

# THE INTERPRETATION OF HUMAN RIGHTS ACCORDING TO INTERNATIONAL TREATIES: NOTES FOR THEIR JURISDICTIONAL APPLICATION IN MEXICO

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**Abstract:** The reform of article 1 of the Political Constitution of the Mexican United States in June 2011, has incorporated into the constitutional text *the clause of interpretation according* to international treaties on human rights as the hermeneutic criteria which domestic judges must adopt in their verdicts. This clause reflects an evolutionary tendency which the Constitutional States are adopting, generating a new understanding of the state function as a whole, especially of the judiciary function. Despite this aperture, which enables the application of this type of hermeneutic techniques, it is possible to see how in some jurisprudential criteria a restraining posture is adopted towards international regulatory contents in human rights, leaving aside the possibility of an interpretative process of harmonization

**Keywords:** Clause of Consistent Interpretation; International Treaties; Human rights; Constitution.

**Summary:** I. THE JUDGE'S OBLIGATION TO ELABORATE A HARMONIC PROCESS FOR THE INTERPRETATION OF INTERNATIONAL TREATIES ABOUT HUMAN RIGHTS; II. GENERAL APPROACH TO INTERPRETATION ADVANCED FORMULA FROM A HUMAN RIGHTS DOGMATIC; II.1. The interpretation of human rights as an open to the public and social power challenge.

## I. THE JUDGE'S OBLIGATION TO ELABORATE A HARMONIC PROCESS FOR THE INTERPRETATION OF INTERNATIONAL TREATIES ON HUMAN RIGHTS

The reform of article 1 of the Political Constitution of the Mexican United States made in June 2011 has incorporated the clause of consistent interpretation into the constitutional text. This way, the constitutional rule contains a valuable pattern and constitutes a vanguard position by establishing that: "the laws related to human rights will be interpreted according to this Constitution and to the international treaties on the matter giving at all times the widest protection to people" (CABALLERO OCHOA, J.L., 2012: 105). Therefore, the clause of consistent interpretation and the *pro person* principle are formally established in the constitutional disposition, both mentioned aspects having their origins in the scope of international law and defined as hermeneutic criteria which inform about the scope of human rights (PINTO, M., 1997: 163; OLANO GARCÍA, H.A., 2006: 199). This novel disposition reflects an evolutionary tendency of

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opening which present Constitutional States are adopting by establishing that international treaties on human rights have constitutional hierarchy and on the other hand, it implies that laws and actions can be controlled according to not only constitutional rights but to human rights as well.

This type of clauses or hermeneutic techniques have been incorporated already in other constitutional frames, like the European, which allows to prove that the present tendency is from a ductile and international State. Thus, for example, the German Constitution points out that: “The rules of international law form an essential part of the federal legal system, they will have priority over domestic laws and will create direct rights and duties for the inhabitants of the federal territory”; the same Fundamental Law also states: “If in a judicial litigation it was uncertain if a rule of international law forms part of federal law and if it directly creates rights and duties for individuals, the court will have to gather and deliver the enunciation to the Constitutional Federal Court.” In Austria: “The rules and laws generally acknowledged by International Law are considered part of the federal system.” Meanwhile in Portugal, in its article 16.2 it is stipulated that: “The constitutional and legal precepts related to fundamental rights must be interpreted and integrated in harmony with the Universal Declaration of Human Rights”.

Meanwhile the Spanish Constitution of 1978 in its article 10.2 utters that: “The rules and laws related to the fundamental rights and to the liberties acknowledged by the Constitution will be interpreted according to the Universal Declaration of Human Rights and the treaties and international agreements on the same subjects, ratified by Spain”. The Greek Constitution declares: “The rules and laws generally accepted by International Law and all international treaties on the matter once ratified through the legislative process and enforced according to their own dispositions, form part of Hellenic Law and will have a higher degree of importance when in conflict with domestic law. Ireland also accepts that the main and recognized principles of international law as the rule of conduct in Ireland’s relationships with other States. Meanwhile the Italian Constitution states that: “The Italian legal system shall adapt to the rules and dispositions from international law which are generally acknowledged”. (PFEFFER URQUIAGA, E. 2003: 467-484). All this has influenced the Latin American countries which have given constitutional hierarchy to international treaties on Human Rights, such as: Argentina, Chile, Colombia, Costa Rica, Peru, Paraguay and very recently the Dominican Republic in its new Constitution proclaimed in January 26, 2010.

It is worth mentioning that in Mexico there is legal precedent for the use of this international hermeneutic exercise, in articles 6 & 7 of the Federal Law to Prevent and Eliminate Discrimination of 2003. These legal advances on human rights were already located before the constitutional reform in a manner that obligates all authorities to act in congruence with international treaties about non-discrimination. It even goes beyond by not only incorporating treaties but also international precedents adopted by the American Court and the recommendations of the American Commission of Human Rights. It also includes the *pro person* principle in the manner that when different

interpretations are possible, the one which protects people or groups victimized by discrimination must be preferred. In this sense, meaningful would also be the possibility of establishing in the first paragraph of article one of the Constitution the obligation of the Mexican State to incorporate a mechanism that would give acceptance and the follow-up to the abiding of the American Commission of Human Rights recommendations and not expect to wait for the Mexican State to be sued and a complaint filed to the Organization of American States for not abiding by the recommendations of the American Commission<sup>2</sup> (BECERRA RAMÍREZ, M., 2007: 63-113).

Meanwhile, interpretative and vanguard principles have been established in the states on the topic of human rights, like the one established in the Constitution of the State of Sonora which, in its article 4, Bis-C., in which the *principle of non-contradiction; the clause of consistent interpretation* according to international treaties attending to the precedents set by the American Court of Human Rights; *the principle of pondering* when in a conflict, two or more different human rights might apply for a harmonic interpretation to take place, the same goes for *the principle of progressiveness*. Other federal entities have followed Sonora's example, such as the State of Tlaxcala, which has incorporated the aforementioned principles in article 16.B of its state Constitution.

