REVISTA INTERNACIONAL CONSINTER DE DIREITO

Publicação Semestral Oficial do
Conselho Internacional de Estudos
Contemporâneos em Pós-Graduação

ANO VII – NÚMERO XII

1º SEMESTRE 2021

ESTUDOS CONTEMPORÂNEOS

014990

REVISTA INTERNACIONAL CONSINTER DE DIREITO, ANO VII, N. XII, 1º SEM. 2021

Europa – Rua General Torres, 1.220 – Lojas 15 e 16 – Tel: +351 223 710 600
Centro Comercial D'Ouro – 4400-096 – Vila Nova de Gaia/Porto – Portugal
Home page: revistaconsinter.com
E-mail: internacional@jurua.net

ISSN: 2183-6396-00012

Depósito Legal: 398849/15

DOI: 10.19135/revista.consinter.00012.00

A presente obra foi aprovada pelo Conselho Editorial Científico da Juruá Editora, adotando-se o sistema *blind view* (avaliação às cegas). A avaliação inominada garante a isenção e imparcialidade do corpo de pareceristas e a autonomia do Conselho Editorial, consoante as exigências das agências e instituições de avaliação, atestando a excelência do material que ora publicamos e apresentamos à sociedade.

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Porto
Editorial Juruá
2021

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APRESENTAÇÃO

A **Revista Internacional CONSINTER de Direito** é uma publicação de cariz periódico do **CONSINTER – Conselho Internacional de Estudos Contemporâneos em Pós-Graduação** que tem por objetivo constituir-se num espaço exigente para a divulgação da produção científica de qualidade, inovadora e com profundidade, características que consideramos essenciais para o bom desenvolvimento da ciência jurídica no âmbito internacional.

Outra característica dos trabalhos selecionados para a **Revista Internacional CONSINTER de Direito** é a multiplicidade de pontos de vista e temas através dos quais o Direito é analisado. Uma revista que se pretende internacional tem o dever de abrir horizontes para temas, abordagens e enfoques os mais diversos e, através deste espaço, colaborar com um melhor diálogo acadêmico.

Resultado de um trabalho criterioso de seleção, este volume que agora se apresenta destina-se a todos aqueles que pretendem pensar o Direito, ir além da sua aplicação quotidiana, mas sem deixar de lado o aspecto prático, tão característico das ciências.

Capítulo 02

DIREITO PÚBLICO

THE CASE FONTEVECCHIA AND D'AMICO AGAINST ARGENTINA

O CASO FONTEVECCHIA E D'AMICO CONTRA ARGENTINA

DOI: 10.19135/revista.consinter.00012.07

Recebido/Received 22.10.2020 – Aprovado/Approved 25.04.2021

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Abstract

This scientific article was based on a case study, judged by the Argentine Supreme Court. In this process, the author filed a civil action in the civil court to compensate the damage against the authors, understanding that the right to privacy, privacy, honor and image rights were violated. The article sought to analyze the collision of principles, rules, rights and jurisprudence that led the Inter-American Court of Human Rights to rule in favor of Jorge Fontevecchia and Heitor D'amico. These were condemned by the Argentine State for understanding that there was a violation of the Right to Privacy. However, the international court decided to revoke the judgment passed and judged by the Supreme Court of the Argentine Nation, understanding that Fontevechia and D'amigo did not violate the Right to Freedom of Expression, making the action illegal and, therefore, forcing the Argentine State to withdraw the action and also to promote the due reparation of the damages caused to the. On February 14, 2017, the Argentine State rejected the decision of the Inter-American Court, transforming this case into one of the most famous "leading cases" of Argentine international public law. Finally, on October 18, 2017, the International Court issued another resolution to render the sentence in the Fontevecchia y D'Amico case ineffective. It was concluded, therefore, that even with the Argentine constitutional reform of 1994 and the granting of a constitutional hierarchy to international human rights standards, it was defined that the rules of international treaties "do not derogate from the provisions of the first part of the Argentine Constitution" under the terms of article 75, item 22, but attributed to the international treaties a character of complementarity, in addition to the prohibition, provided for in article 27 of the Vienna Convention on the Law of Treaties, to invoke reasons of domestic law for non-compliance in order to comply with international obligations. For the preparation of this scientific article, the deductive method and qualitative and descriptive research were used. As bibliographic references were used published materials, scientific literature, Law and Jurisprudence that were relevant to the purposes discussed here.

