of irreparable harm.

3.2 Regional proceedings: first the States, and if they don't, the Commission and the Court.

The Interamerican System of protection of human rights resembles the old procedure of the European system within the framework of the Council of Europe. First, the complaint is filed before the Commission and if an agreement with the State is not reached, the case goes to the Court for a binding decision.

Any individual, group of individuals, and non-governmental organisations recognized in any OAS Member State may submit complaints -called petitions-, concerning alleged violations of the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, and other regional human rights treaties. Petitions are filed before the IAComm, who generally receives about two thousand petitions a year. The primary function of the IAComm is to promote the observance and defence of human rights, and to serve as an advisory body to the OAS in such matters. The IAComm has competencies with political ramifications, among which special emphasis should be given to the occurrence of visits in loco and the preparation of reports about the human rights situations in member States. It also undertakes functions with a quasi-judicial dimension. It is *via* this latter form of competence that it is able to receive complaints from individuals or organisations relating to human rights violations, examine these petitions, and elaborate a report on the cases with the assumption that they firstly have complied with admissibility requirements. The first step of the proceedings is the admissibility analysis of the petition which is performed by the IAComm. This control consists of finding out if the internal remedies in the denounced State have been exhausted, if the 6-month period has expired since the violation ended, and if the allegedly violated rights are part of the OAS Charter or the ACHR. Once the petition is admitted, the IAComm acts as a mediator between the victim and the State, and tries to reach a friendly settlement of the matter. The State may reply and propose evidence as well as the victim. When this stage is over, according to Article 49 ACHR, if a friendly settlement is reached, the IAComm prepares a report, describing the facts and the terms of the agreement.

For those cases that do not result in a friendly settlement, the contentious procedure follows. In order to bring a case to the Court, the State concerned must have declared its acceptance of the IACourt's contentious jurisdiction. This declaration can be made *ipso facto*, upon ratification of the Convention, at a later time, or on an *ad hoc* basis regarding one specific case. At this stage, the IAComm acts as a party against the State. The IAComm "*shall immediately give notice of that decision to the State, the petitioner and the victim.*"

The IAComm's application shall contain, among other information, (i) the claims on the merits, (ii) reparations and costs sought, (iii) the parties in the case, (iv) the facts alleged, (v) information regarding the procedure before the Commission, (vi) the report on the applicable law and (vii) related conclusions. Furthermore, the IAComm must cooperate with the IACourt requests for additional evidence, documents and information, including the summoning of witnesses, experts and so forth. The IAComm may also request that the IACourt hold hearings or issue provisional measures. The IAComm is authorised to participate in subsequent phases of the procedure, such as reparations, interpretation of judgments and the follow-up to Court decisions.

The Inter-American Court is the only judicial organ of the IA Human Rights System. It is "*an autonomous judicial institution*", entrusted with "*the application and interpretation of the American Convention.*". The IACourt's mandate is more limited than that of the IAComm because the Court may only decide cases brought against the OAS member States that have specifically accepted the Court's contentious jurisdiction. Those cases must first be analysed by the IAComm. Only States parties and the IAComm may refer contentious cases to the Court (Article 61.1 of the ACHR). It exercises two types of jurisdiction: contentious and advisory. Contentious jurisdiction is defined as the power to adjudicate cases concerning alleged ACHR violations by States parties. In the exercise of its advisory jurisdiction, the IACourt has the power to interpret the ACHR and "*other treaties concerning the protection of human rights in the American states.*" Advisory opinions may be requested by States parties to the ACHR, other OAS member States, and also OAS organs, -including the IAComm-, within their spheres of competence.

The law applied by the IACourt consists of the ACHR, its protocols and thematic conventions, all of which make up the so-called inter-American *corpus iuris*. From 1985 onwards thematic conventions deal with various issues such as the prohibition of torture, second-generation rights, the abolition of the death penalty, violence against women, enforced disappearances and the rights of persons with disabilities.

As a final step of the judicial process, the IACourt adjudicates the case, based on the evidence presented by each party. It issues a judgement that is final and binding for the concerned State. Over the Court's first several decades in operation, the Court adjudicated a significant range of rights protected by the ACHR and its *corpus*

iuris, from extrajudicial execution and forced disappearance cases, to labour, land, and freedom of expression rights.

3.3 The Control of Conventionality doctrine

The Inter-American Court of Human Rights has forged a path, aimed at imposing the doctrine of conventionality control in the inter-American system. Faced with this, States have reacted in multiple ways. The answer runs between the requirement of uniformity, on one side, and legal pluralism, within the framework of a human rights system, on the other side. Uniformity corresponds to an unique inter-American jurisprudence and interpretation: it is the repressive nature of the doctrine. Legal pluralism tries to accommodate the need for the homogeneous exercise of rights, with the duty to respect constitutional identities.