In this subject, the discussion has revolved around the reach of these constitutional norms of opening for human dignity and international law. Particularly, the debate has focused on the following question: Does it imply or not with the aforementioned rules and dispositions the incorporation of international law and its dispositions to the rank of Constitutional Law? Some authors claim that, with the reform, the incorporation into the constitution or "constitutionalization" of Human Rights on the international stage has occurred. Others point out that the rule does not imply the constitutionalization of the international regulations, but in fact constitutes a particular figure of *quasi-constitutionalization* or *indirect constitutional efficiency*. Finally, there are those who have sustained that this has purely hermeneutic consequences. (NASH ROJAS, C., 2010: 166-167).

However, the Spanish constitutional court's precedent has adopted a clearer stance. It rejects the idea that rules and dispositions contained in international treaties on Human Rights may serve as parameters of constitutionality. In this way, the central argument of the Spanish Constitutional Court has been that the disposition from article 10.2 does not bestow constitutional rank to the rights and liberties internationally proclaimed when they are not also contained in the Constitution itself, but forces the interpretation of the corresponding precepts of it according to the content of the aforementioned Treaties or Agreements, therefore in the practice this content turns in a certain way in the constitutionally declared content of the rights and liberties announced

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<sup>2</sup> About the topic of recommendations resulting from State international responsibility on human rights, the work of certain authors is highly recommended (MARTÍN, C., 2004: 79-117) and (CORCUERA CABEZUT, S., 2003: 1-112).

in chapter second, title I of the Spanish Constitution (STC 36/1991). The main effect of this interpretation of article 10.2 of the Spanish Constitution will be that, in case of a contradiction between a domestic law and a Human Rights treaty, the latter will not serve as an argument to justify the unconstitutionality of the domestic law in question, since international law is not considered constitutional law (NASH ROJAS, C., 2010: 167).

The Spanish Constitutional Court has pronounced so in its STC 28/1991, in which it states that: "...while constitutional laws recognize rights and liberties, they must be interpreted in accordance to the Universal Declaration of Human Rights and the treaties and international agreements on the subject ratified by Spain (art. 10.2 C.E.), in any case would a contradiction between a law and fundamental rights turn the treaty "per se" in a measure of constitutionality for the examined law, because such measure would still be integrated by the constitutional precept definer of the legal right or liberty, if interpreted according to the exact profiles of its content, in conformity with the international treaty or agreement" (C 28/1991. B.O.E. 14/02/1991).

Somehow, this jurisprudence of the Spanish Constitutional Court shows a preference for the constitutionality of fundamental rights against its international opening. Facing this international expansion, it is relevant to point out that the Mexican Constitution has a broader scope of this protection; compared to the Spanish Constitution, the Mexican legislation has two performance parameters: the Constitution and treaties, the Spanish refers only to treaties. Mexican law despite the two interpretive parameters commands the use of *pro person principle* by applying the standard or interpretation most favorable to the person; the Spanish law does not make that distinction. Furthermore, human rights standards in Mexico include, in accordance with the first paragraph of Article 1 of the Constitution, those of the Commission and of human rights treaties; in Spain, only those that the Constitution recognizes. Furthermore, human rights laws in Mexico include, in accordance with the first paragraph of Article 1 of the Constitution, thereof and those of human rights treaties; in Spain, only those that the Constitution recognizes. In any case, the example of Mexico serves to make a minimum balance of how the Inter-American system is forced to open, even more with international scope of reference of rights, than the constitutionality of the tightest fundamental rights at international level of European system, particularly the Spanish case which still retains the constitutional primacy over international treaties (ANSUÁTEGUI ROIG, F. J., 2007: 147-203).<sup>3</sup>

However, making reference to some legal precedents, on March 14, 2012, the Second Hall of the Nation's Supreme Court of Justice, in the constitutional trial in revision 781/2011, decided that when constitutional dispositions on Human Rights are deemed as "enough", it is unnecessary to seek answers in the international instruments due to the obligation established by the *pro person* principle which says that the most

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<sup>3</sup> About the need of opening of the legal systems of European states as a criterion for regional internationalization and universal, see: ANSUÁTEGUI ROIG, F. J., 2007: 147-203.

favorable dispositions must be considered and this may satisfy the constitutional norms as well.

It has been established in the following “JURISPRUDENCE 2º. XXXIV/2012 (10A.) HUMAN RIGHTS. THEIR STUDY SINCE THE REFORM TO CONSTITUTIONAL ARTICLE 1º, PUBLISHED IN THE FEDERATION’S OFFICIAL DIARY ON JUNE 10, 2011, DOES NOT NECESSARILY IMPLY THAT INTERNATIONAL INSTRUMENTS SHOULD BE CHECKED, IF IT RESULTS ENOUGH TO CHECK THE CONSIDERATIONS THEY HAVE ABOUT THE POLITICAL CONSTITUTION OF THE MEXICAN UNITED STATES”, which points out that:

*“According to what has been established at the article one of the Political Constitution of the Mexican United States, since the reform published in the Federation’s Official Diary on June 10, 2011, in attention to the pro person principle, it doesn’t result necessary to consider the content of international treaties and instruments that from part of our legal system, if it is enough the consideration of human rights estimated to be violated stated in the General Constitution of the Republic and therefore it is enough the study of the constitutional precept that considers the situation to determine the constitutionality or not of the act that is complained about”. (underlining added).*

In these argumentative lines what we see is a restrictive posture of the application of the clause of consistent interpretation, by taking the Supreme Court into account, an essential element that Eduardo Ferrer points out, in the sense that the consistent interpretation is not about an imposition of the international law over the domestic one, but of an *interpretative process of harmonization* which implies even in some occasions, stop applying the first one, by resulting of greater protective reach the domestic law, according to the *pro person* principle, and also derived of the general obligation of respecting the rights and liberties considered in international treaties, and not of considering as the Supreme Court does as “unnecessary” the contents of international treaties. (FERRER MAC-GREGOR, E. 2012: 358-359).

The consistent interpretation either used to determine the unconstitutionality of a law, or to apply it to a specific case when it resulted more protective of the person’s rights and liberties it must be understood as *process of harmonization*, it is not about “sufficiency” or of “need”, but of a holistic study of rights, meaning, the interpreter must seek an interpretation that allows to “harmonize” the “domestic and the international law”. It is not about two successive interpretations (first the constitutional consistent interpretation and then the one according to the international treaty), but of a consistent interpretation that harmonizes both. When the constitutional formula says that human rights laws will be interpreted “consistently with “this Constitution and international treaties...”, the conjunction “and” grammatically constitutes a “binding conjunction”, that works to reunite in a single functional unit two or more homogeneous elements by indicating their accession. From there we can conclude that this clause meets with the “hermeneutic function” need for harmonization. And amongst the

possible consistent interpretations for harmonization, the interpreter must choose for the widest protection. (FERRER MAC-GREGOR, E. 2012: 365).

