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The Conventionality Control It's Not the Solution Equal to Justice

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Abstract

The longed-for search to reach justice constitutes one of the biggest concerns of the legal systems of the world. The path oriented towards this purpose, is almost registering the time of existence of the human being in the world. On the other hand, common as wrongly, it is considered that with the arrival of conventionality or control of conventionality, the claims of justice would have to be appeased. This, in as much as it speaks of standards that surpass the registered thing in the Political Constitution, basically in the related to recognition of the fundamental rights. So, in the present work, the author develops an explanation as a theory, in order to elucidate not only the subject referred to, but also, to raise the evolution of the administration of justice. That is, what happened in this regard and what would be or would be touched to happen. Culminating in the demonstration that the control of conventionality not only does not turn out to be equal to justice, but that it is below it.

Keywords: Examination of conventionality; Justice; Conventionality; Justice administration; Law conventionality

Introduction

As initial ideas to the present delivery, it should be noted that the Conventional, that is, the Test or Control of Conventionality, is currently at the peak of the wave. Thus, both as different academic courses of different nature are being offered in the Signatory States of the American Convention on Human Rights. Then, it is noteworthy that these events are well received by the actors of the administration of justice system. And there are fewer and fewer people, who ignore, ignore or resist knowing what the issue of Control of Conventionality entails.

And it is possible to breathe the predominance and prominence of the Control of Conventionality, forcing the legal systems to carry out two basic actions in their internal legislations:

1. To comply with what is established in the Conventional Law treaties (on human rights) and

2. Apply the interpretation of fundamental rights, carried out by the Inter-American Court of Human Rights.

The particular (to say the least), is that it is assumed as a dogma of faith (as the only and last north), which supposedly Control Conventionality, will solve and cover the large existing gaps, which cause the embrace to the desired justice, which to date is presented as a utopia, can be finally landed, embodied, effected, for the benefit of the defendants. And we mentioned that this is something supposed, in as much, that we maintain that this conviction is not correct. Thus, corresponds to deal with the resolution that involves the major question, the same that is the title of the present delivery. Arguments that develop.

Development

As a first point, the Inter-American System for the Protection of Human Rights (SIDH) is an international system agreed upon by the States of the inter-American system in order to establish minimum common standards in terms of respect, guarantee and adaptation of national legal systems. conventionally established in the American Convention on Human Rights. The States-Parties have also agreed to establish a system for monitoring compliance with these standards through two agencies, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. The latter constitutes a binding jurisdiction for the States Parties, whose sentences constitute obligations of result, which are not subject to any appeal. This jurisdiction maintains oversight of compliance with the judgments until the respective State Party complies with all the reparation measures determined by the Court. This is the object and purpose of the inter-American human rights system [1].

First of all, that the Fourth Final and Transitory Provision of the Peruvian Political Constitution, regarding the interpretation of fundamental rights, advocates: "The norms relative to the rights and freedoms that the Constitution recognizes are interpreted in accordance with the Declaration Universal of Human Rights and with the treaties and international agreements on the same matters ratified by Perú".

Next, there is the American Convention on Human Rights (also known as the San José Pact of Costa Rica) and part of the Inter-American System for the Promotion and Protection of Human Rights; It is ratified by the Peruvian State on 07/12/78. And like that State, more than twenty countries have signed it, namely: To date, twenty-five nations have adhered to the Convention: Argentina, Barbados, Bolivia, Brazil, Colombia, Costa Rica, Chile, Dominica, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Suriname, Trinidad and Tobago, Uruguay, among others.

Consequently, these States are subject to the interpretation of the rights and freedoms that the Political Constitution recognizes, in accordance with the provisions of the text of the American Convention on Human Rights. In turn, the 1. of Art. 1., of the American Convention on Human Rights, on the obligation to respect rights, states: "The States Parties to this Convention undertake to respect the rights and freedoms recognized in it and to guarantee its free and full exercise to any person subject to its jurisdiction(...)".

