INAPPLICABILITY OF HUMAN RIGHTS: CAUSES AND FOUNDATIONS[*].

di José Ramón Narváez Hernández e Carlos Manuel Rosales[**]

1. Introduction.

Human Rights have become the element that serves to measure the quality of life of people, the normative number of many legislations, the moral essence of public institutions, and the spiritual and inspirational compass of Latin American and European jurisdictional systems. So its space, use, and relevance are the sources for the actions of the authorities, and the justification of the existence and validity of the contemporary State.

However, the materialization of human rights as an instrument to demand the State's full compliance and monitoring could be questioned. And it is that the indeterminacy, relativity, ambiguity and universality of the idea of human rights, has caused positive effects for society and at the same time, has been used as a shield to flag a particular cause or a personal desire, in which the arguments (selfishly subjective) are the key to a win.

[*] *Sottoposto a referaggio*.

[**] José Ramón Narváez Hernández, Doctorando en Derecho – Universidad de Chile. Carlos Manuel Rosales, Dottore di ricerca in Teoria e storia del diritto – Università di Firenze.

In this time of pandemic, for example, the right to move freely through the country is suspended, ignoring the international treaties that guarantee the human right to free national transit. The seizure of a bank account by an administrative authority, without observing the human right to the presumption of innocence. When in a family violence case, a protection measure is requested for the victim, and the administrative authority orders that the person likely to be responsible leave his home, without considering his human rights in terms of hearing, presumption of innocence and property.

As far as human rights can be observed, their management and follow-up is determined by various variables, including the knowledge of legal operators and the political importance of the issue for the officials of the Government. Although it is true, it is a duty of States in the performance of these, there is the possibility that they are not observed (by omission), are inapplicable by the authority as a discretionary power, or that their non-compliance is materially impossible.

This paper will explain the act of not recognizing or granting (totally or partially) any human right, either by a reservation that was specified by the State when recognizing an international instrument (Convention, Treaty, Protocol, Declaration, among others); for the lack of conformity with the Constitution of the country, in which constitutional supremacy is the pillar of the positive system or for the material impossibility to fulfill the request, because its realization produces an expenditure not included in the public budget (for example, the construction of a hospital specializing in oncology in a rural area, to guarantee the human right to health) and even because of the impossibility of developing public policies to grant this right by the programs established by public authorities.

The text provides a guideline for creating an interesting dialogue between the authors' lines and the reader’s ideas. This scenario, dialectically, facilitates the generation and construction of applicable legal knowledge in any field of the professional practice of the legal profession.

2. Foundations of human rights.

Human Rights have become the measure of people’s quality of life, the number of normative laws, the moral essence of public institutions and the spiritual and inspirational compass of Latin American and European jurisdictional systems. Thus its space, use and relevance are the

sources for the actions of the authorities, and the justification for the existence and validity of the contemporary State[1].

However, the administration of human rights could be questioned as a means of requiring the State to comply with them and to monitor them fully. And that is that the indeterminacy, relativity, ambiguity, and universality of the idea of human rights, has caused positive effects for society and at the same time, has been used as a shield to champion a particular cause or a personal desire, in which the arguments (selfishly subjective) are the key to obtaining a triumph. Let us think of some examples. In times of pandemic, the right to move freely through the country is suspended, ignoring international treaties that guarantee the human right to free national transit. The seizure of a bank account by an administrative authority, without observing the human right to the presumption of innocence. When in a case of family violence, a protection measure is requested for the victim, and the administrative authority orders that the person likely to be responsible leave his or her home, without considering his or her human rights in terms of hearing, the presumption of innocence, and property.

As far as human rights can be observed, their management and follow-up are determined by various variables, including the knowledge of legal operators and the political importance of the issue for the commands of public power. While it is true that it is a duty of States in the performance of these obligations, there is a possibility that they are not observed (by omission), that they are inapplicable by the authority as a discretionary power, or that their non-compliance is materially impossible.

This space will set out the act of not recognizing or granting (in whole or in part) any human right, either by a reservation specified by the State when recognizing an international instrument (Convention, Treaty, Protocol, Declaration, among others); for the lack of conformity with the Constitution of the country, in which constitutional supremacy is the pillar of the positive system or for the material impossibility to fulfill the request, because its realization produces an expenditure not included in the public budget (for example, the construction of a hospital specializing in oncology in a rural area, to guarantee the human right to health) and even because of the impossibility of developing public policies to grant this right by the programs established by public authorities[2].