In the words of Bidart Campos, it constitutes a “conciliatory interpretation” as a double highway, therefore making an interpretation “of” the Constitution (human rights of constitutional and international source) and “from” de Constitution downhill with the sub constitutional law, whose interpretation must be consistent with the Constitution and international treaties. (BIDART CAMPOS, G., 2003: 388). The “principle of harmonization” on international subjects has been established by the United Nations’ Commission of International Law by studying the issue of “fragmentation” of international law and it consists in the fact that when several laws on the same subject exist such laws must be interpreted as much as possible in a manner that only one series of compatible obligations is established. Indeed, it is considered in numeral 29 of the American Convention of Human Rights, the pointing that no disposition in that treaty may be interpreted to “exclude other rights and legal guarantees that are inherent to the human being of that result from the representative democratic form of government” o “to exclude or limit the effect that the American Declaration of Men’s Rights and Duties and other actions.”

Attending the referred thesis, it is important to point out that even though it might not be categorically stipulated in constitutional article one that international treaties must be consulted, it is important to consider international treaties as background arguments from which a controversy must be solved and not consider them as simple additional considerations from the essential argumentative work of judges. In addition, the Supreme Court of Justice would have to clarify which are going to be the standards of interpretation used by judges. Besides, the Supreme Court of Justice would have to clarify which criteria will be used for interpretation by judges to determine when the constitutional dispositions on human rights will be enough and it will be unnecessary to interpret the contents of international treaties. We consider that with this interpretation a resistance from the Supreme Court to apply the instruments of international origin is proved, for which it is timely to assure that the constitutional law does not only authorize, but in fact forces all judges without exception to directly interpret and apply international law on human rights.

The breach of this mandate may generate the State’s international responsibility for actions or omissions when these mean a violation to international compromises derivatives from treaties on human rights. Judges, as a part of the Mexican State’s system, are also submitted to signed and ratified international treaties by Mexico, which forces them to look out for the effects that the dispositions of international treaties are not restricted by the application of laws, authority actions or omissions, etc. In other words, the judiciary must exercise a “control of conventionality.”

In addition to the principle of harmonization, another postulation incorporates itself which develops a primordial function, the one that constitutes the “material or guarantee principle” regulated by the hermeneutic criterion *favor libertati*, which tells us that rights must be interpreted in the widest way possible for them to be effective, as all interpretative difficulties related to human rights cannot be solved with the full

interpretation of the international treaty, because many times, both the treaty's dispositions and the constitution's regulate the same thing, meaning that, it is not more precise or more protective, but having both the particular right written on them and enounce them in the same terms. In these cases we consider that the interpretations from international courts in certain rights must be appealed to, also to the doctrine precedents that have been applied on different cases solved by the United Nations' committees enabled to obtain individual communications about human rights violations contained in the respective international treaties, because binding effects for domestic systems are born from their decisions.

In this way we can see a clause of open interpretation with consistency not only with international rights, but also with international precedents, as Eduardo Ferrer Mc-Gregor has said in his definition of consistent interpretation, that international treaties and international precedent make an indivisible binomial. So he defines consistent interpretation as an "...hermeneutic technique with which rights and constitutional liberties are harmonized with values, principles and rules contained in international treaties on human rights signed by States, as well as by precedents from international courts (and in certain occasions other resolutions and international sources), to achieve its greater efficacy and protection." (FERRER MAC-GREGOR, E. 2012: 358). Nowadays the importance of the *in dubio pro libertati* principle cannot be argued, and favouring fundamental rights, because its aim, as stated by Professor Perez Luño, is to achieve the maximum expansion of the constitutional liberties system; principle that, in relation with the rule, increases the powers of the judiciary interpreter. (PÉREZ LUÑO, A., 1984:101-124)<sup>4</sup>.

We can affirm that this is the challenge and the most important practical note for judges, because today it is acknowledged by the scientific community that law in general and most of all constitutional law and international treaties containing human rights, contain a really vague language, (ENDICOTT, T., 2003: 179-189), therefore, legal indetermination which affects fundamental rights of a certain Constitution, affects human rights acknowledged in international treaties even more, because generally in international treaties, rights normally appear numbered with no specification about the concrete meaning, therefore the role of interpretation from judges is the key (PECES-BARBA, G., 1999: 578-579). About the wavering of law in the works of (ENDICOTT, T., 2007: 237-270), it reinforces the need to design a methodology for the making of harmonizing decisions in cases of uncertainty or rights collision; hence the importance of the use of criteria emanated from international doctrine precedent in the argumentative processes of the Mexican judges. (MIJANGOS Y GONZALEZ, J., 2006: 420).

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<sup>4</sup> Other authors related to the subject such as (CASTANEDA OTSU, S., 2002:227), offers us similar postures. In the same way, the works of (CABALLERO OCHOA, J.L. 2013: 27), help us have a greater comprehension, meaning and reach on the clause of consistent interpretation according to national treaties on human rights as mexican legal operators.

If with the reform a “constitutionality block” is established made of all those laws that allow us to carry out a constitutionality control, meaning that the legal systematization of all materially constitutional laws (Constitution, International Treaties, pacts, protocols and ordinary legislation); it is transcendental that steps are taken towards a *block of conventionality*, a block of rights integrated that Mexican judges should take into account. (FERRER MAC.GREGOR, E., 2010: 172). That is, speaking more specifically, it has to be pointed out that the obligation for the Mexican Judiciary Power of embracing the doctrine precedents from international courts, especially those of jurisdictional nature, like in the case of the Inter-American Court of Human Rights, but also, the interpretative guides for the application of international treaties, known as *Soft Law*.

