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Índice

Presentación

El Instituto Interamericano de Derechos Humanos (IIDH) presenta el número 64 de su Revista IIDH, publicada ininterrumpidamente desde 1985. En esta edición monográfica, se aportan juicios críticos y opiniones cimentadas en el estudio riguroso y la práctica del control de convencionalidad, desde la realidad de su aplicación en los contextos nacionales y sus distintos enfoques, lo que enriquece aún más el debate acerca de un concepto y una práctica de por sí complejos.

Esta edición recoge los artículos académicos de Letícia Soares Peixoto Aleixo y Sophia Pires Bastos (Brasil); André de Carvalho Ramos (Brasil); Leandro Caletti (Brasil); Juan Arnulfo Vicente Gudiel y Leslie Argentina Véliz Arriaga (Guatemala); Karlos A. Castilla Juárez (México); Lautaro Pittier (Argentina); Laura Alicia Camarillo Govea y Elizabeth Nataly Rosas Rábago (México); Víctor Hugo Rodas Balderrama (Bolivia); Pamela Juliana Aguirre Castro (Ecuador); Luis Miguel Gutiérrez Ramírez (Colombia); Viviana Benavides Hernández y Marvin Carvajal Pérez (Costa Rica); y Andrés Rousset Siri (Argentina).

A través de la contribución de dichos autores, la Revista incluye disertaciones en tres aspectos: discusiones generales sobre el control de convencionalidad, su aplicación en algún país específico y su aplicación con relación a un derecho en particular.

Con relación a la primera categoría, se examina el control difuso de convencionalidad respecto de la elaboración de normativa interna como una práctica que contribuye a optimizar

la observancia de los derechos humanos, al armonizar el orden jurídico nacional con los tratados internacionales ratificados por su país.

Por otra parte, se intenta llenar algunos de los vacíos conceptuales del control de convencionalidad, intentando precisar cuál es la operación jurídica a cargo de autoridades públicas con distintas funciones –ejecutivas, legislativas y judiciales–, y dando una mirada al presente y futuro del control de convencionalidad interamericano.

Además, al analizar el control de convencionalidad como consecuencia de las decisiones judiciales de la Corte Interamericana de Derechos, se identifican casos concretos para determinar los elementos centrales de los que ha sido objeto el control de convencionalidad en el desarrollo de su jurisprudencia. En sentido complementario, también se hace un recuento de los parámetros establecidos en la jurisprudencia interamericana y se analizan desde la teoría del sistema jurídico.

Por otra parte, se plantea la interrogante acerca de la relación que existe entre el control de constitucionalidad y el control de convencionalidad a la luz de la experiencia francesa. Más allá de lo anterior, se analiza el diálogo entre las jurisdicciones nacionales e internacionales como un mecanismo de encuentro que evitará conflictos judiciales en la interpretación de los derechos humanos, un campo en el que el control dual puede ser visto como el modo de superar tales antagonismos.

En la segunda categoría, la Revista nos presenta una serie de reflexiones sobre el control de convencionalidad en Guatemala, dando a conocer cómo es percibida esta obligación por parte de operadores y operadoras de justicia del Organismo Judicial guatemalteco, cómo la entienden, cuáles son sus criterios o si aún

no la conocen, lo que se expone respecto de la responsabilidad internacional que esto trae consigo.

Asimismo, respecto de Argentina, se describe la evolución y particularidades de esta obligación en la jurisprudencia de la Corte IDH y la Corte Suprema Argentina, así como su alcance y el rol de los jueces nacionales al respecto.

Finalmente, se analiza el control de convencionalidad y sus desafíos en Ecuador, analizando su proceso de perfeccionamiento de manera pormenorizada y lo que implica su aplicación para este país.

Con relación a la tercera categoría, un primer artículo aborda una problemática de mucha actualidad, la difusión no autorizada de imágenes íntimas de acuerdo con esta obligación internacional. Por otra parte, otra disertación ejemplifica el control de convencionalidad en el proceso de cumplimiento de obligaciones internacionales, utilizando como referencia la práctica de la fertilización *in vitro*. Finalmente, se analiza la posibilidad de que el juez nacional aplique el control de convencionalidad respecto de normas procesales interamericanas, aportando al cumplimiento efectivo de las sentencias de la Corte Interamericana de Derechos Humanos al interior de los Estados Parte.

