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Conventionality Control Between International and Constitutional Law

The Viewpoint of a Comparativist

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Abstract

This contribution addresses conventionality control in its double dimension, encompassing international law and constitutional law. It focuses on the comparative methodological issues when equating the Inter-American and the European systems of protection of human rights, taking into account the progressive "Europeanization" of the former's case law. Then, it critically examines the question of judicial authority of domestic and international courts in multilevel systems, to raise a few points concerning the complex relationship between international courts and states.

Keywords

conventionality control – Inter-American Court of Human Rights – European Court of Human Rights – legal comparison – judicial authority

The book being discussed in this Symposium represents a relevant contribution to the debate on conventionality control and the relationship between domestic norms and courts and international norms and courts.[1]

The structure of the volume, the style, as well as the presentation of data in a graphic manner make it an informative and enjoyable reading for anyone interested in the issue. It overcomes the monism/dualism perspectives intersecting different additional standpoints and focusing on the actual effectivity

1 NEGISHI, *Conventionality Control of Domestic Law. Constitutionalised International Adjudication and Internationalised Constitutional Adjudication*, Baden-Baden, 2022.

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of international norms. As the author explicitly says, he managed the dichotomy of the double dimension recalled in the title, namely "constitutionalized international adjudication" and "internationalized constitutional adjudication", "by focusing on the practice of conventionality control of domestic law in the European and Inter-American systems of human rights" (p. 195).

He sensibly distinguishes, on the one hand, the "decisional authority" of international courts' judgments, which applies to the dimension of *res judicata* of their decisions applicable *inter partes*, from the "jurisprudential authority" of the res *interpretata*, which extends to state parties beyond individual cases. The arguments of the book pivot around these concepts building a new construction based on openness, substantivism and human-centrism.

The basic feature I would like to emphasize is the "hybridity" of the intended approach combining constitutional and international law, as the title itself shows. The book actually deals with concepts from both the realms of international law and constitutional law. Nevertheless, from the perspective of a comparativist dealing mainly with comparative constitutional law, the attitude embraced is that of an international lawyer more than that of a constitutional lawyer.

1 Truly Comparable Cases?

The comparative dimension is there although it is not disentangled in depth from a methodological perspective. The author assesses the problem of the "comparability or commensurability between regional human rights systems, which have created different epistemic communities" (p. 30) and chooses the perspective of the "situationality of regional human rights systems" while embracing Koskenniemi's idea that comparative international law shall be aware of "universal and particular at the same time, speaking a shared language, but doing that from their own, localizable standpoint".[2] It is not by chance that Koskenniemi's starting center in this statement is comparative *international* law.

In terms of comparability, it is true that the systemic role of both the Inter-American Commission (IACR) and the Inter-American Court (IACtHR) has evolved over time, due to structural changes and the nature of the cases submitted to the system which has tended towards a "Europeanization" of the cases, but still significant differences remain.

2 KOSKENNIEMI, "The Case for Comparative International Law", *Finnish Yearbook of International Law*, 2009, p. 1 ff.

In the evolution of the case law, I may identify three phases.[3] The first would be the set of decisions exclusively adopted upon mass and gross violations perpetrated by dictatorial regimes and/or within violent domestic conflicts.[4] Subsequently, in the second phase, the system contributed to the transitions to democracy of several countries, by helping them to overcome the legacy of dictatorships and dealing with the issues of truth and reparation. Still in the 1990s it confronted regimes based on state terrorism, forced disappearance, torture, extrajudicial executions. It consolidated and expanded the assessment of amnesty laws,[5] while facing the regime of Alberto Fujimori in Peru and monitoring the internal conflict in Colombia, among other sensitive situations. The third phase is characterized by a wider diversity in the cases which address issues well beyond infringements upon basic rights like the right to life or physical integrity[6] and are related to the safeguard of different rights and the protection of vulnerable groups, such as indigenous peoples, children, migrants, women and minorities in general. Nevertheless, this process of Europeanization is not totally detached from the historical background of civil wars, guerrillas and state terrorism which still affects today's take on human rights and political issues in general.