In the subject of human rights, the term *soft law*, of international origin, makes reference to a certain type of instruments or rules that, due to their process of creation and who dictates them, do not have the formal and legal characteristic that does correspond to the laws contained in international treaties. However, *the soft law* finds itself in a threshold of political and moral obligation, because international laws are bound by principles such as *jus cogens* (imperative rules of international law in general). (SCJN. 2012: 1-2). Several rules exist like that, such as the General Observations from the monitoring committees of international treaties from the United Nations System and the Advisory Opinions of the Inter-American Court of Human Rights, Principles and Declarations; rules that must not be considered as strange and unrelated to the Mexican legal order, but that must be applied by judges as any other Constitutional, treaty, rule or compulsory precedent rule or law.

So it has been established recently by the Third Referee Court of the Twenty-Seventh Circumscription in the Thesis: XXVII, 3º.6 CS, “SOFT LAW”. THE CRITERIA AND DIRECTIONS DEVELOPED BY INTERNATIONAL ORGANS IN CHARGE OF PROMOTING AND PROTECTING FUNDAMENTAL RIGHTS ARE USEFUL FOR THE STATES TO GUIDE DE PRACTICE AND IMPROVEMENT OF THEIR INSTITUTIONS IN CHARGE OF WATCHING, PROMOTING AND ENSURING THE UNRESTRICTED ADDICTION TO HUMAN RIGHTS. That on the particular issue points out that:

*“In conformity with article one of the Political Constitution of the Mexican United States and its protective reach on human rights, the agents of the Mexican State not only should observe the compulsory international normative and the Inter-American precedent, but that in virtue of the maximum rules of universality and progressiveness, it must be admitted that the development of principles and practices of international law of non-binding nature considered in instruments, declarations, proclaims, uniform rules, directions and recommendations accepted by most States. Such principles are identified by the doctrine as “soft law”-in English-, light, ductile, soft and it is used due to the sense of lack of effective obligation and in opposition to “hard law” or positive law. Now, with independence of the obligation that they imply, its content may be useful for States to individually guide the practice and improvement of its institutions, which watch, promote and guarantee the unrestricted addiction to human rights. Without it*

*implying the ignoring of the primal following of the domestic national order, nor the principle of subsidiarity of supranational laws, according to which, the international protection of human rights is applicable after exhausted the domestic resources and only then, may individuals resort to it, because beyond the fact that the Federal Constitution and international treaties do not relate in hierarchy according to the country's Maximum Court in the precedent P./J. 20/2014 (10º.)(\*), the consultation of non-binding directions only reports practical effects derived from experience of the international organizations in charge of promoting and protecting fundamental rights". (underlining added).*

Now, how can we interpret and give the rule or law a certain meaning through all possible interpretation criteria, if we ignore the existence of legal instruments and precedent criteria? This leads us to another of the great challenges for the Judiciary Power in this subject and a fundamental and practical note, that is to say, the knowledge obtained from the content and reach of international treaties and from the precedents of international courts and interpretative rules by judges (soft law). However, the application of the human rights treaties deserve a special mention, in the past few years, slowly but surely, the organs of the Mexican Judiciary Federal Power and specifically from the Referee Circuit Courts by incorporating in their sentences, human rights considered in the American Convention and the precedent criteria of the Inter-American Court. That is how federal courts have made use of the inter-american heritage on human rights normally for novelty and protective interpretations. About the precedents coming from inter-american courts talking about human rights and their reception by Mexican federal courts. (MIJANGOS AND GONZALEZ, J., 2006:411-424).

Unquestionably, with the obligation of judges to interpret consistently with international treaties on human rights, several duties arise regarding their application by the judiciary power, a generic duty to respect, protect and guarantee rights contained in international treaties, according to the nature, sense and reach given to the rules themselves; also the modification of administration practices and of judiciary criteria. The use or management of international treaties and precedent criteria, what is done with them, has to be general for all judges from the judiciary power; besides the minimal standards of factual identity must be reached with the matters judges solve and find the criteria that occupy the same protected rights which are being interpreted arriving to adequate conclusions with the object and purposes of treaties that need to be attended. In addition, it is primordial to find uniformity in the use of international treaties and the value given to rights contained in the treaties themselves, in the judges' projects.

## **II. A GENERAL APPROACH TO INTERPRETATION ADVANCED FORMULA FROM A HUMAN RIGHTS DOGMATIC**

Certainly there are many rules, principles or objective criteria of interpretation,<sup>5</sup> so it is difficult to find a fully effective formula that can be applied to specific cases; however when it is interpreted in accordance with international treaties certain methods are followed, such as the general rule of interpretation regulated in Article 31 of the Vienna Convention on the Law of Treaties between States and International Organizations or between international organizations. This systematic articulates with the fact that the techniques of interpretation contained in Article 31 when identifying or determining significance or meaning to the provision of a treaty shall be interpreted in good faith in accordance with the terms of the Treaty in the context and taking into account the object and purpose.

Let's see:

***“General rule of interpretation. 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and considering its object and purpose. 2. For the purposes of the interpretation of a treaty. a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty: the context, in addition to the text, including its preamble and annexes comprise b) any instrument which was made by one or more parties celebrate the treaty and accepted by the other parties as an instrument related to the treaty; 3. together with the context, shall be taken into account: a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions: b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding the interpretation of the treaty: c) any relevant rules of international law applicable in relations between the parties. 4. given to a term a special meaning if it is established that such was the intention of the parties”.*** (Bold added).

The following criteria derive from general Rule of Interpretation:

Textual criteria (**t-c**) Contextual criteria (**c-c**) Object and purpose (**o-p**)

The function of these criteria as established on the above provision is that when interpreting, i.e. attributing a sense or meaning to the text of an international treaty, arguments or interpretation techniques to be applied in one combined operation are the three criteria we have noted: the text, context, object and purpose. The function of these criteria as established on the above provision is that when interpreting, i.e. attributing a sense or meaning to the text of an international treaty, arguments or interpretation techniques to be applied in one combined operation are the three criteria we have noted: the text, context, object and purpose.<sup>6</sup>

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<sup>5</sup> The Inter-American Court of Human Rights, in its Advisory Opinion OC-3/83 of September 8, 1983, stated that the method of interpretation contained in the Vienna Convention is covered by the primacy of the text, i.e., to apply objective criteria interpretation.