It should be specified that: "The name" conventionality control "is relatively new. It has a European background dating back to the seventies of the last century, but in our American environment it was only set up in 2006, in the famous case «Almonacid Arellano vs. Chile", where the plenary session of the Inter-American Court of Human Rights (hereinafter, the Court or the IC) made it its own. The first one who proposed this thesis in the inter-American jurisdictional space was Judge Sergio García Ramírez, an accredited Mexican jurist whose beginnings are in criminal law, but who has since devoted himself to the topic of human rights, both locally and internationally inter-American [2].

Regarding the conventional control, the Peruvian Constitutional Court, in the Funds. 5., and 14., of the Exp. N° 04617-2012-PA/TC, respectively states: "(...)the constitutional magistrature must not only focus on exercising only a constitutional control; but they are in the obligation to exercise control of conventionality, that is, the jurisdictional power of local judges and supranational jurisdiction, which in our case is constituted by the Inter-American Court of Human Rights (IDH Court), to resolve disputes arising from norms, acts and conduct contrary to the American Convention on Human Rights, to regional treaties on human rights ratified by Peru, to ius cogens and to the jurisprudence of the Inter-American Court, "and" A control can be distinguished of vertical conventionality that arises from a supranational order, from a supranational jurisdiction and from a supraconstitutional interpretation. It is a concentrated control exercised by the Inter-American Court, whose decisions generate a jurisprudential doctrine with erga omnes effects, that is, that bind all the domestic courts of the region, who have a "margin of national appreciation" that allows them to apply the doctrine of the Inter-American Court, as they deem appropriate. There is also a control of horizontal conventionality, exercised by the domestic judiciaries of each country (diffuse control), whose effects are only for the country in which its judges have applied international instruments (Treaties, ius cogens or jurisprudence of the Inter-American Court) before its internal regulations".

The control of conventionality is developed in relation to the pro homine principle, since not only is an interpretation of the national norm made in light of the American Convention, its Protocols and the jurisprudence of the Inter-American Court of Human Rights, but that is also done according to the pro homine interpretative principle, which will consist in applying the most favorable interpretation for the effect of the enjoyment and exercise of the rights and freedoms of the person [3].

In the case "Almonacid Arellano and others vs. Chile", the Court clarifies that the purpose of the institute is to ensure that the norms of the Convention or any other treaty" are not undermined "by internal norms or provisions that are contrary to its content, purpose and purpose. In the case "Workers dismissed from Congress vs. Peru", specifies the purpose of the institution by stating that it must" ensure that the useful effect of the Convention is not diminished or annulled "by norms or provisions contrary to its wording, purpose and purposes. In short, as pointed out by Sagüés, the control of conventionality is a powerful instrument for the respect and effective guarantee of human rights included in the conventionality parameter [4].

Advisory opinions on laws and bills have binding effects for the requesting State and for States that have ratified the CADH and other instruments of the SIDH. The judgments of the Inter-American Court of Human Rights have res judicata effects for the States involved in the contentious and procedural way interpreted for the rest of the States that are part of the SIDH and have accepted the contentious jurisdiction of the IDH Court. The declaration of unconventionality of a norm by the IDH Court does not involve its annulment, repeal, loss of validity automatically, since the IDH Court is not a supra-constitutional court and its jurisdiction is subsidiary. The power to create norms, reinterpret them, annul them or disapply them remains an exclusive power of the State. The IDH Court redraws its decision to the sentenced State, so that it may take the necessary measures to adapt the domestic law to the standards of the SIDH [5].

I agree that the control of conventionality: "(...) has been emerging slowly and has been outlined, recently, from the year 2006, as has been seen. And it has been accepted gradually by the States that have recognized the contentious jurisdiction of the Court. It is, then, a principle that has had a praetorian creation and concretion. In the case of Peru, it has been accepted very soon and even before such control arose, by our Constitutional Court. As for the Judicial Branch, the reception of such control is still incipient, even more so when there are many causes that do not reach the Supreme Court of the Republic, and even less so the Constitutional Court. But it is expected that this will expand progressively in the coming times and in a prudent manner" [6].