Aprovecho esta presentación para agradecer en nombre del IIDH a las autoras y autores que han hecho llegar al IIDH sus contribuciones académicas para esta edición, así como a todas las personas que respondieron a nuestro llamado haciendo llegar sus valiosos artículos. Asimismo, agradecemos a la Cooperación Noruega que hace posible la producción y distribución de esta revista, y a quienes dan lectura y consultan la Revista.

Esperamos que los aportes de nuestra Revista 64 sean útiles para la investigación al versar sobre una temática que, además de ser controvertida, es trascendental en el proceso de configuración de condiciones para la plena vigencia de los derechos humanos consagrados en la Convención Americana en los países de la región.

José Thompson J.
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Control of Conventionality and the struggle to achieve a definitive interpretation of human rights: the Brazilian experience

*André de Carvalho Ramos**

Introduction: general theme of the article

The existence of a human rights catalogue no longer represents a novelty in national legal systems or in the international legal order. The consolidation of democratic States around the globe as well as the internationalization of human rights have led to its consecration both in national constitutions and in international standards (in treaties and in international custom).

The normative consecration of human rights, however, has not been enough to eliminate contradictions in human rights issues. If recognition of human rights in constitutions and treaties has undermined the traditional conflict between national law and

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international human rights law, the encounter between different interpretations of the scope and meaning of each right remains.

The *conflict of different interpretations* is currently the main controversy with respect to the relationship between national and international human rights' orders: even in democratic States, human rights are sometimes interpreted one way by national Superior Courts or Constitutional Courts and another by international human rights bodies.

Traditional solutions to resolve this conflict of interpretation - such as the use of the most favourable interpretation to the individual and the principle of the primacy of the most favourable rule to the individual – result only in an opaque and disguised prevalence of rights, insufficient to deal with the complexities of a globalized society characterized by the clash of rights.

Due to the insufficiency of traditional solutions to avoid the conflict of interpretation, this article aims to analyse *control of conventionality* as a mechanism to deal with the encounter between *international* and *local interpretations* of human rights. To avoid a *judicial war* between Constitutional Courts and international human rights bodies regarding the interpretation of rights, a *dialogue of courts* is essential. Moreover, in the common situation of an absence of dialogue between national and international courts, the *theory of dual control* may be viewed as the way of overcoming the antagonism between domestic courts and international bodies in interpreting human rights.

1. Interpreting human rights: general aspects

Interpreting the law is an intellectual activity aimed at solving legal problems through the following steps: 1) choosing

the relevant rules; 2) assigning meaning to these texts; and 3) resolving a legal issue in light of the chosen parameters.[1]

Human rights, though, have particularities and specificities. Human rights rules contain broad and indeterminate concepts and, therefore, are drafted with open terms (for example, the terms intimacy, due process of law and reasonable length of proceedings). Furthermore, human rights norms have an intrinsic risk of collision (among the most known cases are freedom of information vs. privacy and property vs. the right to a healthy and balanced environment). Consequently, interpretation is essential to define and clarify human rights.

To know, abstractly, the human rights set out in Constitutions and treaties is to understand them only partially. It is solely with the interpretation given by national and international courts that the final delimitation of the scope and meaning of each right occurs. Hence, the interpretation of human rights is, above all, a mechanism to achieve these rights.

Interpretation requires a reasoned procedure with rational and grounded arguments that can be consistently repeated in similar situations, which generates legal predictability as well as avoids arbitrariness by the interpreter. That is, legal arguments ought to justify legal decisions relating to human rights in a *coherent* and *consistent* manner. Interpreting human rights is not, then, simply performing a deductive operation to extract an uncontroversial conclusion from a legal premise and the facts of the case: the human rights framework (based on principles) creates many possible outcomes when dealing with contrasting moral values. In a scenario where there is no right or wrong, a conclusion must

1 PEREIRA, Jane Reis Gonçalves. *Interpretação constitucional e direitos fundamentais*. Rio de Janeiro: Renovar, 2006, p. 37.

meet a reservation of consistency (*Vorbehalt der Bewährung*) in a broad sense.[2]

The reservation of consistency in a broad sense, when applied to human rights, requires that the interpretation be: 1) transparent and sincere, avoiding the adoption of a prior decision and the use of the rhetoric of human dignity as a mere form of justification for a decision that was already taken; 2) comprehensive and plural, not excluding any empirical information and knowledge from other sciences as well as encouraging the participation of third parties, such as *amici curiae*; 3) consistent in a strict sense, showing that the practical results of the decision are compatible with the appreciated empirical data and the original legal norm; 4) coherent, in that it can be applied to other similar issues, avoiding the contradictions that can lead to legal uncertainty.