[1] V. C.M. Rosales, *La excepción ratifica la regla. Consideraciones sobre la coercibilidad y la generalidad de la norma*, in *Revista Foro*, vol. 20, no. 2/2018.
[2] C.M. Rosales, *Genealogía de la desigualdad*, in *Revista Internacional de Derechos Humanos*, Vol. 16, No. 3/2019.

3. Human rights. Spatial validity and International reception

One of the ways in which a human right could be inapplicable at the state level is of origin. This implies that, since accession to an international treaty is recognized and confirmed, the country declares an article of the international instrument to be national invalid (in general or in part). For example, in Mexico, The suspension of political rights of ministers of worship is provided for in the Constitution so that when the American Convention on Human Rights was ratified, a reservation was expressed in this area not to recognize the political human rights of the holders of a religious creed, and thus cannot be candidates for elected office or be politically associated[3].

The territorial validity of the laws is limited to the place where the power of the State that issued them exercises its sovereignty and governs them for all subjects placed within the hypothesis of the norm, whatever the nationality of the subject[4].

Rules that violate the principles of public order of another State may never be applied outside the territory subject to the sovereignty of the State that issued them[5], and the laws of judicial procedure which, by their special nature, affect the moral responsibility of the State, are under public law and may only bind nationals of the same State, without affecting persons domiciled in other jurisdictions, who reside outside the territory in which the system prevails.

For example, the Federal Constitution in Mexico provides for a prohibition of extraterritoriality of the norms issued by one entity against another, which means that the legislation of a State is binding only on its territory, as each State legislates for its own territorial area and not for a different one.[6] Hence, this constitutional provision does not establish a rule of judicial jurisdiction but recognizes the general rules of cooperation.

These competition rules do not always determine the substantive laws that will be applicable to the case, because although they do determine jurisdiction by territory, it will depend on the specific litis the material competence that is updated in each case. That is, if there is no

[3] C.M. Rosales, *Los ministros de culto en el sistema electoral mexicano. Requiem o resucitación de sus derechos políticos*, in *Revista Pensamiento Jurídico*, no. 46/2017.
[4] Isolated thesis issued by the First Chamber of the previous composition of the Supreme Court of Justice of the Nation, with electronic registration number 235592, heading: "territoriality, the principle of, in the application of criminal procedure law".
[5] Cfr. D. Quaglioni, *La sovranità*, Bari-Roma, Laterza, 2015.
[6] Article 121.

extraordinary question justifying a conflict between the jurisdiction of the judge and the substantive law, there is no reason for such a division, since it is absurd to oblige the competent judge to apply legislation that is unknown to the same State, and that a person's request for rights generates more than recognition; rather, that compliance is committed to the conditions, in order to protect their rights[7].

Now if you look at this issue from an international perspective, you have several scenarios. In the first, fundamental rights must be regarded as inalienable to the individual[8]. These are born in an intrinsic way by the relationship between the State and the person. Its scope of protection is not subject to being in the country, there is no rule that indicates it. On the other hand, it can be considered as a limit to the fundamental rights that their fulfillment and protection are feasible as soon as the conditions of the local infrastructure of the State to be able to make them realizable[9], and that a person's request for rights generates more than recognition; rather, that compliance is committed to the conditions, in order to be able to protect their rights[10]. However, the scope of fundamental rights has not been determined at the international level and it is, therefore, possible to consider and envisage the possibility of demanding the extraterritorial protection of constitutional norms[11].

In addition, it must be considered that, according to the Vienna Convention, countries cannot modify their domestic rules for the application, invalidation or denial of a right signed in an international treaty; therefore, any derogation through legislation, would be contrary to what has been internationally ratified by the State[12].