Conventionality control is a doctrine that refers to the obligation of every State party to apply within its domestic jurisdiction, the ACHR and its interpretation as developed by the IA Court. At present, the control of conventionality is considered as one of the most relevant issues in the case law of the IACourt, and enjoys wide reception. The doctrine has already been mentioned in 6 advisory opinions and in numerous judgments. As an example only between 2018 and 2021, the court has mentioned the conventionality control in 23 contentious cases.

As regards legal sources, the doctrine has been built on the basis of Article 1.1 ACHR that imposes on States the obligation to respect human rights; Article 2 by which States assume an obligation of actively guarantee human rights -the duty to enact domestic legislation-; Article 29 about the interpretation criteria of the ACHR and sets out a duty to interpret rights and guarantees as broadly as possible, limiting restrictive interpretations; and Article 69 which obliges States to comply with judgments of the IACtHR in cases to which they are party.

Entering into the description of the doctrine through the analysis of the case law, the first relevant case was *Almonacid Arellano* (2006), when the phrase "control of conventionality" was first used. The *Almonacid Arellano* case was about a decree that granted amnesty for serious human rights violations that took place in Chile in the 1970s. This made it impossible to investigate the extrajudicial execution of *Almonacid Arellano*. In its decision, the IACourt noted that every domestic judge shall compare his internal law to the ACHR and, from this comparison, it comes out a duty not to apply domestic law in any case in which it is in opposition to conventional law.

Two years later, in the *Heliodoro Portugal* case, the Court linked the duty to perform a conventionality control with Article 2 of the ACHR that refers to the State duty to adapt its domestic law through positive measures. Later on, in the *Radilla Pacheco* case, the Court said that judges are obliged not only "not to apply" internal rules which are in opposition to the ACHR, but also to apply their domestic law in accordance with the conventional interpretation and the principles established by the same Court. In this case, it was the first time that the Court used the conventionality control as a guarantee of non-repetition in order to avoid future violations of human rights, which motivated the reform of the Constitution of Mexico.

In *Cabrera García and Montiel Flores v. Mexico* (2010), the IACourt added a new aspect to the doctrine, by expanding the range of authorities required to carry out the conventionality control so that the convention has a useful effect. The Court said that the obligation to monitor the conventionality of domestic law extends to every State agency involved in the administration of justice.

From the case law evolution described above, certain elements that we consider central to a theory of conventionality control in the Inter-American system, follows:

- a. every democratic State, which is part of the Inter-American system, has a duty to respect the values and principles of international human rights law;
- b. the control of conventionality is a hermeneutic exercise. Its main purpose is to give real effect to conventionally enshrined rights, while seeking to harmonise domestic legislation in order to make real the universality of human rights;

- c. the obligation assumed by a State party to an international human rights treaty and which has domestically incorporated such obligations, obliges all its officials and agents to apply the IACourt's interpretation, within their competence;
- d. any domestic law contrary to the convention does not generate effects, as it is incompatible with the international obligations assumed by the State; this avoids the generation of international responsibility;
- e. when interpreting conventional rights, national judges and other officials who apply the law within their competences, must be familiar with and apply the case law of the IACourt. This preventive control seeks to avoid the procedure before the Inter-American system, and constitutes the application of the principle of complementarity. However, it is up to each State to decide which method of conventionality control shall better fit within its domestic legislation;
- f. as a guiding principle of interpretation, priority should be given to the rule and interpretation that provides the broadest protection to the human person. This means that the convention must take precedence whenever the conventional protection is diminished by domestic law (useful effect of treaties), and domestic law should prevail whenever it expands the minimum floor of conventional rights (counter-limits doctrine). The exceptional situation that seeks to preserve the constitutional identity of each State (national margin of appreciation doctrine) remains unaffected.

4. Conclusion

The Inter-American Court has been exercising conventionality control since its first ruling. This is one of the ways it uses to deepen the influence and effectiveness of the inter-American system of protection of human rights. The progressive case law affirmation of the control of conventionality in favour of human rights, systematised an activity that affects sovereignty. We find this control implicit in any theory of universal aspiration, such as the international law of human rights. As Judge Silva Meza states:

"It is in the Constitutions where the roadmap for this internationalisation is dictated and it is the domestic jurisdictional bodies that are responsible for designing the contours of this normative change through our judgments" (Silva Meza, 2014).

The success of the doctrine of conventionality control, says Hesse, depends on the sensible, prudent and legitimate implementation that the Inter-American Court makes of it, taking into account local particularities (Hesse, 2011). Which, we add, must be done in light of the useful effect of the treaties, and according to the exercise that each State performs of its national margin of appreciation, and the way in which the doctrine of counter-limits is applied.

Finally, after describing the evolution of the control of conventionality doctrine in the Americas, we may conclude that modern democratic constitutions shall facilitate the articulation between the international, regional and domestic systems. They should be integrated into a new one that ensures respect for democratic governance, the rule of law and the protection of fundamental rights.

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