Human rights are not statically dogmatic, which imposes an abstract and unique legal truth. On the contrary, they are the result of a process of reconciliation of interests developed to promote human dignity in a particular historical and social context. Human rights, insofar as they are experienced in society, are interpreted and reinterpreted by all those who live in society, because they regulate both vertical relations between individuals and the State and horizontal relations between individuals themselves.[3]

In order to enable judicial appreciation of various aspects of a right under scrutiny, the interpretation of human rights

2 The term "reservation of consistency" *(Vorbehalt der Bewährung)* was spread in Brazil by Häberle. HÄBERLE, Peter. *Hermenêutica constitucional: a sociedade aberta dos intérpretes da Constituição: contribuição para a interpretação pluralista e "procedimental" da Constituição*. Trad. Gilmar Ferreira Mendes. Porto Alegre: Sergio Antonio Fabris Editor, 1997.

3 Ibid., pp. 15-31.

demands broad access and the participation of individuals. Moreover, human rights interpretation inevitably requires a broad verification of the facts as well as of the effects of legal provisions in daily life. Therefore, the adoption of an open model of interpretation contributes to a more complete judicial decision-making.

2. Traditional solutions regarding the conflict of interpreting human rights: maximum effectiveness, the interpretation *pro homine* and the principle of the primacy of the most favourable rule to the individual

The traditional solutions for the conflict of interpretation regarding human rights are: (i) the criterion of maximum effectiveness, (ii) the interpretation *pro homine*; and (iii) the principle of the primacy of the most favourable rule to the individual.

The criterion of maximum effectiveness requires that the interpretation of a particular right lead to a greater advantage to its holder as regards a lesser sacrifice to holders of the other rights in collision. As all human rights norms are binding, maximum effectiveness of human rights leads to a *full* applicability of these rights. This criterion also implies a *direct* applicability of human rights codified by Constitutions and treaties, which can be directly and specifically applied. Finally, the criterion of maximum effectiveness leads to an *immediate* applicability of human rights, providing that these rights be applied concretely and instantaneously, without any lapse of time.

In turn, the interpretation *pro homine* alternative involves the interpretation of human rights guided by the one that is the most

favourable to the individual. Roughly speaking, the interpretation *pro homine* implies the recognition of the superiority of human rights standards and, consequently, the adoption of the interpretation that is the most favourable or beneficial for the individual.

However, in the 21st century, it is not feasible to disregard the existence of rights of different holders in collision and, therefore, the following questions arise regarding the *pro homine* interpretation of human rights: how is it possible to adopt the interpretation *pro homine* in cases involving rights in collision? In cases of colliding rights, who should be privileged and who should have their right constricted?

The principle of the primacy of the most favourable norm to the individual follows the same path. For this option of interpretation, in the case of conflicting rules (whether national or international) the most beneficial to the individual should be applied. By this criterion, the source of the norm (national or international) does not interfere with the result: the benefit to the individual. In sum, the principle of the primacy of the most favourable norm to the individual also aims at a *pro homine* interpretation of human rights.

The foregoing shows that it is clear that the three traditional alternatives for interpreting human rights are insufficient in the contemporary scenario of the expansion of human rights and, as a result, of the colliding rights of different holders. Being impossible to choose the most favourable rule to the individual in cases involving different rights, the criterion of the primacy of the most favourable rule does not offer a plausible solution as the interpreter has to seek support of the traditional methods for resolving conflicts of rights. In such cases of colliding rights, even the application of the standard that most promotes the

human dignity is unsatisfactory[4] since, due to the uncertainty of its content, it does not overcome the interpretative conflict between the national and international orders.

All things considered, it is crucial to approach a mechanism that truly assesses the conflict of interpretation: the control of conventionality of national norms and decisions.

3. *Control of conventionality* and its forms: international control and national control

Control of conventionality is the analysis of the compatibility of national actions (acts or omissions) in light of international standards (treaties, international custom, general principles of law, unilateral acts and binding resolutions of international organizations).