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Also, "The control of conventionality and the debate that it has generated leave in evidence the efforts that are made to accommodate the interaction and interrelation, increasingly intense, between different legal orders. In the contemporary world, the State does not have the exclusive monopoly of the creation of the applicable Law within its jurisdiction" [7].

Then, "The control of conventionality shows that at present the inter-American system is not an autonomous and self-sufficient system (if at any time it was), which operates by itself in its own sphere of action. For some time now, we have been insisting that when speaking about the inter-American human rights system, it should be thought more broadly than just the Commission and the Court" [8].

And for the purposes of a plausible harmonization, the landing of a conversation between the internal courts of each State and the IDH Court would be healthy. In that sense we have to: "(...) an exchange generated as a result of the jurisprudential dialogue between the Idh Court and the national courts could really be fruitful. The opposite, that is, a context that seeks the mandatory and uncritical application of inter-American jurisprudence by judges and internal authorities, would represent not only a jurisprudential imposition, but also a curtailment of efforts to carry out an authentic dialogue between courts" [9].

Then it should be noted that if at the time, before the arrival of the Constitutional State of law (which left behind the former State of law), which also brought the constitutionalizing of law, while the Constitution was raised as guardianship and guarantor of a new legal order; Now to start the entrance to a new stage, in which, it is the Constitution that becomes complemented, seeing itself conventionalized, giving rise to the conventionalization of law. Thus, this current stage is one in which the American Convention on Human Rights stands (if you will) above the Constitutions of the democratic States of the entire world. That is, to the Conventional State of law.

In that sense [10], it's of consider that within the stages or stages of the evolutionary scale that involves the administration of justice, the Conventional State of law is in the fourth. Thus, it's to consider: i) State of nature, ii) Rule of law, iii) Constitutional law, iv) Conventional law, v) Restoring state of law and vi) State of Justice.

The first, the state of nature, also called private revenge, private or savage justice (justice by one's own hand, eye for an eye...), that characterized by justice done by the affected person's own hand.

The second, would be the rule of law, which is the right (and not the people) is who takes the reins of the administration and organization of power. Specifically, it is the Law that has the respective protagonism.

Would be the third, the constitutional State of law, is one where the Law no longer mandates, but the Constitution, generating that all the regulatory apparatus of a State, align or register unavoidably in line with the provisions of the Constitution. It is called: Constitutional State of law (in which the binding precedents of the Constitutional Court made their appearance). Incidentally, it is convenient to reiterate that the present is the one that currently governs us, and we find ourselves.

Likewise, we point out that the fourth, the conventional legal state, is the one that to begin to enter into the Peruvian legal system, where it is conventionality that governs as the flagship of legal order, above the Political Constitution.

Although, if you want in strictu sensu, we experience a sort of tutti frutti as a legal order. That is, that we are in that fusion of Constitutional State of law (which struggles for its consolidation) and Conventional State of law (in the pininos of its knowledge, dissemination and application).

Then, as the fifth, the so-called Restorative State of Justice, is characterized by strengthening or humanizing the mandates of the Constitution, that is, in light of what is prescribed by the Restorative Justice. That is, to ensure that the eventual violation of fundamental rights is duly compensated, restored, rebuilt, restored. The present phase would be the one that eventually, in a short time, we would arrive.

In a common way, the precepts of restorative justice are assumed and applied, with only criminal and procedural penal orientation.