4. National sovereignty contained in reservations to international treaties.

The general principle governing the application of procedural law is based on and limited in the space in which the law is applicable[13]. In order to limit or exclude the rule of this rule, there

[7] Isolated thesis CXXVII/2016, issued by the First Chamber of the Supreme Court of Justice of the Nation, with electronic registration number 2011480, under the heading "extension of jurisdiction. As a rule, the competent judge, when resolving a judicial dispute, must apply the law of his jurisdiction".
[8] Cfr. L. Ferrajoli, V. Ermanno, *Diritti fondamentali: un dibattito teorico*, Bari-Roma, Laterza, 2015.
[9] See N. Luhmann, *I diritti fondamentali come istituzione*, Vol. 31, Bari, Edizioni Dedalo, 2002.
[10] See R.H. Fallon, *The dynamic Constitution,* New York, Cambridge University Press, 2004.
[11] Cfr. A. Cassese, *I diritti umani oggi*, Bari-Roma, Laterza, 2015.
[12] Vienna Convention.
[13] E. Salmón Gárate, *Las Reservas a los Tratados y su Evolución en el Derecho Internacional*, in *Revista Themis*, No. 21/1992, p. 55.

must be an express provision containing specific cases of exception, authorizing the application of international law. Thus, if there are no legal provisions issued by the legislature on treaties or conventions that were adopted under the Constitution, it is provided that the courts do not abide by foreign laws, that contravene the national political code[14].

5. Territoriality and extraterritoriality.

As stated above, the territorial validity of the legal system is limited to the space where it exercises its sovereignty, the procedural law is essentially territorial and cannot be applied other than the national law, due to the rule of state sovereignty[15].

It must consider the sovereignty of each State in order to limit the applicability of a human right, based on its self-determination as an independent State. This means that the State that will recognize an international instrument has the capacity to contemplate reservations[16], thereto, so that, based on its sovereignty as a State, a subject of the same Treaty on Human Rights may be denied[17].

6. Democracy and constitutional conformity.

The Constitution has various meanings ranging from utilitarian, organic, guarantor, political and many others[18]. This document comes ideally from the sovereign, and contains, from an abstract idealism, the citizen will. Citizen[19] (concessionary sovereignty) have delegated their

[14] *Cfr*, J. Soeharno, Jonathan, *The integrity of the judge*, Fernham, Ashgate 2009.
[15] C.M. Rosales, *El debido proceso en Latinoamérica*, México, Re*vista de la Facultad de Derecho*, vol.70, No.277-3/ 2020.
[16] A. Basilico, *In tema di riserve ai Trattati internazionali e alle Convenzioni sui diritti umani*, in *Rivista di Studi Politici Internazionali*, 1999, Vol.66, No.3, pp.414-428.
[17] A. Di Blase, *Convenzioni sui diritti umani e corti nazionali*, Roma, Roma Tre-Press, 2014.
[18] *See* M.E.Rocca, *Teoría de la Constitución y el estado para principiantes*, Uruguay, Universidad de la República, 2014. Available in : https://publicaciones.fder.edu.uy/index.php/me/article/view/22
[19] The model of democratic rule of law is one of the historical-political evolutions of the rule of law (rule of law). These values should not only guide the administrative organization and/or its decisions, but should be considered for the different spheres of public power. See, J.J. Orozco Henríquez, Voice: "Estado de Derecho", in *Enciclopedia Jurídica Mexicana*; Instituto de Investigaciones Jurídicas de la Universidad Nacional Autónoma de México, Vol. III, D-E, 2006, pp.830-832.

representation to their peers (decision-making sovereignty) to carry their voice, interests and defend their common affairs[20].

As for its composition, it is a set of minimum guarantees for the population and of governing principles for the State. In this way, democracy, established in the Constitution, becomes the instrument of the people to be able to obtain security and justice, through legal norms, which safeguard the prerogatives of all inhabitants in the country[21].

The rights of the population contained in the Constitution are recognized as fundamental rights, and are the minimum of prerogatives that people have to live with dignity and that limit the power and action of the State[22]. Constitutionality is the circumstance of complying with the provisions of the Constitution.

In other words, it is on the basis of an application or an act of authority that its validity is judged or recognized, and its validity verified, taking into account adherence to and respect for the Constitution.