Keywords: Inter-American Court of Human Rights; Collision of Principles; Right to Privacy; Right to Freedom of Expression; Leading Case.

Resumo

Este artigo científico foi baseado em um estudo de caso, julgado pela Suprema Corte Argentina. Nesse processo, o autor ajuizou ação na justiça cível para ressarcir os danos contra os autores da Revista Notícia, por entender que foram violados os direitos à in-

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timidade, à privacidade, à honra e à imagem. O artigo buscou analisar a colisão de princípios, normas, direitos e jurisprudência que levou a Corte Interamericana de Direitos Humanos a se pronunciar a favor de Jorge Fontevecchia e Heitor D'amico. Estes foram condenados pelo Estado Argentino por entender que houve violação do Direito à Privacidade. No entanto, o tribunal internacional decidiu revogar a sentença proferida e julgada pelo Supremo Tribunal Federal da Nação Argentina, por entender que Fontevechia e D'amigo não violaram o Direito à Liberdade de Expressão, tornando a ação ilegal e, portanto, obrigando o Estado Argentno desistir da ação e também promover a devida reparação dos danos causados aos autores da revista. Em 14 de fevereiro de 2017, o Estado Argentino rejeitou a decisão da Corte Interamericana, transformando este caso em um dos mais famosos "casos paradimáticos" do direito internacional público argentino. Finalmente, em 18 de outubro de 2017, a Corte Internacional emitiu outra resolução para tornar ineficaz a sentença no caso Fontevecchia y D'Amico. Concluiu-se, portanto, que mesmo com a reforma constitucional argentina de 1994 e a concessão de uma hierarquia constitucional aos padrões internacionais de direitos humanos, ficou definido que as regras dos tratados internacionais "não derrogam as disposições da primeira parte da Constituição Argentina" nos termos do artigo 75, inciso 22, mas atribuiu aos tratados internacionais um caráter de complementaridade, além da proibição, prevista no artigo 27 da Convenção de Viena sobre o Direito dos Tratados, de invocar razões de ordem interna, a fim de não cumprir com as obrigações internacionais. Para a elaboração deste artigo científico, utilizou-se o método dedutivo e a pesquisa qualitativa e descritiva. Como referências bibliográficas foram utilizados materiais publicados, literatura científica, Legislação e Jurisprudência que foram relevantes para os fins aqui discutidos.

Palavras-chave: Corte Interamericana de Direitos Humanos. Colisão de Princípios. Direito à Privacidade. Direito à Liberdade de Expressão. Caso Paradigmático.

Summary: 1. introduction; 2. composition of the inter-american court of human rights; 2.1. resource for international court; 3. right to freedom of thought and expression; 4. the right to intimacy, honor and the image of people; 5. fundamental rights and human rights; 6. final considerations; 7. bibliographic references.

INTRODUCTION

The present work aims to present a study on the process that became final in the first, second and third instances of the Argentine courts, where the plaintiff seeks in the civil judicial process the filing of the damages repair action. Because the defendants understood that their rights had been violated, they appealed to the Inter-American Court of Human Rights to try to overturn the judgment of the Argentine Supreme Court.

This is the case of the violation of the privacy rights of the then ex-President of Argentina Carlos Saúl Menem involving the existence of an unmarried extramarital son with Mrs. Martha Meza and important amounts of money donated by Menem to the deputy and her son Carlos Meza. In two publications, which date from 5 and 12 November 1995, the then ex-President Carlos Menem had the right to privacy considered invaded due to revelations made by journalists Jorge Fontevecchia and Hector D'Amico.