It is sufficient to state that *control of conventionality* is the contemporary mechanism to assess the differences between the national and international interpretation of human rights. The *control of conventionality* evaluates a local standard or decision, which has already contemplated the rights in collision, according to international interpretive parameters.

Control of conventionality does not offer a way around the differences of interpretation or disparities when addressing human rights in collision. On the contrary, with the *control of conventionality* it is probable that in a case of collision between privacy and information, for example, a decision of a

4 SARLET, Ingo W. Direitos fundamentais, reforma do Judiciário e tratados internacionais de direitos humanos. In: CLEVE, Clèmerson Merlin; SARLET, Ingo W.; PAGLIARINI, Alexandre Coutinho (orgs). *Direitos Humanos e Democracia*. Rio de Janeiro: Forense, 2007, p. 331-360.

constitutional court, in which the right to privacy had prevailed, is overruled by a decision of an international human rights body that determines the primacy of the right to information, or *vice versa*.

Control of conventionality control has two sub-categories: 1) *international control of conventionality*, also known as authentic or definitive conventionality control; and 2) *national control of conventionality*, often called provisional or preliminary conventionality control.

On the one hand, *international control of conventionality* (generally exercised by international bodies composed of independent judges) is prescribed in treaties to prevent the undesirable figure of the *nemo judex in causa sua* (*i.e*, the States being, at the same time, parties and judges). With respect to human rights, *international control of conventionality* is exercised, among other bodies, by international human rights courts (such as the European Court of Human Rights, the Inter-American Court of Human Rights and the African Court on Human and Peoples' Rights) and the UN committees.

On the other hand, *national control of conventionality* is exercised when national courts perform the test of compatibility of national norms and international standards. *National control of conventionality* has its origins in the 1975 French Constitutional Council decision regarding the voluntary interruption of pregnancy law. Due to the supra-legal status of treaties (Article 55 of the French Constitution), the Constitutional Council declined its competence to examine the compatibility of the laws with international conventions, stating that this was the jurisdiction of the Court of Cassation and the Council of State.

In Brazil, *national control of conventionality* concerning human rights is the analysis of the compatibility between

Brazilian laws (and normative acts) and international treaties on human rights. Brazilian courts exercise this control when deciding individual cases in which an internal normative act might be violating a treaty.

However, *international and national controls of conventionality* do not always coincide. For example, a domestic court may state that a certain Brazilian norm is consistent with a human rights treaty and then an international human rights body, examining the same situation, may come to the conclusion that the law indeed violates the international human rights standard established in the treaty.[5]

In the Brazilian experience, four major differences between international and national conventionality controls are identified: (i) the comparison parameter; (ii) the object of the control of conventionality; (iii) the treaty-parameter hierarchy; and (iv) the depth and the scope of the interpretation of the parametric norm

(i) The comparison parameter and (ii) the object of the control of conventionality

In *international control of conventionality* the parameter of compatibility is the international standard (usually a treaty) and the object of the control is always a national (internal) standard, regardless of its hierarchy. As an example, *international control of conventionality* exercised by international courts can even analyse the compatibility of a constitutional norm (from the original constitutional power) with an international human rights treaty. On the other hand, in *national control of conventionality*, judges and national courts do not examine the compatibility of

5 In this sense, as the international *control of conventionality* is the true result of the authentic interpretive action, it is preferable to use the term control of conventionality to refer to the conventionality control exercised by international bodies.

a constitutional norm with a human rights treaty. In this sense, the Brazilian Supreme Court, in a 1996 precedent, held that "*The Supreme Court has no jurisdiction to review the validity of the standards set by the original constitutional power.*"[6] Thus, the object of *national control of conventionality* is restricted and limited.

(iii) The treaty-parameter hierarchy

In *national control of conventionality*, the treaty-parameter hierarchy depends on the status of treaties established by national law. In Brazil, the current view of the Supreme Court is that human rights treaties, depending on the procedure of its implementation, can have either a supra-legal status or a constitutional status. On the other hand, in *international control of conventionality* human rights treaties are always the superior parametric norm, which means that the entire national legal system, including the norms from the original constitutional power, must be in compatibility with the international standards.