The context, which plays a paramount role in comparative studies, shows relevant differences between the two geographical areas. The Inter-American system still has to act in an environment characterized by dramatic economic

3 See RAGONE, "The Inter-American Court of Human Rights turned 40: achievements and challenges", *Revista General de Derecho Público Comparado*, 2019, p. 1 ff., p. 12. In this respect, see the previous reconstructions by GROSSMAN, "The Inter-American System and Its Evolution", *Inter-American and European Human Rights Journal*, 2009, p. 49 ff., p. 51 and ABRAMOVICH, "From Massive Violations to Structural Patterns: New Approaches and Classic Tensions in the Inter-American Human Rights System", *Sur – International Journal on Human Rights*, 2009, p. 7 ff. More recently, SANTIAGO and BELLOCCHIO (eds.), *Historia de la Corte Interamericana de Derechos Humanos* (*1978–2018*), Buenos Aires, 2018, p. 33 ff., divided the history of the IACtHR into six phases.

4 See MEDINA QUIROGA, *The Battle of Human Rights. Gross, Systematic Violations and the Inter-American System,* Dordrecht, 1988, p. 21 ff. and GONZÁLEZ MORALES, *Sistema Interamericano de Derechos Humanos,* Valencia, 2013, p. 263 ff.

5 IACtHR, *Consuelo Herrera and others v Argentina*, Judgement of 2 October 1992; IACtHR, *Hugo Leonardo de los Santos Mendoza and others v Uruguay*, Judgement of 2 October 1992; IACtHR, *Las Hojas Masacre v El Salvador*, Judgement of 24 September 1992; IACtHR, *Héctor Marcial Garay Hermosilla and others v Chile*, Judgement of 15 October 1996; that paved the path for IACtHR, *Case of Barrios Altos v Perú*, Judgement of 14 March 2001. See BINDER, "The Prohibition of Amnesties by the Inter-American Court of Human Rights", in VON BOGDANDY and VENZKE (eds.), *International Judicial Lawmaking*, Berlin-Heidelberg, 2012, p. 295 ff.

6 BURGORGUE-LARSEN, "El contexto, las técnicas y las consecuencias de la interpretación de la convención americana de los derechos humanos", *Estudios Constitucionales*, 2014, p. 105 ff.

and social inequalities; spread violence, impunity and corruption; as well as strong presidential systems often labeled as "hyper-presidentialism" within weak institutional frameworks. The contextual element explains why the cases submitted to the Inter-American system (IASHR) have not changed completely, and there are still issues consistent with the first phase, while inequality, exclusion, and over the past few years also social rights are becoming more and more protagonists of this new phase.

The operational rules of the two courts are different and their performances have also proved to be distinct. The IASHR is largely underfunded and relies upon judges who still keep their previous occupation. Such framework determines one of the major phenomena of differentiation: the number of cases decided per year is absolutely not comparable, as the European jurisprudence encompasses hundreds of decisions vis-à-vis few dozens in the Inter-American case. Numbers and languages (as the countries subject to the jurisdiction of the IACtHR share at least the same roots, if not the same language) also play a role in the concrete possibility for ordinary judges to be aware of and be able to refer to the relevant case law.

2 Conventionality Before 2006?

Interestingly, throughout the evolution of the system, a significant phenomenon of diffusion of arguments has appeared, which preceded the formal elaboration of the conventionality control. For example, in the case *Simón, Julio Héctor and others* by the Argentinian Supreme Court on June 14, 2005, such Court decided to strike down the pieces of legislation passed in the 1980s to exempt military personnel and civil servants from criminal responsibility deriving from acts committed during the dictatorship (so-called *ley de punto final* and *ley de obediencia debida*). It referred to the case law of the IACtHR, in particular to the leading case, *Barrios Altos v Peru* (2001), in order to reconstruct the state of the art of international law concerning amnesties (more recently, throughout the peace process negotiations in Colombia the idea of complying with international law and in particular Inter-American law was always on the table).[7]

7 See the contributions to the Symposium on the Colombian Peace Talks and International Law edited by HUNEEUS and URUEÑA, *American Journal of International Law*, 2016, p. 161 ff.; in particular ACOSTA LÓPEZ, "The Inter-American Human Rights System and the Colombian peace: Redefining the fight against impunity", *Ibid.*, p. 178 ff.