<sup>6</sup> Case Gonzalez and others ("Cotton Field") vs. Mexico, Inter-American Court of Human Rights, judgment of 16 November 2009, para. 42, p. 12. Cf. "Other treaties" Subject to the Advisory Jurisdiction of the Court (Art. 64 American Convention on Human Rights). Advisory Opinion OC-1/82 of September

Since the identification of these three criteria we approach to develop a General Formula Advanced Interpretation through the combination of these criteria and other values represented in the following formula:

### Formula

The approach of the formula presented is linear and punctual in their variables; however, this can be considered a first step towards the design of a more elaborated model that considers more variables and different relationships between the application of criteria and an interpretation from the scientific treatment of human rights.

$$(nf) + \frac{n - c}{c - c} \sum (i) + \frac{o - p}{\sim r} \sum [N]$$

### Definitions

This section defines the concepts necessary to understand the model proposed. The definitions presented here can be contrasted with the formal criteria that are used in mathematical models.

**(NF)** “Normative formulation” It is the norm that expresses the text.

**(N-C)** “Normative criterion” determines a meaning to the specific normative statements.

**(C-n)<sup>1</sup>** “textual Criteria”.

**(C-n)<sup>2</sup>** “lógica Criteria”.

**(C-n)<sup>3</sup>** “historical criteria”.

**(C-n)<sup>4</sup>** “systematic criteria”

**(C-C)** “Contextual criteria” assigns a meaning or normative meanings taking into account axiological categories, Principlist, extralegal factors and the global context of constitutional and conventional law”.

**(I)** “Interpretive statement” is the product of the activity to interpret and ascribe meaning to the (N-C) y (C-C)

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24, 1982. Series A No. 1 paragraph 43-48; Restrictions to the Death Penalty (Arts. 4.2 and 4.4 American Convention on Human Rights). Advisory Opinion OC-3/83 of September 8, 1983. Series A No. 3, para 47-50; Proposed Amendments to the Constitution of Costa Rica related to naturalization. Advisory Opinion OC-4/84 of January 19, 1984. Series A No. 4, paragraph 20 -24, and, among others, Velásquez Rodríguez v Honduras. Preliminary Objections. Judgment of June 26, 1987. Serie C No. 1, paragraph 30.

**(O-P)** *“Object and purpose” determines the content and scope of a right, principle or value against the particular case to reach a [N]*

**(~r)** *“Rational approach” justifies the passage of the interpretive statements giving reasons for reaching the standard [N]*

**[N]** *“Decision norm”<sup>7</sup> is the end result of interpretation.*

A description and a concise analysis of the articulation of each of the variables and their relevance to the interpretative activity of judges is presented.

### **Applicative modeling of variables: emphasis on contextual criteria (c-c)**

There is no doubt that today's interpretation is a fundamental component in the law that demands a cognitive activity and practice also;<sup>8</sup> so that we can say that the interpretation from the point of view neoconstitutional, is a fundamental task of legal operators as a norm [N]<sup>9</sup> - at least from a legal doctrine of human rights-, is the interpretation that gives a Tribunal to one or several legal provisions of a normative formulation (*nf*), Which it is the norm expressing the text, and can be: constitutions, laws, codes, international treaties; which are combined with normative criteria (n-c), (grammatical or textual, logical, historical and systematic)<sup>10</sup>; criteria that determine a meaning to the specific policy statements, or justifying the meaning assigned to a legal provision.

It is important to note that these notoriously plausible interpretation criteria and methods used by legal operators are bounded within a legal system with new paradigms of interpretation for the solution of essentially controversial cases especially on human rights;<sup>11</sup> as a result of admission to the Constitution of principles, values and standards

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<sup>7</sup> A decision norm [N] it fully out the interpretation process to its peak, i.e., the legal norm occurs to apply to a particular case. This application is made by formulating a court decision, a judgment that expresses the decision rule [N]. Thus, the judge is the one that goes beyond mere interpretation and production of legal norms, to extract therefrom decision rules; this type of judge is that Kelsen called "authentic interpreter", ie the judge. (GRAU, Eros), 2007:18).

<sup>8</sup> On the implications of the interpretation and argumentation in the modern conception of law vine; (ATIENZA, M., 2007). By the same author, vine; (2011).

<sup>9</sup> To Guastini the "disposition" is any statement pertaining to a source of law and considers that the "norm" means the content meaning of the provision, its meaning, which is a dependent variable of interpretation. In this regard, the provision is the object of the interpretive activity, and the standard, its result. On the concept of "standard" and "disposition" see the work (GUASTINI, 2012: 10-11).

<sup>10</sup> Regulatory criteria are rooted in Savigny, who highlighted the existence of four criteria: grammatical, logical, historical and systematic., (SAVIGNY, F. 2009)

<sup>11</sup> The literal method. In the letter of the law is nonexistent weighting principles. The systematic approach, which seeks a reiteration in the vision of strong and perfect legal system, lacking gaps and contradictions. The originalist method. In which the constitutional originalism is now a legal

of interpretation that generated the constitutional reform of June 10, 2011, a change required by the interpretive dynamic judges to strengthen the material content of the Constitution, and therefore the role of argumentation and application of modern hermeneutical methods in judicial proceedings. Indeed, Konrad Hess notes that the methods of constitutional interpretation should not be limited to those classic criteria of normative interpretation as (the literal, teleological, systematic and historical) but should incorporate a set of principles, criteria, methods and novel reasoning inform the hermeneutical exercise of constitutional judges.<sup>12</sup>

In this sense it propose the need for the application of contextual criteria (c-c) or systematic, from which normative meanings are assigned taking into account the identification of one or more norms, purposes, values, constitutional principles are more abstract and in which moral, legal, political and social objectives are expressed from a universal character. Based on these criteria the interpreter must seek the reasonable sense of normative formulation (nf) within the context of conventional systemic constitutional law and subject to a systematic and purposive interpretation.