(iv) The depth and the scope of the interpretation of the parametric norm;

The interpretation of the compatibility or incompatibility of a norm with the treaty-parameter can, sometimes, not be the same in *international and national controls of conventionality*. *National control of conventionality*, if not properly exercised, can lead to a breach of treaty provisions (in the interpretation of international bodies). This is because domestic courts often rely upon standards established in treaties without even mentioning the interpretation given to such provisions by the international bodies, which can easily lead to differing conclusions on the interpretation of the same right. The idea that national courts

6 ADI 815 Rel. Min. Moreira Alves, judgment on 03/28/1996, DJ 5th of October 1996.

could interpret international treaties differently than international bodies is absurd and devalues the principle of the primacy of human rights treaties, which, in turn, is implicit in the recognition of a *control of conventionality*.

In this sense, in the Inter-American Court of Human Rights (I/A Court) case *Gomes Lund v. Brazil* (*Guerrilha do Araguaia* case), the *ad hoc* Brazilian judge Roberto Caldas, in his separate concurring opinion, pointed out that: "*if supreme courts or national constitutional tribunals are incumbent upon constitutional control and of having the last word within the internal legal frame of the States, the control of conventionality is incumbent upon the Inter-American Court of Human Rights as well as having the last word on issues regarding human rights. This is what results from formally recognizing the jurisdictional competence of the Court, by a State, which is what has been done by Brazil*".[7] To sum up, the present *control of conventionality* is international and, therefore, is also known as *genuine* or *definitive control of conventionality*.

It is worth noting that *national control of conventionality* is also relevant. Nevertheless, in order to guarantee that human rights treaties are effectively respected, the national control must follow the interpretation given by the *international control of conventionality*.

Therefore, there is an interaction between *international* and *national controls of conventionality* that allows a dialogue between international and domestic law (particularly with regard to the interpretation provided by the international bodies whose jurisdiction Brazil has recognized).

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7 Separate concurring opinion of ad hoc judge Roberto Caldas, Inter-American Court of Human Rights, *Gomes Lund e outros v. Brazil*, judgement of 24th of November 2010.

4. The Dialogue of Courts and its parameters

The ratification of international human rights treaties is, likewise, important to the recognition of international supervision over compliance with international human rights standards. To date (2016), the Brazilian situation regarding the recognition of international human rights bodies' jurisdiction is the following:

1) In 1998, Brazil recognized the compulsory jurisdiction of the I/A Court of Human Rights (organ of the American Convention on Human Rights);

2) In 2002, Brazil adhered to the Optional Protocol to the Convention on the Elimination of all Forms of Discrimination against Women, recognizing the Committee's competence to receive petitions from victims of violations of the rights protected by the Convention;[8]

3) In 2002, Brazil also recognized the competence of the Committee for the Elimination of all Racial Discrimination to receive and examine complaints of violation of the rights protected by the International Convention on the Elimination of All Forms of Racial Discrimination;[9]

4) In 2006, Brazil recognized the competence of the Committee against Torture to receive and consider petitions from victims. In 2007, Brazil adopted the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment recognizing also the jurisdiction, for preventive purposes, of the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment;[10]

8 Decree n. 4.316, of 30th of June 2002.

9 Decree n. 4.738, of 12 of June 2003.

10 Decree n. 6.085, of 19th of April 2007.

5) In 2009, Brazil recognized the competence of the Committee on the Rights of Persons with Disabilities to receive petitions from victims of human rights violations;[11]

6) In 2009, Brazil adhered to the Optional Protocol to the International Covenant on Civil and Political Rights and the competence of the Human Rights Committee to receive petitions from victims of violations of the rights protected in the Covenant.[12]

As a consequence of accepting the international interpretation of human rights, Brazil took an important step towards the realization of the universalism.[13] At the national level, judges and courts regularly interpret human rights treaties. If the national interpretation of human rights treaties is incompatible with the international interpretation, the international human rights bodies can be triggered to exercise *control of conventionality*.

It is indispensable to reconcile the results of *national control of conventionality* with *international control of conventionality*. It would be unreasonable, for example, that, examining an article of the American Convention on Human Rights, the Brazilian Supreme Court choses an interpretation that is not accepted by the I/A Court. Such conflicting interpretation would, moreover, allow for the possibility of Brazilian international responsibility.