Former President Carlos Menem decided to file a lawsuit against the director of News magazine and the editors Fontevecchia and D'Amico through civil law. In this sense, the plaintiff acted in search of compensation for moral damage, according

to allegations by Mr. Carlos Menem. The author sought to obtain the amount in monetary values as a way of repairing this damage, as he understood that the right to his privacy, privacy, honor and image were violated.

In Brazil, as explained by MIRABETE (2006): "*The criminal action is based on the punitive claim due to the disturbance of the social order caused by the crime and aims at the application of the penalty; the civil action has its origin in the offense considered as a harmful act and aims at the reparation of the damage*", therefore, such civil action can be brought against the perpetrator of the crime, his civil guardian or his heir, under article 64 of the Criminal Procedure Code.

In 1997, the lower court rejected the content of the lawsuit filed by Carlos Menem to the editors of the magazine. However, the National Civil Appeal Chamber of the Federal Capital of Argentina reversed the decision and ordered the publication so that Jorge Fontevecchia and Hector D'Amico paid the sum of one hundred and fifty thousand Argentine pesos. The defendants filed an extraordinary appeal. Subsequently, on September 25, 2001, the Argentine Supreme Court upheld the judgment under appeal, but modified the amount of compensation, reducing the amount to sixty thousand Argentine pesos.

Due to the serious disrespect for the right to freedom of expression and thought of editor Hector D'Amico and director Jorge Fontevecchia, of News magazine, they appealed to the Inter-American Commission on Human Rights on December 10, 2010. The Court was asked to celebrate and the declaration of universal responsibility of the Argentine State for the transgression of a civil right of the individuals mentioned, as provided for in article 13 and article 1.1 of the American Convention on Human Rights.

On March 28, 2011, the representatives of Jorge Fontevecchia and Hector D'Amico presented their petitions, arguments and evidence. The representatives asked the Court to declare that the Argentine State violated Jorge Fontevecchia and Hector D'Amico's right to freedom of expression, protected by article 13 of the American Convention. They also requested several remedies to the decision handed down by the Argentine Supreme Court.

Based on the American Convention on Human Rights, article 62, item 3, it appears that the Court had jurisdiction to hear the case in question, since the Argentine State has been a party to the Convention since September 5, 1984, on the same date , legitimized the jurisdiction of the Court. The subject of the aforementioned article is as follows:

> *The Court has jurisdiction to hear any case presented to it in connection with the application and interpretation of its determinations, provided that the States Parties have, in this case, recognition or else recognize the aforementioned jurisdiction, which may be by special convention, or by special declaration, as provided for in the preceding items*[2].

[2] BRASIL, Decreto 678, de 6 de Novembro de 1992. Promulga a Convenção Americana sobre Direitos Humanos (Pacto de São José da Costa Rica), de 22 de novembro de 1969, *Diário Oficial da União*, Brasília, 09 nov. 1992.

Thus, the entry of the Inter-American Court of Human Rights in the Fontevecchia and D'Amico case occurred due to a violation of the basic principle of the Argentine State's inability to harm the Rights of Freedom of Expression.

The Argentine Supreme Court in 2017 proceeded again to penalize the defendants, in accordance with the noted principle of the right to privacy to the detriment of the right to freedom of expression, as well as the supremacy of the courts. This article deals with analyzing these two rights and how they influenced the judges in the case to sentence in the manner alleged by the Inter – American Commission on Human Rights and how the Argentine State ruled against the Inter-American Court.

COMPOSITION OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS

Constituted by the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights, the Inter-American Human Rights System[3] was born, in the context of advancing post-war, in the area of Universal Rights, in legal, temporal and logical complementarity to the establishment of the Universal Protection System, which started to be structured from 1948, with the Declaration of the United Nations Organization.

The Inter-American Court of Human Rights consists of an independent judicial entity, originated by the Organization of American States. One of this Court is an interpretation and application of the American Convention on Human Rights and other treaties on the same topic. Located in Costa Rica, in the city of San José, the Court was founded in 1979, having been formed by jurists elected in a personal capacity, for being men of recognized competence in the area of Human Rights with high moral authority.

