The Conventionality Control Doctrine

When a State has ratified an international treaty such as the American Convention, the judges are also subject to it; this obliges them to ensure that the effect of the Convention is not reduced or annulled by the application of laws contrary to its provisions, object and purpose. In other words, the organs of the Judiciary (Part II) should exercise not only a control of constitutionality but also of ‘conventionality’ ex officio between domestic norms and the American Convention (Chapter 1), evidently in the context of their respective spheres of competence and the corresponding procedural regulations (Chapter 2). (The Inter-American Court of Human Rights (Part I), Case of the Dismissed Congressional Employees (Aguado-Alfaro et al.) v. Peru, Series C, No. 158, Judgment (Preliminary Objections, Merits, Reparations and Costs), 24 November 2006, at para. 128.)

Chapter 1: Conventionality Control Parameters

Interpretation of Parameters by Human Rights Courts

1. Connection between the Conventions and Universal Standards

Evolutionary Interpretation
- The Conventions as living instruments must be interpreted in the light of present-day conditions.
- Human rights courts refer to international instruments other than the Conventions for evolutive interpretation.

Consensus among States
- Regional consensus has been invoked by human rights courts to justify evolutive interpretation.
- Human rights courts also emphasize consensus emerging at universal level to refer to other international instruments.

Application of Parameters by Domestic Courts

2. Integration and Diversity of International Human Rights Law

Constitutionalization
- Interpretation bridging the Conventions and other sources ensures the unity and consistency of international human rights law.
- The pro homine (most favorable to persons) principle does not allow narrowing interpretation of the Conventions than that which prevails in international law.

Fragmentation
- Interpretation of the Conventions in light of other sources within independent constitutional orders also contribute to fragmentation.
- The pro homine principle ensures the hierarchical and complementary relationship between the Conventions and universal standards.

Chapter 2: Conventionality Control Competences

Subsidiary Competences of Human Rights Courts

1. Negative and Positive Aspects of the Principle of Subsidiarity

Negative Aspect
- Prioritize national implementation over international protection
- Grants “margin of appreciation” to States Parties
- Ensures legitimacy in terms of separation of powers and democracy
- Makes human rights courts defer the conventionality control.

Positive Aspect
- Realizes competencies in favor of international surveillance
- Restricts “margin of appreciation” granted to States Parties
- Ensures legality in terms of checks and balances and the rule of law
- Allows human rights courts to exercise the conventionality control.

Allocation of Competences among Domestic Courts

1. The Diffused Conventionality Control by Ordinary Courts

Disappollication
- Domestic courts are required to apply the domestic norms which conflict with the conventionality control parameters.
- The conventionality control is decentralized if ordinary courts are authorized to disapply such norms.

Consistent Interpretation
- Domestic courts are required to interpret domestic norms in manners consistent with the conventionality control parameters.
- The conventionality control is decentralized in the sense that all judges assume the obligation of consistent interpretation.

2. The Centralized Conventionality Control by Constitutional Courts

Legal Certainty
- The conventionality control by ordinary courts may damage the legal certainty by differently interpreting the Conventions.
- To evaluate the certainty of conventionality control parameters, constitutional courts are more suitable.

Democracy
- The conventionality control by democratic courts may favor democracy.
- To produce the communicative arrangement of constitutional courts, enjoying democratic credentials are more suitable.

The Hybrid of Centralization and Diffusion of the Conventionality Control at International and Domestic Levels

Part I – Chapter 1
- The conventionality control is internationally diffused in terms of negative subsidiarity when national authorities disbelieve in the primacy of guardians of the Conventions.
- The conventionality control is internationally centralized in light of positive subsidiarity if human rights courts are suitable for identifying the appropriate means and subjects of the control.

Part II – Chapter 2
- The conventionality control is domestically diffused when ordinary judges perform disapplication of unconventional norms simultaneously.
- The conventionality control is domestically centralized if constitutional courts are suitable for the conventionality control in terms of legal certainty and democracy.