Also in the contextual criteria (c-c), when interpreting takes into account the social, axiological arguments, situations and certain requirements, human behavior, sociological use of the norm –as you well holds the Inter-American Court– the interpretation has to be coupled with the changing times and current living conditions.<sup>13</sup>

The application of contextual criteria of the position that human rights are not only normative legal instruments with an ethical justification, but they are also a social reality. In this sense they help us measure the effectiveness of the rule, the influence of law on social reality, or conversely the impact of reality on the Law.<sup>14</sup>

Thus, for example, a contextual approach has been expressed in some way in the following jurisprudential reasoning of the Supreme Court in the "THESIS: 1ª /J.43//2015 (10ª.) MARRIAGE. FEDERAL LAW OF ANY ENTITY THAT, ON ONE SIDE, CONSIDER THAT THE PURPOSE OF THAT ONE IS THE PROCREATION AND / OR THAT DEFINE AS HELD BETWEEN A MAN AND A WOMAN, IS UNCONSTITUTIONAL", that sustains thereon:

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interpretation methodology, based on a historicist worn XIX century romanticism. (FLORES SALDAÑA, A., 2014: 113-114).

<sup>12</sup> On neo-constitutional interpretation models (HESSE. K., 1992: 45-47).

<sup>13</sup> The Inter-American Court in the judgment in the Case of the "Mapiripán vs. Slaughter Colombia has argued that human rights treaties are "living instruments whose interpretation must consider the changes of the times and current living conditions. Such evolutionary interpretation is consistent with the general rules of interpretation enshrined in Article 29 of the American Convention, as well as those established by the Vienna Convention on the Law of Treaties "Inter-American Court of Human Rights (Case" Slaughter of Mapiripán vs. Colombia), judgment of 15 September 2005, par. 106, p. 90. [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_134\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_134_esp.pdf) Accessed on May 3, 2016.

<sup>14</sup> On the social reality of human rights as a postulate of three-dimensional theory (PECES-BARBA MARTÍNEZ, G., 1999: 84).

*“Consider the purpose of marriage it is procreation constitutes a measure not suitable to fulfill the unique constitutional purpose for which the measure could obey: **the protection of the family as a social reality**. Pretending to link the requirements of marriage to the sexual preferences of those who can access the institution of marriage to procreation is discriminatory ... ”(Underline and bold added)*

We see the Court's interpretative statement (i) to come, that is, to be interpreted as unconstitutional all legal provisions of the states to establish that the purpose of marriage is procreation for being exclusionary and discriminatory; the Court disapproves procreation as incapable as not suitable to fulfill the constitutional purpose for which can be adjusted this provision, which is the protection of the family as a social reality, which requires that in this context homosexual couples are in an equal or similar position to that heterosexual couples in access to marriage. In this criterion we see the reasoning changes in relation to the context; what was "rational" in the past, ie, the same-sex marriage whose purpose was procreation; It is now "irrational" because this category is not inherent in the rational design of what marriage is currently based on the jurisprudence of the Court.

Also the "contextual approach" can be used as a parameter to determine the international responsibility of a State for acts committed by individuals or to measure their response or behavior in a situation where there is a real or immediate risk;<sup>15</sup> thus we see how the Court in the case Gonzalez and others ("Cotton Field") vs. Mexico uses the "context" and analyzes all the factual context of the case and the conditions under which the facts were given for attributing to the State and engage its international responsibility accordingly.

The Court warned in his remarks that the facts of the case were generated within a context of widespread and pervasive crime on violence against women in Ciudad Juarez, Mexico; a social, political and economic context of violence and systematic discrimination against women within which occurred murders and disappearances of women reported 2003 CEDAW and Amnesty International, the NGOs recorded about 400 cases in the period 1993 -2003.<sup>16</sup> Fundamental to the Court is how respondents officials and state authorities even knowing this context, minimizing the problem, showing a disinterest in diligently address complaints of disappearances of women; and to set 72 hours to officially declare a woman missing in this context is irrational for the Court, ie, the state did not act reasonably in its obligation to ensure in this context. Precisely in this regard, the Court notes that:

*“...the State, given the context of the case, was informed that there was a real and immediate risk that the victims were sexually abused, subjected to ill-treatment and*

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<sup>15</sup> The scope of the context to determine the international responsibility of a State see the Gonzalez case and others ("Cotton Field") vs. Mexico, Inter-American Court of Human Rights, judgment of 16 November 2009. [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_205\\_esp.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_205_esp.pdf) Accessed on April 26, 2016.

<sup>16</sup> Report on Mexico produced by CEDAW, supra note 64, folio 1928 and Amnesty International, Intolerable killings, supra note 64, folio 2253.

*killed. The Court considers that there arises a duty of due diligence strict regard to reports of missing women to such context regarding their search during the first hours and the first days... ”<sup>17</sup>. (Underlining added).*

This breach of the obligation to ensure is serious because of the context of which the State had knowledge; context which placed women in a situation of extreme vulnerability and in which the three killings occurred based on gender that gave rise to this case. It is important to note that the context is used by the Court as a parameter to measure how serious was the real and immediate risk, and if as a result of state action in this context or not there was actual harm by failing to establish the general prevention measures to guarantee the personal integrity and human rights of women victims of this context.

Likewise they can be used as contextual approach "systematic violence" exercised against women as absolving measure when judging in criminal proceedings for murder; precisely the argument and legal interpretation with a gender perspective requires an argument that goes beyond the application of a rule to a particular case; involves questioning the supposed neutrality of standards, the establishment of an adequate legal framework to solve in the most attached to human rights and equality and non-discrimination; also it is taken into account as a criterion of legitimacy of the judicial exercise to justify differential treatment and give reasons why it is necessary to apply certain rules to a given context or facts<sup>18</sup>.

In this sense, although the meanings are connected, what is is to extend the understanding, determine the scope, extent, sense or meaning of any normative formulation (nf) assigning a value to each of the criteria normative (cn) and contextual criteria (cc) to result from this process of interpreting an interpretative statement (i) which is the product of the activity to interpret and ascribe meaning to the normative standards and contextual.<sup>19</sup> Phrasing interpretive (i) to be confronted with the object and purpose (o-p) that will determine the content and scope of rights, values and constitutional principles, and thus its effective ness, such as: determining the value of equality between spouses;<sup>20</sup> the scope of the principle pro person to distinguish the favorability of a rule or the least restrictive interpretation, the scope of the principle of universality to know when to expand the number of holders of a human right.

Similarly, the object and purpose (o-p) help us determine what is "family", to distinguish the "preferred position" of the subjects in the case to protect the right to self-image and to privacy / privacy; or to determine whether the "procreation" is inherent in

<sup>17</sup> Case Gonzalez and others ("Cotton Field") vs. Mexico, par. 283: 74.