However, the restorative justice, in so far as it is in accordance with the postulates contained in the Political Constitution and the American Convention on Human Rights, as corresponds to a Constitutional State of Law; it must also be applicable to all branches of law. And although it comes very close to justice (since it does not manage to restore in its totality or as it should be), it does not manage to embrace it. Justice cannot be comparable to restorative justice, since unlike the latter, the burden or emotional need is not reflected, because for example, if the offender stole the offended ten heads of cattle, then, it will only be fair or just, that the victim receives the offender in a timely manner, the complete number and quality (characteristics) of the stolen and in some extreme, an apology that can act as a balm reducer of the number and nature of the stolen. That we are not misled, since we are not against, demonize, reduce or demean the restorative justice, we only compare it with justice and that in this company is evidently in backwardness of the latter.

Finally, the sixth stage (which we consider, the definitive one), would turn out to be the so-called State of justice. This stage would be doomed to the total landing in the justice proper, the only one of must exist; since it really manages to capture the meaning of the priora legal institution, that is, justice, the same that Justiniano taught: "Justice is the constant and perpetual will to give each one his right". Then, in this phase there will be no room for unsuccessful and erroneous appeals, such as: "private justice", "legal justice", "constitutional justice", "conventional justice" or "restorative justice".

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Result

And the most important thing is that the defendant claims with all the reason in the world that is granted or administered justice itself, as corresponds to the very name of Administration of Justice. Unfortunate, to say the least, is that the Justice Administration System responds to what the defendant expects, with answers identified with the mere ones: private justice, legal justice, constitutional justice, conventional justice or restorative justice.

Discussion

To all this, let us not forget that in the first paragraph reference was made to the fact that the Inter-American System for the Protection of Human Rights constitutes an international system agreed upon by the States of the inter-American system in order to establish minimum common standards in terms of respect, guarantee and adaptation of the national legal systems established conventionally in the American Convention on Human Rights.

Then, these standards set for the States are only minimal and common in terms of respect, guarantee and adaptation of the national legal systems established conventionally in the American Convention on Human Rights.

The existence of said minimum standards, seems to indicate that they mark the beginning of a progressive protection and safeguard of the fundamental rights, for the purposes of at the time, to become maximum or total, as it should correspond. And in addition, the Control of Conventionality (typical of a Conventional State of Law), is located a little beyond the middle of the path or evolutionary process of the administration of justice, that is, in the fourth stage, of six. What in parentheses, leads to another reflection. If the standards of defense and safeguards that the Control of Conventionality embraces are minimal, it is understood that the proper handling of the internal legal systems of each State, certain as worryingly, are below the said minimum standard.

In addition, it is worth mentioning that the Inter-American Court of Human Rights handles exaggeratedly long deadlines for the issuance of its Advisory Opinions, rulings and resolutions, which can even reach twenty years. To which there is an average of about ten years for the State party to comply with the provisions of the same. And finally, add at least ten years, so that the case exhausts the domestic jurisdiction, in order to be expedited to be aware of the aforementioned Court.

So, it is to be seen, that the summation of the years turns out to be very worrying, since they turn out to be forty years on average so that the decisions of the Court, are finally effective, materialized. This, in addition to the fundamental rights violated that the Court itself and the States Parts, are responsible for violating in the course of this period.

Therefore, that is an additional reason why the Control of Conventionality, does not meet the objectives of its quintessence, because, the remedy ends up being perhaps, worse than the disease (conventionality has raised the: "that", In an acceptable manner, but, it has been lost in the: "as") and therefore also, does not merit in any way, be equated with the nature that holds justice.

Conclusion

In merit to the sustained, it is demonstrated that the examination of conventionality is not the solution equal to justice (since it is below even restorative justice). Thus, it is not the light, the oracle, the last in line or the Zombie Squad. And by the way, only thing equal or comparable to justice, is the last stage referred, it refers to, the State of Justice.

Obviously, it would be missing a few centuries or maybe millennia, for the State of Justice to become a reality. However, this should not be an obstacle for all the actors of the administration of justice system to decide, from now on, to assume the challenge and decision in terms of justice, by virtue of the principle of legitimacy; then, it is what uniquely, exclusively and with just right deserves and demands the justiciable.

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