Thus, the constitutionality is a significant and constructive element, because materially through it the defense of the Constitution is enunciated[23]. Now, the rights contained in the national political code are obligatory recognition and the guiding principle for the actions of the authorities. While for people are of device order, this means that their use is at their free consideration when required or requested. In addition, constitutional rights must be considered as the guarantee for individuals to retain and demand from the State the protection and supervision of the minimum that allows them a dignified human life[24]. So having control and defense of the constitution becomes vital for the validity of this, and to be able to generate certainty to the people[25].

There are two main aspects of the constitutional review model, which are in line with the model of ex officio control of rights by the judiciary. Both aspects of control are exercised independently and the existence of this general control model does not require all cases to be reviewable and contested in both[26].

---

[20] C. Mortati, *La costituzione in senso materiale*, Milano, Giuffrè, 1998.
[21] P. Sorokin, *Características de las normas jurídicas,* in *Revista chilena de derecho*, Vol. 9, No.2/ 1982, p. 471 et ss.
[22] Judgment T 049/93 of the Constitutional Court of Colombia.
[23] R. Alexy, *La construcción de los derechos fundamentales*, Marcial Pons, Buenos Aires, 2010, pp. 24 et 44.
[24] C.M. Rosales, *Texto y contexto de la independencia judicial*, in Revista *Judicatus*, no. 13/2019.
[25] B. Celano, *I diritti nello Stato costituzionale*, Bologna, Il mulino, 2013.
[26] See, J. Austin, *Sobre la utilidad del estudio de la jurisprudencia,* Coyoacán, Ciudad de México, 2011.

A system concentrated in one part and diffused in another, which allows for constitutional criteria and interpretations, either by a declaration of unconstitutionality or by non-application, of which is known to the judicial authority to determine the constitutional interpretation that should prevail in the national legal order. It should be pointed out that all other authorities within their sphere of competence are obliged to apply the relevant rules by applying the most favourable interpretation to the individual in order to achieve the widest possible protection of his rights, without having the possibility not to apply or declare its incompatibility[27].

Fundamental rights, socio-historically, come from a political pact. These have ideally a democratic origin, in which those represented will expose the feeling and needs of society so that different values and goods are recognized[28].

For several jurists ruled under the mantle of legal reductionism of theoretical positivism, fundamental rights are human rights positivized in a specific legal system[29]. In other words, they are human rights that are materialized spatially and temporarily in a given State.

Fundamental rights are linked to the dignity of the person within the State and society; these are precisely the shielding of that. It should be noted that fundamental rights are not created by political power, and that the State is under an obligation to protect, protect and guarantee them, and, where appropriate, punish non-compliance[30].

The normative structure of fundamental rights is based on the capacity that allows the person to perform certain acts, that is, that fundamental rights are legal institutions that have the form of subjective right. And the structure of the subjective right has several elements: the holder of the subjective right, the content of the subjective right in which the faculties are to be distinguished, moreover, the object of the right, and a third element is the addressee or the passive subject, who is obliged to do, to give or not to do.

The traditional formulation of fundamental rights as limits directed only against the public authorities has proved insufficient to respond to violations of those rights by individuals[31]. In this sense, it is undeniable that the relations of inequality that arise in contemporary societies,

[27] Isolated thesis LXX/2011, supported by the Plenum of the Supreme Court of Justice of the Nation, with electronic registration number 160480, item: «system of constitutional control in the Mexican legal order».
[28] G. Pino, *Il costituzionalismo dei diritti*, Bologna, Il mulino, 2017.
[29] D. Valadés, *El control del poder*, UNAM, Ciudad del México, 2000, p. 65.
[30] See R. Barnett, *Restoring the lost constitution*, Princeton University Press, Princeton, 2004.
[31] Jurisprudence 15/2012, supported by the First Chamber of the Supreme Court of Justice of the Nation, with electronic registration number 159936, under the heading "FUNDAMENTAL RIGHTS. ITS VALIDITY IN RELATIONS BETWEEN PARTIES.".

and that form positions of privilege for one of the parties, may lead to the possible violation of fundamental rights to the detriment of the weaker party[32].

The Constitution does not provide any textual basis for affirming or denying the validity of fundamental rights between individuals; however, this is not an insurmountable barrier, In order to give an adequate answer to this question, we must start from a concrete examination of the rule of fundamental law and of those characteristics that allow us to determine its function, scope and development within the legal system. In the first place, therefore, it is essential to examine the functions of fundamental rights in the legal system[33].