To prevent that national misinterpretations of treaties lead to human rights violations a *dialogue of Courts* must be carried out. In order not to be a mere rhetorical argument, a *dialogue of*

11 Decree n. 6.949, of 25th of August 2009.

12 Legislative Decreee n. 311, of 17 of June 2009.

13 For more about the international interpretation of treaties, in opposition to the national interpretation of treaties (that creates the anomalous figure of "national treaties") see CARVALHO RAMOS, André de. *Processo internacional de direitos humanos*. 5. ed., São Paulo: Saraiva, 2016.

Courts must consider the following aspects in the analysis of a national judicial decision:

1) The international human rights provisions of a binding nature to Brazil;

2) the international precedents against Brazil on the matter and the consequences of these international decisions;

3) the previous *case law* on the matter in the international human rights bodies able to deliver binding decisions to Brazil;

4) the weight given to human rights provisions and to international case law.

It is to be noted that, due to the independence of judges and to the democratic rule of law, it is not possible to force Brazilian judges to engage in a *dialogue of Courts*. Thus, if the dialogue is absent or insufficient, the *theory of dual control* must be applied as the mechanism to resolve conflicts of interpretation.

5. The judicial war in Brazil and the theory of dual control

5.1 Conflicting national and international decisions: the Brazilian Supreme Court vs. the Inter-American Court of Human Rights

The *Guerrilha do Araguaia case* was paradigmatic to the *theory of dual control* in Brazil, since it was the first time that a matter (the application of the amnesty law enacted during the Brazilian dictatorship) was analysed both by the Brazilian Supreme Court and by the I/A Court of Human Rights.

In October 2008, the Brazilian Bar Association filed a Non-Compliance Action of Fundamental Principle No. 153 (also known as the allegation of disobedience of fundamental precept No. 153) before the Brazilian Supreme Court, wherein it was requested that Article 1 of Law 6.683/79 (Brazilian amnesty law) was interpreted in light of the 1988 Brazilian Constitution and that the amnesty granted by the law would not extend to common crimes carried out by agents of the dictatorship.

In turn, in March 2009, the Inter-American Commission on Human Rights sent to the I/A Court of Human Rights the *Gomes Lund et al. v. Brazil* case, claiming (among other arguments) that the extensive case law of the I/A Court was contrary to amnesty laws and favourable to the duty to investigate, prosecute and punish those responsible for human rights violations.

The Brazilian Supreme Court, on April 28, 2010, ruled on the Non-Compliance Action of the Fundamental Principle No. 153. The Court decided that "*the Amnesty Law represented, at the time, a necessary step in the reconciliation and redemocratization process in the country*" and, therefore, that legally protecting officials involved in human rights violations during the dictatorial regime from criminal prosecution was in conformity with the Brazilian Constitution.

It is noteworthy that the Supreme Court decision is a clear example of a *national control of conventionality* that ignores the international interpretation of a treaty (the American Convention on Human Rights) exercised by an international court (the I/A Court of Human Rights).

Only a few months after the Brazilian Supreme Court decision, on November 24, 2010, the I/A Court unanimously condemned Brazil in the *Gomes Lund* case. The Court declared that the provisions of the Brazilian amnesty law that prevented

the investigation and punishment of human rights violations were incompatible with the American Convention on Human Rights and, thus, lacked legal effect. Furthermore, the Court ordered that Brazil conduct an effective criminal investigation and punish those responsible for human rights violations during the military dictatorship.

After the Brazilian Supreme Court decision on the Non-Compliance Action of Fundamental Principle No. 153 and the I/A Court decision at the *Gomes Lund et al. v. Brazil* case, one question remains: How to solve the apparent conflict between national and international decisions?

5.2 The "denial approach" to the Inter-American Court of Human Rights decision and the unconstitutionality of a Brazilian denunciation of the American Convention on Human Rights

Before analysing a theoretical solution to resolve the apparent conflict between the decisions of the Brazilian Supreme Court and the I/A Court, it is worth asking about the consequences of a hypothetical refusal to apply the I/A Court decision because of its potential collision with the rule of the Non-Compliance Action of the Fundamental Principle No. 153.

A "denial approach" to the I/A Court decision would be based on the premise that the Brazilian Supreme Court consider Article 68.1 of the American Convention on Human Rights unconstitutional as to the binding force of the decisions of the Inter-American Court of Human Rights.[14]

14 Article 68.1 of the American Convention on Human Rights states that: "The States Parties to the Convention undertake to comply with the

In this scenario, what would be the consequences for the Brazilian State?