The Judges who were members of the Inter-American Court of Human Rights at the time were Mr. Diego Garcia-Sayan of Peru, the President of this Court. Mr. Manuel E. Ventura Robles from Costa Rica, Dr. Margarette Maio Macaulay, from Jamaica. In addition to Rhadys Abreu Blondet, from the Dominican Republic, Doctor Alberto Pérez Pérez, from Uruguay and Eduardo Vio Grossi (Chile). The Secretary of the Court, the Chilean Pablo Saavedra Alessandri and the Assistant Secretary, Ms. Emilia Segares Rodríguez from Costa Rica. Judge Leonardo A. Franco, due to his nationality, did not participate in this case.

RESOURCE FOR INTERNATIONAL COURT

The Argentine Republic ratified the American Convention on Human Rights in 1984, when it recognized the jurisdiction of the Inter-American Court of Human Rights.

It is important to note that at the time of ratification of the American Convention, the Argentine legal system adopted the thesis of constitutional supremacy, the prevalence of domestic law over international law, and submitted to the highest interpretation of the Supreme Court.

[3] SIDH, Sistema Interamericano de Direitos Humanos, *O quê, como, quando, onde e o porquê da Corte Interamericana*. Disponível em: <www.stf.jus.br/arquivo/cms/noticiaNoticiaStf/.../CorteIDHPORTUGUESFINAL.docx>. Acesso em: 17 ago. 2017.

Indirectly, the 1994 reform expanded the corpus of rights, by establishing the constitutional hierarchy of eleven international human rights norms, which may increase when ratified by two thirds of Congress (article 75, item 22). With this inclusion, the 1994 constitutional reform internalized in Argentine law what is called jus cogens, that is, the body of basic human rights that constitute international public order, in addition to any act of recognition, ratification or reception by the legal systems national[4].

The defendants submitted a petition to the Inter-American Commission on Human Rights in November 2001, and the Admissibility Report was then issued on October 12, 2005. After that, the Process Fund Date Report was presented on July 13, 2010.

The Commission, before the Inter-American Court of Human Rights, expressed its request for the Inter-American Court to decide on the transgression by the Argentine State of article 13, which deals with freedom of thought and expression, as well as the article 1.1 of the American Convention. In addition to the approval of the board, a violation of article 2 of the said Convention was included, thereby establishing the responsibility for observing the provisions of domestic law determined by that article.

According to art. 1.1 of the American Convention on Human Rights:

> *The States that are part of this Convention are responsible for the fulfillment of the rights and freedoms provided for therein and for the guarantee of their full and free exercise to any and all individuals under their jurisdiction, without any discrimination based on political position, religion, language, sex, color, race or any other character, birth, economic position, social or national origin or any other social particularity*[5].

Accordingly, note what is stated in article 2 of the same text:

> *Member States if the functioning of the freedoms and rights set out in article 1 is not yet guaranteed by legal or other determinations, are responsible for adopting, according to their constitutions and the Convention, the legislative or other measures that have been adopted necessary for the realization of these freedoms and rights*[6].

RIGHT TO FREEDOM OF THOUGHT AND EXPRESSION

In Argentina, the legal regime of freedom of expression is supported by three constitutional provisions, which, according to Sagüés[7] are: a) Articles 19 and 75,

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4 ERMIDA URIARTE, O, La Declaración Sociolaboral del Mercosur y su eficacia jurídica. IUS ET VERITAS, 13(27), 2003, p. 247-258. Recuperado a partir de <http://revistas.pucp.edu.pe/index.php/iuset veritas/article/view/16270>.

5 BRASIL, Decreto 678, de 6 de novembro de 1992. Promulga a Convenção Americana sobre Direitos Humanos (Pacto de São José da Costa Rica), de 22 de novembro de 1969, *Diário Oficial da União*, Brasília, 09 nov. 1992.

6 *Ibidem*.