The fundamental rights provided for in the Constitution enjoy a double quality, since if on the one hand they are configured as subjective public rights (subjective function), on the other they are translated into objective elements that inform or permeate the entire legal system, including those originating between individuals (objective function)[34]. In a legal system, fundamental rights occupy a central and indisputable position as the minimum content of all legal relations in the system. In this logic, the dual role played by fundamental rights in the order and structure of certain rights constitute the basis for affirming their impact on relations between individuals. However, it is important to stress that the observance of fundamental rights in relations between individuals cannot be sustained in a hegemonic and all-encompassing way over each and every relationship that occurs in accordance with private law, by virtue of the fact that in these relations, unlike those that are initiated against the State, we usually find another right holder, which causes a collision of the same and the necessary weighting by the interpreter[35]. Thus, the fundamental task of the interpreter is to analyze, in a singular way, the legal relations in which fundamental rights are found with other assets or rights constitutionally protected; At the same time, the structure and content of each right will make it possible to determine which rights are only opposable to the State[36].

No fundamental right is absolute and to that extent all admit restrictions. However, the regulation of such restrictions cannot be arbitrary. For the measures issued by the ordinary legislator (for the purpose of restricting fundamental rights to be valid) they must satisfy at least the following requirements: a) be admissible within the constitutional scope, that is, the

[32] A. Pintore, *Diritti insaziabili*, Milano, Franco Angeli, 2000, pp. 1000-1018.
[33] B. Bix, *Jurisprudence*, Durham, Carolina Academic Press, 2004, p.88.
[34] See E.W. Böckenforde, *Estudios sobre el estado de derecho y la democracia*, Madrid, Editorial Trotta, 2000.
[35] J.R. Narváez Hernández, *Apuntes para empezar a descifrar al destinatario de los derechos humanos*, in *Revista Telemática de Filosofía del Derecho*, no. 8/2005.
[36] See P. Comanducci, *Razonamiento jurídico,* Ciudad del México Fontamara, 1999.

ordinary legislator may restrict or suspend the exercise of individual guarantees only for purposes which may fall within the provisions of the Constitution.

The Constitution provides that all persons enjoy fundamental rights. The protection of these presupposes, in the first place, access to public institutions and, on the other hand, to jurisdiction, that is, that the governed can enjoy their rights and, secondly, the right to obtain a judgment on the merits of the question and its full implementation, which must be prompt, complete and impartial. Therefore, access to an effective, simple and prompt remedy, through which judges and courts effectively protect the exercise of the fundamental rights of any person who requests it[37].

The judge must determine in each case whether the legislative restriction on a fundamental right is, firstly, admissible in the light of the constitutional provisions, secondly, whether it is the necessary means to protect those purposes or interests constitutionally protected, in the absence of less restrictive options to achieve them[38]; and thirdly, whether the legislative distinction is within the treatment options that can be considered proportional. Similarly, restrictions must be in accordance with the law, in the interest of achieving the legitimate objectives pursued, and be strictly necessary to promote the general welfare in a democratic society[39].

Fundamental rights are legal imperatives with conditions of application defined in a very open way, which naturally leads them to interact, in specific cases, with other rules with legal content that point in non-identical directions.[40] So, it is often said that fundamental rights operate in legal reasoning as optimization mandates,[41] because their protection and recognition in constitutional texts naturally presuppose that their normative requirements will conflict with others in specific cases, where a weighting exercise will be required to articulate the outcome of their joint implementation in such cases[42].