First, Brazil would not, at least in good faith, be able to commit to comply with the decisions of the I/A Court. The Brazilian State would only comply with the decisions that would not clash with the national interpretation of human rights as determined by the Brazilian Supreme Court. As a result, international human rights protection would lose its purpose and future cases before the I/A Court would be a mere disguise.

Second, Brazil would have to withdraw its declaration of recognition of the jurisdiction of the Inter-American Court of Human Rights, as it would only accept the binding force of the decisions that were in harmony with the Brazilian Supreme Court's national vision. In other words, the I/A Court's judgments would either be superfluous, if they would repeat the Brazilian Supreme Court's position, or innocuous and ineffective if contrary to the national vision.

In this case, Brazil would have the option of denouncing the American Convention on Human Rights (as have Trinidad and Tobago and Venezuela).[15] Opting to denounce, in accordance with Article 78 of the Convention, the Brazilian State could

judgment of the Court in any case to which they are parties".

15 Article 78 of the American Convention on Human Rights states that: "1. The States Parties may denounce this Convention at the expiration of a five-year period from the date of its entry into force and by means of notice given one year in advance. Notice of the denunciation shall be addressed to the Secretary General of the Organization, who shall inform the other States Parties. 2. Such a denunciation shall not have the effect of releasing the State Party concerned from the obligations contained in this Convention with respect to any act that may constitute a violation of those obligations and that has been taken by that state prior to the effective date of denunciation".

still, however, be held responsible for acts that may constitute a violation one year after the date of the denunciation. On top of that, from the point of view of Brazilian law, denunciation of the Convention would be unconstitutional. The Convention is considered a material constitutional norm, which implies that, in light of the prohibition of the principle of retrogression (provided for in Article 60, § 4, IV of the Brazilian Constitution), legal norms and administrative acts cannot abolish individual rights and guarantees.

Thus, by virtue of the need of consistency in the interpretation of human rights in Brazil, the prohibition of principle of retrogression would prevent the Brazilian denunciation of the American Convention (the natural consequence of the "denial approach"). Moreover, the impossibility of the Brazilian denunciation of the American Convention on Human Rights also means the impossibility of non-compliance with the Court's judgments.

Last but not least, it is important to consider the prospect of reconciliation between the *Gomes Lund* decision and the Non-compliance Action of the Fundamental Principle No. 153 decision.

5.3 The theory of dual control

The Non-Compliance Action of the Fundamental Principle has an impressive legal regime, being one of the actions of Brazilian abstract constitutional control. Without going into its complexity, for the purpose of this article it is enough to state that the allegation of disobedience of fundamental precept has a binding and *erga omnes* effect in Brazil.[16]

16 The Non-Compliance Action of the Fundamental Principle is detailed at the Brazilian Law no. 9.892/1999.

That being said, considering the decision of the Non-Compliance Action of the Fundamental Principle No. 153, is it possible to comply with the part of the *Gomes Lund* judgment that orders the investigation, prosecution and punishment of those responsible for human rights violations during the dictatorial regime?

The answer derives from the following premise: there is no real and insoluble conflict between the decisions of the Brazilian Supreme Court and the I/A Court because both courts have the same task of protecting human rights. The conflict, which is only apparent, is a result of the normative pluralism of the contemporary world and can be solved by recourse to judicial hermeneutics.[17]

There are two instruments to resolve apparent conflicts of interpretation between national and international courts: (i) the preventive instrument, and (ii) the *theory of dual control*.

The preventive instrument is the use of the *dialogue of Courts* and the cross-fertilization between tribunals. With that instrument, it is conceivable to foresee the mention by the Supreme Court of the position of various international human rights bodies whose jurisdiction Brazil has recognized.[18]

When the *dialogue of Courts* is insufficient, the *theory of dual control* (also known as the scrutiny of human rights) must be applied. This theory recognizes two separately judicial reviews: the *control of constitutionality* from national courts and

17 DELMAS-MARTY, Mireille. *Le pluralisme ordonné*. Paris: Seuil, 2004.

18 CARVALHO RAMOS, André de. "O Diálogo das Cortes: O Supremo Tribunal Federal e a Corte Interamericana de Direitos Humanos". In: AMARAL JUNIOR, Alberto do e JUBILUT, Liliana Lyra (Orgs.). O STF e o *Direito Internacional dos Direitos Humanos*. 1ª ed. São Paulo: Quartier Latin, 2009, p. 805-850.

the *control of conventionality* from international human rights bodies. It must be emphasized that, in Brazil, acts and norms must be approved by the two controls to ensure compliance with human rights.