7 SAGÜÉS, 2006 apud COLNAGO, Cláudio de Oliveira Santos; BRASIL JÚNIOR, Samuel Meira, *A liberdade de expressão e suas limitações: um estudo comparativo entre Brasil e Argentina*. Disponível em: <http://www.publicadireito.com.br/artigos/?cod=88e1ce84f9feef5a>. Acesso em: 17 ago. 2017.

which provide for all citizens the free movement and creation of works by authors; b) Article 32, whereby Congress is not permitted to create laws that limit press freedom or that place federal jurisdiction over it; a) Article 14, which guarantees everyone the right to publish their ideas without prior censorship. According to the authors Colnago and Brasil Júnior:

> *Contrary to what happens in Brazil, the Argentine Constitution does not deal specifically with social communication, therefore, there are no specific constitutional precepts on the performance of radio and television broadcasting activities. It is by ordinary legislation that these activities are regulated. As Lara points out today, in addition to the rules of the American Convention on Human Rights (included in Argentine law), Law 26,522 of October 2009, known as "Ley de medios", which, throughout the national territory of the Argentine Republic, regulates audiovisual communication practices*[8].

There are several items of article 5, of the 1988 constitutional text, which deal with freedom of expression. According to item IV, the expression of thought is free, anonymity is not allowed. Subsequently, item V guarantees, in addition to indemnity for material, moral and image damages, the right of reply in equal measure to the grievance. Section VII, on the other hand, determines the non-deprivation of rights due to the individual's political position, philosophical conviction or religious belief, except if such beliefs were invoked with the objective of legal release imposed on all, in refusal to fulfill alternative benefits provided for law.

In this sense, it can be said that both constitutions currently indoctrinate the principle of Freedom of Expression. In this sense, it is necessary to comply that these provisions must be analyzed, due to the action brought by the Inter-American Commission on Human Rights.

According to article 5, item XI, of the Brazilian Constitution[9], regardless of license or censorship, the free expression of communication and scientific, artistic and intellectual practices is guaranteed.

According to Fiorilo:

> *The press service, its informative and thought-forming activity, by disseminating facts that compromise the privacy of other individuals, causes questions about its area of activity in society. The information disclosed, in accordance with the Journalists Code of Ethics, must be accurate and correct, and the journalist must convey facts that interest people, with due regard for each individual's right to privacy. From an analysis of constitutional guarantees regarding the privacy and dignity of the human person, it appears that they conflict with the freedom of expression given to the press by the Brazilian legal system. Both are not absolute, even though we are facing constitutionally protected rights, and each case must be examined in a specific way,*

[8] COLNAGO, Cláudio de Oliveira Santos; BRASIL JÚNIOR, Samuel Meira, *A liberdade de expressão e suas limitações: um estudo comparativo entre Brasil e Argentina*. Disponível em: <http://www.publicadireito.com.br/artigos/?cod=88e1ce84f9feef5a>. Acesso em: 17 ago. 2017.

[9] BRASIL, Constituição (1988), *Constituição da República Federativa do Brasil*: promulgada em 5 de outubro de 1988, Organização do texto: Juarez de Oliveira, 4. ed, São Paulo, Saraiva, 1990.

> *so that the protected social interest and its limitation can be verified. For the preservation of the democratic rule of law, the function of printing is essential. Certain authors even take it as a fourth power, which is due to the fact that, when disclosing information, they play a very important role in the critical formation of their public about the other powers, the Judiciary, the Legislative and the Executive. However, even though it is not, in fact, a fourth power, it is certain that the press exercises some control over the state machine*[10].

Taking into account the arguments of the aforementioned author, it can be said that the role of the Press in the fulfillment of Freedom of Expression is in some ways essential. Therefore, the relative parallelism between the right to privacy and the right to freedom of expression is noticeable.

THE RIGHT TO INTIMACY, HONOR AND THE IMAGE OF PEOPLE

Law, according to Silva[11], in proposing and setting equitable and fair standards of conduct, seeks to make the conditions of social coexistence better, since it is exactly like art that Law, in its intent, resorts to other areas of knowledge, such as: politics, sociology, history, philosophy and others.

Nader[12] says that the law serves social life, as it is aimed at broad favoring between social groups and citizens, which is fundamental for society to progress.