[37] Cfr. M.J. Gerhardt, *The power of precedent*, New York, Oxford University Press, 2008.
[38] See C.M. Rosales, *La internacionalidad de los derechos fundamentales*, in *Revista Pensamiento Constitucional*, No. 23/2019.
[39] Isolated thesis II.8o.(I Region) 1 K, supported by the Eighth Circuit Collegiate Court of the Auxiliary Center of the First Region, with residence in Naucalpan de Juárez, State of Mexico, with electronic registration number 2002096, item: "EFFECTIVE JUDICIAL PROTECTION. ACCESS TO AN EFFECTIVE REMEDY, SIMPLE AND PROMPT, IS A CONSEQUENCE OF THAT FUNDAMENTAL RIGHT.".
[40] J. De Zan, *La ética, los derechos y la justicia*, Montevideo, Konrad Adenauer, 2004, pp.56-59.
[41] Jurisprudence 2/2012, supported by the First Chamber of the Supreme Court of Justice of the Nation, with electronic registration number 160267, item: "RESTRICTIONS ON FUNDAMENTAL RIGHTS. ELEMENTS THAT THE CONSTITUTIONAL JUDGE MUST TAKE INTO ACCOUNT TO CONSIDER THEM VALID.".
[42] H. Tribe e Laurence H., *On Reading the Constitution*, Harvard, Harvard University Press, 1991, p.67.

Thus, in today's constitutional democracies, the legal resolution of conflicts involving fundamental rights does not always start from scratch, but the legal system contains a more or less consensual range of rules or criteria that express what may or may not be considered an appropriate balance between them in different contexts or application scenarios. Some of these rules are expressly enshrined in the Constitutions, and others become more explicit as constitutional justice resolves cases, including those in which the constitutionality of the limits to the rights included in the laws is judged.

Hence, the legislator is generically competent to issue rules that regulate and limit rights, but it cannot do it as it prefers, but under certain conditions related both to purposes and to means, whereas its normative work to ensure that limits are justified by the need to protect constitutionally protected rights and interests, and has not been adopted on an arbitrary or insufficiently based basis, sensitive to its impact on the conditions of enjoyment of the right involved[43].

7. Inapplicability of the rule by the public authority.

Exceptionality is a space that is contained in systems to generate a form of resolution, and that there is no contradiction with the rest of the systems that sustain a relationship with it. In our case, inapplicability is the exception for not recognizing the norm contained in an international instrument; which is considered and used for coherence and coexistence with the local normative order, if there is a contradiction between the positive national system and the agreed obligations deriving from international treaties[44].

The inapplicability of human rights may be carried out by the authorities (public and private), but in this work we will concentrate on the acts of the public authorities, which have the obligation to protect and protect the guarantees, rights and prerogatives of all persons. Thus, the ways in which the authorities could derogate from international treaties containing human rights will be presented in a concise manner.

[43] Thesis XII/2011, supported by the Plenary of the Supreme Court of Justice of the Nation, with electronic registration number 161368, title: "CONFLICTS INVOLVING FUNDAMENTAL RIGHTS. ITS LEGAL RESOLUTION.".

[44] G. Gladio, *Rispetto dei trattati internazionali: un nuovo obbligo del legislatore statale*, in *Quaderni costituzionali*, 2002, pp. 605-606.

7.1. Administrative.

Since the administration of the State, inapplicability could happen either by omission or by an action of a public servant of the bureaucratic apparatus. In the first case, it could be carried out, if a bureaucrat carries out his work with ignorance of international instruments, executing his work according to the local operative law, considering only the normativity of his function, according to his category or scale.

In the inapplicability of human rights by an action arising from an administrative act, it must be contemplated either a responsibility or a justification, to judge the arguments for not being able to materialize the human right that has been blocked between the governed and the authority. In these kinds of cases, one could reflect on the strict responsibility of the State, or that the same public authority recognizes the impossibility of failing to realize the human right of the individual, but without any responsibility for the official or the State.

7.2. Legislative.

Human Rights should be considered as the principles for the creation of norms produced by the legislature. It was therefore necessary to analyse the topic of principles as the basis, source or guideline for a positive system.

The principles as concepts are elucidated grammatically as the "First instant of being, of existence, of life. Reason, foundation, origin. Cause first. Foundations or rudiments of a science or art. Maxim, norm, guide"[45].

As already mentioned in the previous chapter, for Ronald Dworkin "the principles incline the decision in a direction, although not conclusively, and survive intact even when they do not prevail"[46]. That is why "principles are the basis that build legal systems, radiating to the whole

[45] G. Canabellas, *Diccionario Jurídico Elemental*, Madrid, Torres, 2003, p. 359.
[46] Ronald Dworkin believes that legal principles are not extralegal standards and are binding on the judge. *Los derechos en serio*, , Barcelona, Ariel, 1995, pp.19-22 et 77-78.

legal system"[47]. Now, it is important to notice the differences between principles and rules. It is therefore to see rules as definitive mandates and principles as optimization mandates[48].
Hence, the legislative construction of human rights must be done in the light of an open and moldable logic, otherwise it would represent building dogmatic and rigid mandates, closer to the definitive than to their optimizing potential.