Moreover, as *control of constitutionality* and *control of conventionality* act in different spheres of competence, there is no conflict between the courts' decisions. In this sense, the separate attributions of national and international judicial organs were expressly recognized in the Brazilian Constitution (Article 102 refers to the Brazilian Supreme Court and Articles 5, § 2 and 3 and Article 7 of the Temporary Constitutional Provisions Act refers to international human rights treaties and to an international human rights court).

To guarantee the compatibility of all these provisions, the separation of the respective areas of competence is needed: on the one hand, the Brazilian Supreme Court is the guardian of the Brazilian Constitution and exercises *control of constitutionality*. For example, in the Non-Compliance Action of the Fundamental Principle No. 153, the Brazilian Court decided that the grant of amnesty to agents of the military dictatorship was in harmony with the Brazilian Constitution.

On the other hand, the I/A Court is the guardian of the American Convention on Human Rights and of other human rights treaties concerning the protection of human rights in the American States. The I/A Court exercises *international control of conventionality*. Applying the same example to the I/A Court decision, the result is that the Brazilian amnesty law is not compatible with the American Convention and the amnesty cannot be an obstacle to the investigation and punishment of those responsible for the violations of human rights during the dictatorial regime.

In light of the above, it is clear that, while for the Non-Compliance Action of the Fundamental Principle No. 153 the *control of constitutionality* was exercised, for the *Gomes Lund case* the *control of conventionality* was exercised. In the example of the amnesty of the agents of the dictatorship, the amnesty would only be applicable if it were successfully approved by both controls (in this case, the amnesty law passed the *control of constitutionality*, but failed the *control of conventionality*).

Consequently, it is unreasonable to plead *res judicata* or the binding effect of national decisions as a way of avoiding the investigation and prosecution of those responsible for the human rights violations, because the Brazilian Supreme Court decision was not declared null and void and remains in force as national law. The Brazilian authorities must, however, comply with the international decision of the I/A Court of Human Rights that orders the investigation and punishment of the agents of the dictatorship.

The *theory of dual control* allows the interaction between the different normative orders in the defence of human rights. The Brazilian Supreme Court has the final word on national law and the I/A Court of Human Rights has the final word on the American Convention on Human Rights, international custom and related treaties, which also apply to Brazil.19 As a result of

19 In 2014, the theory of dual control was expressly mentioned by the General's Prosecutor Office on the Non-Compliance Action of the Fundamental Principle No. 320: "As noted by André de Carvalho Ramos, there is no conflict between the decision of the Brazilian Supreme Court in the Non-Compliance Action of the Fundamental Principle No. 153 and the decision of the Inter-American Court of Human Rights in the Gomes Lund case. The theory of dual control, adopted in Brazil, is a result of the Brazilian Constitution and the integration of the American Convention on Human Rights and requires: national control of constitutionality and international control of conventionality. Any act or standard must be

the *theory of dual control*, all internal acts and norms must be in conformity not only with the Brazilian Supreme Court case law but also with the I/A Court decisions, whose content should be studied in the law schools in Brazil.

Conclusion

International Human Rights Law has advanced greatly in Brazil and this improvement is due, in large part, to the action of the Brazilian Supreme Court. To mention just one example, in the development of the protection of human rights, the Court was crucial in establishing the legal status of international treaties.

Nevertheless, in light of the *Guerillha do Araguaia* case, it is clear that it is time to move one step further and accept the international interpretation of human rights. It is important to bear in mind that the internationalization of human rights cannot be restricted to treaties: the interpretation must also be international. National interpretation insulated from international human rights standards is harmful as it allows each State to establish the meaning and content of human rights, allowing the risk of abuse and relativism. Moreover, a purely national interpretation denies the universality of human rights and reduces human rights treaties and the Universal Declaration of Human Rights to rhetorical texts.

After all, only the *theory of dual control* values *the international control of conventionality* as well as avoids the judicial war between the Brazilian Supreme Court and the I/A Court of Human Rights.

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approved by the two controls, so that the rights are respected in Brazil." Available at: http://noticias.pgr.mpf.mp.br/noticias/noticias-do-site/copy_of_pdfs/ADPF%20000320.pdf/>.