<sup>18</sup> On how to judge gender perspective see Protocol for Judging with a Gender Perspective, Realizing the right to equality, (Supreme Court of Justice of the Nation, 2015).

<sup>19</sup> On the concept and uses of interpretive statements vid; Guastini, Riccardo, studies on the legal interpretation, (GUASTINI, 2012:10-11)

<sup>20</sup> On the content and scope of equality between spouses, see the precedent of the Supreme Court of Justice of the Nation in Isolated Thesis No.. 1ª. LXIII/2016 (10ª.) published on March 11, 2016 in the Gazette of the Federation Judicial Weekly; <https://www.scjn.gob.mx/libreria/Paginas/semanarioauto.aspx> Consulted on page 21 April 2016..

the rational design of the figure of marriage;<sup>21</sup> Also, the object and purpose (o-p) will help us to justify the "relevance judgments"<sup>22</sup> before a different legal treatment of two people and not conflict with the principle of equality and non-discrimination; to set limits to an "autonomy" that wants to manifest in the case of the legalization of marijuana use for recreational purposes;<sup>23</sup> or, what it is to be "person" in the case of establishing the scope of human dignity in the development of emerging technologies to improve the lives of human beings, such as computers and the internet, biomedicine, neuroscience, nanoscience and nanotechnology and robotics;<sup>24</sup> to, have a rational approximation (~ r) give us the reasons for the passage of the interpretive statements to a decision norm [N], substantiated, adequately justified in a particular case.

From this scheme, the interpretation becomes subject to interpretation, and that interpretation is a polysemy (FERRER, MAC-GREGOR, E., 2005: XV), that is, we must understand the standard in not only a regulatory system but also, as says Hesse taking into account dimensions or theoretical categories that give it meaning, that give coherence and to Hesse interpret is "concretize" precisely the interpretation must be linked to the object and the problem, which is why Konrad Hesse interpretation is 'concretization' (Konkretisierung); in this sense for Hesse "which does not appear clearly as the content of the Constitution it is to be determined by incorporating the 'reality' whose management it is"(HESSE, K., 1983: 43-44). So that concretization is to complete, adjust, give coherence to incomplete provision in a normative formulation through a creative activity, resulting in a dynamic performer in accordance with the constitutional and conventional rule. But the concretization is not the goal that it wants to reach; the concretization only reaches its fullness, when the decision norm [N] is defined able to resolve the conflict which is the essence of the case. That's why for Grau interpretation and concretization are part of the same process. There is no currently interpretation of the law without concretization, as this is its final stage. (GRAU, E., 2007: 19).

In sum, which aims this General Formula Advanced Interpretation is thereby contribute it is minimal to the judges use these criteria in their practical reasoning way, allowing them to determine the scope and meaning of one or more legal provisions normative formulations, and hereby apply them appropriately to reach a constitutional outcome and conventionally correct, ensuring its objectivity, legal certainty and predictability and a much broader perspective of the principles and postulating values human rights within this new paradigm of contemporary legal reasoning.

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<sup>21</sup> On the purpose of marriage see the jurisprudence of the Supreme Court of Justice of the Nation, Thesis: 1st /J.43/2015, First Chamber, Tenth Epoch, published Friday June 19, 2015 in the Gazette Judicial Weekly Federation; [https://www.scjn.gob.mx/libreria/Paginas/semanarioauto.aspx\\_page](https://www.scjn.gob.mx/libreria/Paginas/semanarioauto.aspx_page) consulted on 26 April 2016.

<sup>22</sup> On relevance judgments should see the work of (LAPORTA F., 985: 20-24).

<sup>23</sup> On regulation of consumption of marijuana for "recreational or recreational purposes", see the decision of the First Chamber of the Supreme Court of Justice of the Nation of Amparo in Review 237/2014.

<sup>24</sup> On the problems and demands posed by the current law in the context of emerging technologies (DE ASÍS, R., 2015).

## II.1. The interpretation of human rights as an open to the public and social power challenge

However, interpretation is no longer an activity of the judge, rather, it originates in all levels of the legal system, through a gradual process of identifying standards, general and abstract of the Constitution to the most particular and concrete until the individual mandate of the judge or any state authority.

Clearly, from the constitutional reform of 2011 the interpretation and application of constitutional norms and principles is no longer reserved only for judges; so we see in Article 1 third paragraph of the Mexican Constitution expressly states the obligation of all authorities “[...]to promote, to respect, to protect and to guarantee human rights in accordance with the principles of universality, interdependence, indivisibility and progressiveness [...]”; so that the response of the authority before a particular event in which they have to safeguard the observance of human rights must apply these interpretive guidelines that maximize performance under these fundamental principles of international scope, extending in this way for all kind of authority including the duty to apply administrative control of constitutionality / conventionality. In this sense the Court in the judgment of monitoring compliance with the Gelman case vs. Uruguay from February 24, 2013, determined that the scope of conventionality control ex officio is not reserved solely for legal operators, but extends to any authority of direct or indirect democratic representation having as action limit the scope of its powers. In its judgment the Court referred to in paragraph 66 states that:

*“[...]when a State is party to an international treaty such as the American Convention, all its organs, including its judges and other bodies linked to the administration of justice at all levels, are also subject to the treaty, which requires them to ensure that the effects of the provisions of the Convention are not affected by the application of rules contrary to its object and purpose, so that judicial or administrative decisions do not illusory full or partial compliance with international obligations. That is, all the state authorities are obliged to exercise ex officio "conventionality control" between domestic norms and the American Convention, in the framework of their respective competences and the corresponding procedural regulations. In this task, they should take into account not only the treaty but also the interpretation thereof made by the Inter-American Court, final interpreter of the American Convention”.*<sup>25</sup> (underlining added).