7.3. Judicial.

The most concrete manifestation of justice in any social system is the correct application of laws and the possibility of protecting their respect through instances that allow the resolution of disputes, conflicts and differences that arise between the parties[49].
The jurisdiction, as already mentioned, is "the set of powers that the State has to exercise, through one of its organs or through arbitrators, with the application of general and individualized legal rules to the various acts and facts arising from the formulation of specific positions in dispute"[50].
In this order, the process of non-application of norms, within this constituted power, materializes through acts of authority that, specifically, are called at the top as judgments and/or resolutions. These acts of judicial authority have a wide variety of manifestations, purposes and meanings. One of these concerns human rights when the approach submitted to the judiciary is that of constitutionality and/or conventionality. The types of controls used by the judiciary to prevent the application of human rights are:

[47] This conception was taken from the fact that from the principles rules are created. Basically, the distinction that Dworkin makes between rules and principles, is that, the legal norms prescribe a conduct with its legal consequence; the principles lack such consequence, on the grounds that these are approaches that help to take a position on specific cases. They are guidelines, standards of conduct. Therefore, the principles are superior to the norm. The same author considers that legal principles are not extralegal standards and are binding on the judge.
[48] R. Alexy, *El concepto y validez del derecho*, Barcelona, Gedisa, 2004, p.72.
[49] V. Andrade Martínez, *Balance y perspectivas de la justicia electoral en México*, in *Evolución histórica de las instituciones de la justicia electoral en México,* 2002, p.601.
[50] C. Arellano García, *Teoría general del proceso,* Ciudad del México, Porrúa, 1992, p. 346.

8. Parameter of constitutional regularity.

The control of regularity is the name or denomination that the Supreme Court of Justice of the Nation has given to the set of norms that serve to evaluate the constitutionality or regularity of a norm. This idea or concept was used by the Plenary of the Supreme Court in several cases that were promoted before the constitutional reform of 2011 but given the significance of the disputes were attracted by the Plenary and resolved at various times[51].

"Since the constitutional reform of 10th June 2011 in the field of human rights and its interpretation by the Plenary of the Supreme Court of Justice of the Nation in the contradiction of thesis 293/2011 and the diverse 21/2011 was incorporated into the techniques of interpretation and the so-called block of constitutionality (parameter of constitutional regularity) that subsumes the block of conventionality"[52].

There are two positive criteria for identifying what should be understood by "direct interpretation" of a constitutional precept: 1) the direct interpretation of a constitutional precept in order to unravel, clarify or reveal the meaning of the norm, for which the intention of the legislator or the linguistic, logical or objective meaning of the words may be taken into account in order to understand the true meaning of the regulation, and this is achieved by using grammatical, analogical, historical methods, logical, systematic, causal or teleological. This implies that the sentence must fix or explain the meaning or scope of the content of a constitutional provision; and, 2) the direct interpretation of constitutional rules which, by virtue of their special characteristics and the supreme character of the body which creates and modifies them, in addition to the general rules of interpretation, may take account of other historical aspects, political, social and economic[53].

The normative supremacy of the Constitution is manifested not only in its ability to serve as a parameter for the validity of all other legal norms, but also in the requirement that such norms,

---

[51] We found the background in the file IN 912/2010 solved the 14 july of 2011; formed on the occasion of the judgment handed down by the Inter-American Court of Human Rights in the case of Rosendo Radilla Pacheco against the Mexican State. Sentence handed down at the amparo directo 28/2010 del 23 november of 2011. Acción de Inconstitucionalidad 155/2007 solved the 7 de february of 2012. Contradicción de tesis 293/2011 sentenced 3 de september of 2013.

[52] A. Maldonado, *Los precedentes de las cortes regionales de protección de los derechos humanos y su influencia en las resoluciones de la Suprema Corte de Justicia de la Nación*, in *Revista del Instituto de la Judicatura Federal*, No .48/2019, p.77.