The existence of previous cases in which Inter-American standards were used in a similar manner as to what the conventionality control would entail, at least raises the question of the practical implications of its elaboration by the Court.

In this respect, there are domestic law elements which significantly favor the use of international standards, incorporating regional conventions through national constitutional law (some of them are mentioned in the text: see p. 108). These tools span from constitutional "consistent interpretation clauses" to hierarchical rankings of international sources at the same level as the constitution, like in the Austrian case. Constitutional, supreme, or even ordinary jurisdictions can contribute when they interpret domestic law in conformity with human rights treaties, determining their hierarchy within the system. It would be useful to explore in further (empirical) research whether and to what extent the existing tools impact on the attitude of the courts and the final outcome, and whether the evolution of domestic case law has been determined by the elaboration of the conventionality control more than by the features of the multilevel system itself.

3 Relative Judicial Authority?

Remarkable are the internal dialogue and plurality of arguments that the author manages to explain the pre-conditions of his path towards a normative model of adjudication which considers current adjudicatory practices. He investigated to what extent the interpretation and application of conventionality control standards present both unifying and diversifying approaches due to the application of distinct levels, be they universal, regional, or domestic. The changing interaction and overlap of legal sources coming from the domestic and the international realms require overcoming the idea of a "single rule of recognition" applicable to the respective legal orders. In this respect, the author defends that "external rules of recognition" shall complement internal ones as to achieve mutual feedback and construction.

Additionally, he explains that the allocation of conventionality control powers shows both patterns of centralization and decentralization due to the different tasks and features of domestic and regional courts (see the charter on p. 196). Most likely, these phenomena depend on the lack of absolute hierarchical superiority of international law over domestic law, requiring constant arrangements and re-arrangements. In light of the approach dealing with the application of the conventionality control, judicial practices (and their contradictions) become paramount for the book. At the same time, this approach

challenges any self-standing, monolithic understanding of judicial authority: co-existing overlapping jurisdictions have to admit being vested in "relative authority".[8]

In this respect, one critical but crucial aspect of the analysis, in my view, is that the doctrine of conventionality control itself was elaborated by a court at a certain point. Other options relying on consistent interpretations and distinct tools for dialogue in theory could have been acceptable and even successful. One could say that Art. 2 of the ACHR played a role in this approach by the Inter-American Court of Human Rights, although this can be disputable. Even more is the fact that, instead of an example of "relative authority" defended by Negishi, this jurisprudence shows a clear stance taken by the Court vis-à-vis domestic orders.

4 Building a New Model?

The third feature that deserves praising is the presence in the volume of both de-construction and re-construction of categorial paradigms. In particular, Negishi criticizes the pyramidal understanding of the relationship between international and constitutional law as long as it allots the role of supreme norm either to the former or the latter. To overcome such static understanding, he defends the trapezium model, situating in its upper base both legal sources, similarly to previous scholarly approaches.[9]

He replaces the holistic and close-minded, formalist and state-centered pyramid with a model based on openness, substantivism and human-centrism. Such model postulates the recognition within constitutional systems of sources that are, from a formal perspective, "external" to those pertaining to each domestic framework.[10] Therefore, pluralism fits in this approach, as it would be more consistent with post-national societies that cannot rely

8 ROUGHAN, *Authorities: Conflict, Cooperation, and Transnational Legal Theory,* Oxford, 2016, p. 136.

9 PIOVESAN, "Direitos humanos e diálogo entre juridições", *Revista Brasileira de Direito Constitucional*, 2012, p. 67 f. claims that the "hermetically-closed pyramid focusing on the *State approach*" shall be overcome through a "permeable trapezium focusing on the *human rights approach*".