In this sense, Häberle through his thesis of constitutional interpretation as a public process and the thesis of the open society of constitutional interpretation, diametrically increases the radius of performers, including all public powers, (judges, legislators, managers, lawyers, public institutions, citizens, public bodies, civil society, etc.) insofar as they are key players as open as the criteria pluralistic society. In this sense the concept of

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<sup>25</sup> Inter-American Court of Human Rights, judgment of monitoring compliance with the Gelman case vs. Uruguay from February 24, 2013, par.. 66:19.

interpretation is based Häberle with the following formula: who lives the norm [N] (co) also plays. In this sense, for Häberle interpretation must go beyond a directed activity consciously and intentionally to understanding and understanding of a norm [N] (from textual criteria ), it takes a broader interpretation, more realistic concept where public powers above are included. While the responsibility lies with interpreting constitutional justice ultimately interpretive theory has to be guaranteed from a democratic theory and thus interact. In short for Häberle there is no interpretation of the Constitution but there are active citizens where public powers referred to above are included. (HÄBERLE, P., 2008:31-32).

Thus, specific challenges for the judiciary and public powers to these guidelines become relevant from the constitutional reform are many, Human International Law has been consolidating in a paced manner, that is why a continuous capacitation by the Judiciary Power is needed and it reflects upon the jurisdictional and professional activity of its members. The Nation's Supreme Justice Court had already interpreted in the file "several" (SCJN. 912/2010) the relationship between the precedents from the Inter-American Court of Human Rights when sentences where the Mexican State are a part of, and the guiding effect of the resolutions where it is not. In this sense, and attending the solved by the Supreme Court in the Thesis Contradiction (SCJN. 293/2011: 96), it will be primordial to study the reach of such criteria, guiding and bonding of the precedents of the Court, to obtain the instruments that help use them in domestic sentences.<sup>26</sup>

It is important to indicate that international jurisprudence is a useful tool when it comes applying and interpreting human rights, both those recognized in the Constitution as in international treaties. Meanwhile in the results of the contradictory thesis 293/2011 the assumptions have been established within which they must be addressed, observed and applied the jurisprudence of the Inter-American Court of Human Rights, the IACHR Court has given some guidelines about the case *Castañeda Gutman vs. United States of Mexico*, the court itself that can be taken into account by the judiciary power as effective tools that give greater clarity all that it implies. (CASTILLA JUAREZ, K., 2010: 219-243). Besides in this way, we postulate the thesis of obligation by the jurisdictional organs to apply the Consultive Opinions emitted by the Inter-American Court, considering that in this function, the Court has emitted criteria in the interpretation of certain articles of the American Convention of Human Rights and other international treaties, what is what dimensions the jurisdictional work of protecting people's human rights. For example the opening to precedents from international courts, the Spanish Constitutional Court in the /STC 36/1984) established that the precedent from the European Court of Human Rights might be understood within the mentions of article 10.2 C. It was confirmed in the (STC 114/1984), in the precedent of said court that the valid criterion considered for the interpretation related to (art. 10.2 CE). Since then the Spanish Constitutional Court has used the precedents from the European Court of Human Rights as a criterion of interpretation for numerous sentences.

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<sup>26</sup> About the binding of precedents from the Inter-American Court of Human Rights and their derivative reach, (SCJN.293/2011:96) check (ANGULO LOPEZ, G., 2014: 1-26).

Facing the new conditions established by the Supreme Court of Justice regarding the Inter-American Court's precedent, we await the necessary adjustments that the new international scenery offers and that precedents acquire practical use for Mexican judges.

Furthermore, we consider the use of the *conventionality control* as an invaluable instrument for judges to be able to apply the clause of consistent interpretation. *The control of conventionality* is an institution, a debugging mechanism created by the international courts with the objective of having domestic courts to evaluate and compare domestic law with supranational law in order to look after the useful effect of international instruments, exercising an *ex officio* control, meaning that, an analysis of normative confrontation of internal law (local laws, constitutions, constitutional reform projects, administration actions, etc.) with the American Convention, being competent the Inter-American Court of Human Rights on an international location and the internal judge in a national location.

This diffuse control of conventionality has been developed by the Inter-American Court of Human Rights since 2006, since the case *Almonacid Arellano and others c. Chile*, and with the *Sentence of the case Radilla Pacheco vs the Mexican United States of November 23, 2009*, the one that distinguishes itself for being the first resolution dictated against the Mexican state in which the judiciary power is directly bound to the obligation of repair measures, as well to apply a *Conventionality Control*. (REY CANTOR, E., 2008: LII-LIII). We can't deduct importance to the seven sentences emitted by the Inter-American Court against the Mexican state between 2008 and 2010 stand out for the lack of effective judiciary mechanisms for the defense of human rights. These are: *Castaneda Gutman*, sentence of preliminary exceptions, background, repairs and costs, from November 23, 2009; Case *Fernandez Ortega and Others*, sentence of preliminary exceptions, background, repairs and costs, from August 30, 2010, Case *Rosendo Cantu and Other*, sentences of preliminary exception, background, repairs and costs, from August 31, 2010; Case *Cabrera Garcia and Montiel Flores*, sentence of preliminary exception, background, repairs and costs, from November 26, 2010, Case *García Cruz y Sánchez Silvestre*, sentence of background, repairs and costs, from November 26, 2013. (AA.VV. 2010: 1-200).

I believe that the decision in this topic that the Inter-American Court offers in the *Radilla Pacheco Case* is far more than acceptable, perfectly usable in very situation mentioned, regarding consistent interpretation, in the sense that the *conventionality control* means the use of an international treaty, in this case the Inter-American Convention of Human Rights (Pact of Saint Joseph) uses a parameter of control to consider their compatibility with laws, acts and omissions from a certain authority. Precisely the context in which it applies this *conventionality control* finds itself immerse in article one from the constitution and has a particularity, because it forces judges to harmonize the rights which have a constitutional basis with the ones acknowledged in international treaties. And from the same it results that if a contradiction should arise,

laws should adopt the stance that favors humans the most. (CARBONELL M., 2013: 20-60).

In this transit towards the constitutional avant-gardism, it is no longer adequate for an interpretation of the present system of fundamental rights, the positivist approach, ciphered in a mechanic attitude based on syllogistic conclusions, but a greater participation from the interpreter throughout the design and development of the status is needed. Human rights no longer fulfil with their concretion, the demands of values higher than the legal order, such as dignity, equality, freedom, solidarity and others which must be acknowledged positively and correctly interpreted and guaranteed through the procedural way in the States, in both domestic and international levels in order to imbue them with effectiveness.

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