According to the aforementioned definition, and in accordance with the prerogatives of the process, in which the injured party accuses the journalists of the News magazine of injury to its image, it is understood that the former President Carlos Menem considers his image and privacy as part subjectivity. In this sense, it is worth remembering that, as mentioned in the 1988 Brazilian Constitution[13], it can be understood that "intimacy, private life, honor and people's image are inviolable, the right to compensation for material or moral damage arising from your violation".

In Andrade's view:

> *The right to privacy covers the rights to the confidentiality of telegraphic communications, correspondence and telephone communications, to the inviolability of the home, to the image, to the time and to intimacy. Received in Brazil by Decree 678, 1992, Article 11 of the San José Pact of Costa Rica guarantees the protection of dignity and honor: every individual must have his honor respected and his dignity recognized; no one, in your home, in your family and in your private life, should be the focus of abusive or arbitrary interference, let alone unlawful outrages on your reputation and / or honor; all individuals must resort to the law, as a right, against this type of offensive attitude. The rights to one's own image and privacy are*

[10] FIORILO, Bruno Viudes, *Os limites da liberdade de imprensa no Estado Democrático de Direito,* Mar. 2015. Disponível em: <https://jus.com.br/artigos/37590/os-limites-da-liberdade-de-imprensa-no-estado-democratico-de-direito>. Acesso em: 17 ago. 2017.

[11] SILVA, Jean Patrício da, *Manual de introdução ao direito*, Cabedelo, PB, 2014, s. n.

[12] NADER apud SILVA, Jean Patrício da, *Manual de introdução ao direito*, Cabedelo, PB, 2014, s.n.

[13] BRASIL, Constituição (1988), *Constituição da República Federativa do Brasil*: promulgada em 5 de outubro de 1988, Organização do texto: Juarez de Oliveira, 4. ed, São Paulo, Saraiva, 1990.

> *constitutional protection for private life, protecting an intimate scope that cannot be overcome by outside illegal interference. As enshrined in article 5, item X, constitutional protection serves both legal entities and individuals, also providing for the protection of their own image against the media*[14].

Thus, the damage to the image is directly related to the intimacy, honor and private life of each person. What requires constitutional guarantees in defense of the injured party. However, the rights to privacy, according to jurisprudence, can be conflicting, being necessary to consider, separately, each real case, in order to decide what should prevail.

According to Alexy[15], the justifications for the removal of such right will be greater, depending on the degree of intervention in a given right or its transgression.

The author says the following:

> *It can be distinguished three spheres with decreasing protection intensity: the most intimate sphere (unquestionable and ultimate space of human freedom), that is, according to the German Constitutional Court, the core space protected, absolutely, from the organization private life, understanding what is most confidential and which should not be known by others due to its excessively particular aspect; the broad private sphere, which includes the private space whereas it no longer belongs to the intimate sphere, encompassing subjects that the individual transmits only to people he trusts; and the social sphere, which contains everything that is not inserted in the broad private sphere, that is, all subjects associated with news that the individual seeks to suppress from the knowledge of other people*[16].

Another author who raises this issue of privacy is Alcalá (2008). The author states that:

> *The coverage of the right to freedom of information establishes that individuals of public importance, especially judges, legislators, administration and government, who are tasked with deliberating on the settlement of social issues, have, compared to other ordinary individuals, the scope of private life shortened. It is, therefore, permitted to inquire about the life of a person who are connected or which directly imply the implementation of public impositions, but not with regard to intimacy and aspects of private life, which are irrelevant and do not agree with the requirements disclosure of information of public interest, which should not be confused with the public's illegitimate interest in someone's intimacy and privacy.*

Therefore, it is essential to understand that fundamental rights are not absolute. According to Bueloni[17], if there is a conflict between rights, the judge

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[14] ANDRADE, Geraldo, *Direito à privacidade: Intimidade, vida privada e imagem*.,2015. Disponível em: <https://quentasol.jusbrasil.com.br/artigos/214374415/direito-a-privacidade-intimidade-vida-privada-e-imagem>. Acesso em: 17 ago. 2017.

[15] ALEXY, Robert, *Teoria dos direitos fundamentais*, Tradução Virgílio Afonso da Silva, 2. ed, São Paulo, Malheiros, 2017.