10 MARTINICO, "Constitutionalism, Resistance and Openness: Comparative Law Reflections on Constitutionalism in Global Governance", *Yearbook of European Law*, 2016, p. 318 ff., p. 320.

anymore only on constitutionalism's paradigms which were elaborated to suit more homogeneous societies and legal systems.[11]

The pyramid's formalism based on hierarchy[12] and fixity of relationships among norms is not well-suited to be applied in multilevel frameworks of protection of human rights, in which substantive protection should be, according to the author, the guiding principle.[13] The substance-oriented understanding of the interaction between international treaties and constitutional/domestic norms in this respect is exemplified as well, in my opinion, by those clauses aiming at ensuring the higher level of protection, namely Article 53 of the European Convention on Human Rights and Article 53 of the Charter of Fundamental Rights of the EU. Differently, Negishi states that they aim to recognize more discretion to European state parties.

Still, differences between such clauses and the *pro homine* principle enshrined in Article 29 of the American Convention remain, as well as between the interventionist attitude of the IACtHR and the frequent deferential approach towards states of its European counterpart. The author is conscious of this disparity, and briefly addresses it in the very conclusion advocating for a convergence between the two courts and systems. In the Latin American context, in fact, a wider margin of maneuver would have progressively been granted to states and in Europe the development of Article(s) 53 could lead to a use of the *pro homine* principle to reduce the absolute supremacy of either international or constitutional law. Again, the issue of comparability is still there, until the end of the volume.

The substantive and humanity-oriented choice of the author leads him to accept that even hierarchically inferior norms can take precedence over higher norms as long as they provide a better protection of rights. International law would only prevail when granting higher levels of assurance of the *pro homine*

11 KRISCH, "Global Administrative Law and the Constitutional Ambition", in DOBNER and LOUGHLIN (eds.), *The Twilight of Constitutionalism?*, Oxford, 2010, p. 245 ff., p. 254. On the need for "estatalidad abierta" through international standards, see MORALES ANTONIAZZI, "El nuevo paradigma de la apertura de los órdenes constitucionales: una perspectiva sudamericana", in VON BOGDANDY and SERNA DE LA GARZA (eds.), *Soberanía y Estado abierto en América Latina y Europa*, Mexico, 2014, p. 243 ff. On the interaction between pluralism and the conventionality control, GONZÁLEZ-DOMÍNGUEZ, *Doctrine of conventionality control: between, uniformity and legal pluralism in the Inter-American human rights system*, Antwerp-Portland, 2018.

12 See HENRÍQUEZ VIÑAS and NÚÑEZ LEIVA, "El control de convencionalidad: ¿Hacia un no positivismo interamericano?", *Revista Boliviana de Derecho*, 2016, p. 326 ff.

13 Norms shall be ranked according to their "substantial weight and significance" according to PETERS, "Supremacy Lost: International Law Meets Domestic Constitutional Law", *Vienna Online Journal of International Constitutional Law*, 2009, p. 170 ff., p. 173.

principle, while more protective national norms shall be applied when the outcome was the most favorable protection to persons.

5 Too Much Optimism?

To conclude, three issues require attention. First, if the recessive role of states were a shared idea (which is not even in scholarly and political discussions),[14] one significant problem would still be attached to all cases in which establishing strictly what the higher level of protection is does not amount to a simple logical operation of comparing standards of protection of one right, requiring on the contrary a process of *balancing* different rights, necessarily leading to a sort of compromise. Second, the practical attitude of the author shall encompass, as well, the analysis of situations of backlash and their potential impact on the attitude of human rights courts in terms of progressiveness, pervasiveness and requirement of absolutely consistent standards. These courts have to rely on the endorsement of states (differently of constitutional jurisdictions, with which at times the author seems to equate them), and this may postulate a different degree of dialogue and collaboration. Third, the elaboration provided in the book, notwithstanding its reconstructive original value, may be labeled as overly optimistic as it embraces the idea of common values present at the international and the constitutional level to be situated at the apex, independently of strict hierarchy. The current state of affairs shows that the scope and even the existence of common values can change over time, therefore raising the dramatic question of what happens when such values are no longer shared.

14 According to NEGISHI, supra note 1, p. 203, "the substantive values shaped by an open interaction between international and national legal sources are construed for the sake of persons, not for states."