[16] *Ibidem*.

[17] BUELONI, Claudio, *Existe Direito absoluto?* 2014. Disponível em: <https://claudiobueloni.jusbrasil.com.br/artigos/122873636/existe-direito-absoluto>. Acesso em: 17 ago. 2017.

should use the criterion of equality as a fair means of applying the law. This defines the adequacy of the rule to a real case, in which fairness and fairness must be observed between the parties involved.

> *Equality not only explains the law (it rejects the simple strict understanding of the law), but it guarantees, in a way, that the use of the law can be harmful to any individual, since any interpretation made by the justice must tip to the possible extent, that is, for the equitable, complementing the law and covering their spaces*[18].

Thus, it will be up to the magistrates to decide which fundamental right would be considered fair for the equalization between the litigating parties. For that, the most reasoned decision should then apply the penalty, observing which fundamental right should be considered: "The Right to Freedom of Expression or the Right to Privacy".

FUNDAMENTAL RIGHTS AND HUMAN RIGHTS

In order to understand how to analyze a case, the doctrine manifests itself in order to clarify how to decide the importance among fundamental principles, based on the definition of Human Rights and Fundamental Rights. In this sense, it is preponderant to realize that Human Rights deal with conceptions within the Law, which are related to internationally established principles.

According to the criterion adopted here, the term "fundamental rights" applies to those rights (generally attributed to the human person) recognized and affirmed in the sphere of the positive constitutional law of a given State, whereas the expression "human rights" is related with the documents of international law, for referring to those legal positions that recognize human beings as such, regardless of their connection with a certain constitutional order, and that, therefore, aspire to universal validity, for all peoples and in all countries. places, in such a way that they reveal a supranational (international) and universal character[19].

In terms of Fundamental Rights, Araújo and Nunes Junior[20] classify three dimensions: That of fraternity, equality and freedom; the same enshrined in the French Revolution. The rights discussed here can be framed in the dimension of freedom. Economic, cultural and social rights, according to Pedro Lenza[21], belong to the second dimension, that of equality.

When it comes to the rights linked to fraternity, Marcelo Novelino[22] defines them as being of a solidarity nature, arising with the objective of reducing the differences between underdeveloped and developed countries through collaborative actions between nations. As an example of these rights, those related to peoples'

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18 *Ibidem*.

19 SARLET, Ingo Wolfgang; MARINONI, Luiz Guilherme; MITIDIERO, Daniel, Curso de Direito Constitucional, São Paulo, Revista dos Tribunais, 2012, p. 249.

20 ARAÚJO, Luiz Alberto David; NUNES JÚNIOR, Vidal Serrano, *Curso de Direito Constitucional*, 9. ed, São Paulo, Saraiva, 2005, p. 109-110.

21 LENZA, Pedro, *Direito Constitucional Esquematizado*, 10 ed, São Paulo, Método, 2006, p. 526.

22 NOVELINO, Marcelo, Direito Constitucional, São Paulo, Método, 2008, p. 229.

self-determination, the environment and development are mentioned, as well as the rights of communication and property over the collective human heritage, defined as third dimension rights.

Sarlet understands that:

> *As a result of the constitutional positivization and personalization of certain basic principles – which gives them an axiological character -, fundamental rights constitute, together with the organizational (called the organizational or organic part of the Constitution) and structural principles, the substantial nucleus, that is , the substance itself, composed of fundamental resolutions, of normative quality, showing that even in a democratic State, certain links of a material nature are necessary (which was felt most strikingly in the post-World War II context) to confront the executioners of totalitarianism and dictatorship*[23].

It is necessary to affirm, therefore, that when considering conflicts and taking into account the principles of the doctrine of law, that the Court has chosen to enforce the principle of freedom of expression to the detriment of facts relating to the private life of public officials or of those who aspire to be them, facts that in general are always subject to a greater examination by the society. In this case, the right to Freedom of the Press to the detriment of the Right to Privacy of the former President Menem.

FINAL CONSIDERATIONS

On November 29, 2011, the Court, after following the appropriate procedural stage at international headquarters, in which only the alleged victims, their representatives and the evidence offered intervened, declared that the Argentine government had violated the right to freedom of expression of the litigants (article 13 of the American Convention on Human Rights).

The court stated that the sentence is in itself a form of redress (the resolution, p. 1, a, trial, p 40. Fontevecchia Argentina and others vs.) and yet, that the Argentine State should annul the sentence imposed on Jorge Fontevecchia and Hector D'Amico, and all its consequences. In addition, it should publish an official summary of the judgment made by the Supreme Court, in the Official Gazette and in a national newspaper, as well as publish the full judgment of the Court on the page of the Judicial Information Center of the Argentine Supreme Court. Finally, deliver the amounts recognized in that judgment, the reimbursement of amounts and appropriate repairs to material damage, the costs arising from the processing of the case and the international procedure.

It was concluded that the voting magistrates decided for the sentence favorable to Jorge Fontevecchia and Heitor D'Amico as they considered that in this case, the right to freedom of expression should be preserved. The sentence was based on the principle that if there is a conflict between principles, the first

[23] SARLET, Ingo Wolfgang, *Dignidade da pessoa humana e direitos fundamentais na constituição federal de 1988*, 5. ed, Porto Alegre, Livraria do Advogado, 2005, p. 70.

dimension of Fundamental Rights would be the primary principle to be observed in the event of a collision of principles.

It is important to note that on February 14, 2017, the Supreme Court of Justice of the Argentine Nation, composed of Ministers Elena Highton de Nolasco, Juan Carlos Maqueda, Horacio Rosatti, Carlos Fernando Rosenkrantz and chaired by Minister Ricardo Luis Lorenzetti, said a sentence stating that "in this case, to render the judgment of this Superior Court without effect, a judgment passed and judged, is one of the presuppositions that substitution is legally impossible in the light of the fundamental principles of Argentine public law. Among these unshakable principles lies, without a doubt, the character of this Court as the supreme organ and head of the Judiciary, as shown in article 108 of the National Constitution. Repealing the final sentence of the Argentine Supreme Judicial Branch and replacing it with an international court, constitutes a clear violation of Articles 27 and 108 of the Argentine National Constitution".

Therefore, according to the judgment issued by the Argentine Supreme Court, it does not imply that the decisions of the Inter-American Court of Human Rights are not binding, nor does it imply that other international treaties are not respected, but that the Inter-American Court of Human Rights does not constitute a fourth degree of jurisdiction to the point of revoking decisions of the Superior Court of Argentina. International treaties cannot alter the supremacy of the National Constitution, the form of government, exclude a state or incorporate others, limit the powers specifically conferred on the government, disintegrate the territory politically, restrict the civil, social and political rights recognized also by the Constitution to those inhabitants of the country, the prerogatives given to foreigners, as well as suppress or diminish in any way the constitutional guarantees created to make them effective.

Finally, on October 18, 2017, the International Court issued another resolution on the enforcement of the sentence in the Fontevecchia y D'Amico case, in which it commented on the decision of the Argentine Supreme Court. The Inter-American Court of Human Rights has stated that States cannot invoke provisions of domestic law to support non-compliance with obligations arising from the American Convention and has also said that it is not a question of resolving the problem of the supremacy of international law over national law in domestic law, but only to enforce what states have sovereignly committed to.

Even with the 1994 constitutional reform and the granting of a constitutional hierarchy to international human rights standards, it was defined that the rules of international treaties "do not derogate from the provisions of the first part of the Argentine Constitution" under the terms of article 75, item 22, but attributed to the international treaties a character of complementarity, mainly because such provision privileges the rules contained in the first part of the constitutional text to the detriment of international treaties, despite the dissident vote of Minister Juan Carlos Maqueda, which reinforced the duty to fully comply with the Court's decision Based on the principles of international State responsibility and good faith, in addition to the prohibition, provided for in article 27 of the Vienna Convention on the Law of Treaties, of invoking reasons of domestic law to fail to comply with international obligations.

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