[53] Jurisprudence 63/2010, issued by the First Chamber of the Supreme Court of Justice of the Nation, with electronic registration number 164023, item: "DIRECT INTERPRETATION OF CONSTITUTIONAL NORMS. POSITIVE AND NEGATIVE CRITERIA FOR IDENTIFICATION.".

when applied, are interpreted in accordance with the constitutional precepts; in such a way that, in case there are several possibilities of interpretation of the norm in question, the one that best conforms to the provisions of the Constitution is chosen. In other words, this intrinsic supremacy not only operates at the time of the creation of unconstitutional norms, the content of which must be compatible with the Constitution at the time of its adoption, but is extended, now as an interpretative parameter, to the phase of application of those rules[54]. In addition to its direct regulatory effectiveness, it is effective as a reference framework or dominant criterion in the interpretation of the other rules.

This principle of the interpretation of all the norms of the order in conformity with the Constitution is an elementary consequence of the conception of the order as a coherent structure, as a unit or context[55].

The block of constitutionality as a hermeneutic tool is used to construct the parameter of constitutional regularity by determining the sources and, where appropriate, the contents of the provisions applicable to the specific case, without it it would not be possible to apply the other principles. Therefore, the block of constitutionality is the basis for the parametric instrumentation of the applicable contents making viable the application of the other principles, and defines what will be the subject of the interpretation that will be the law applicable to the specific case. Thus, in the order of ideas implies an analysis that has to do with the application of the sources contained in a common trunk, observing the applicable special situation provisions or, where appropriate, the specific group to which its human rights were violated.

In this case, the conflicts that it resolves in summary are: a) To clarify in the specific case the applicable sources, b) To determine the normative contents of the provisions and their harmonization with the constitution, c) To enable the application of other interpretative tools, such as the control of conventionality, conformity of interpretation and, where appropriate, the principle of rights. Thus its teleology is to grant coherence and unity to the normative order, and in its case with the parameter of constitutional regularity allowing to warn antinomies or normative gaps, and, where appropriate, recognize the constitutional character of all human

[54] See G. Marshall, *Teoría constitucional*, Madrid, Espasa, 1982.

[55] R. Hernández Valle, *Los principios constitucionales*, Ed. Escuela Judicial. Corte Suprema de Justicia, Costa Rica, 1992, p. 89 ss.

rights norms regardless of their constitutional or conventional for legal operators to use for the interpretation of national rules in specific contexts where suspicious quality is perceived[56].

As can be seen from the block of constitutionality and the conformation of the parameter of constitutional regularity is the core on which the other interpretative tools are based, and to which they subsume by obviousness, as it determines the analysis and where appropriate makes the applicability of the others viable[57]. In this sense, its implementation is a budget for the effectiveness of the other tools[58].

It is important to note that this interpretative rule operates prior to the judgment of invalidity. That is to say, before considering a legal norm as constitutionally invalid, it is necessary to exhaust all possibilities of finding in it a meaning that makes it compatible with the Constitution and that allows it, therefore, to subsist within the order. In this logic, the interpreter must as far as possible avoid such an outcome and interpret the rules in such a way that the contradiction does not occur and the norm can be saved[59]. The judge must, whenever possible, try to escape the vacuum that occurs when a rule is denied validity and, in the specific case, if several interpretations are possible, the one that saves the apparent contradiction should be preferred[60].

9. Ex officio conventional control.

With regard to the nature of ex officio control, judges are obliged to observe not only the acts of the authorities, but also the due and obligatory protection of the constitutional and treaty rights of individuals: “National judges have the obligation to exercise double control over the legality of acts and omissions by public authorities; that is, the control of constitutionality to determine the consistency of secondary acts and norms with the Constitution, and conventionality control to determine the consistency of domestic acts and norms with international human rights treaties and international jurisprudence. In other words, the new constitutional reality, derived from the interaction between domestic and international law,

[56] E. Carpio Marcos, *Bloque de constitucionalidad y proceso de inconstitucionalidad de las leyes*, in *Revista Iberoamericana de Derecho Procesal Constitucional*, no. 4/2005.
[57] L. Favoreu, *El bloque de constitucionalidad*, in *Revista del Centro de Estudios Constitucionales*, no. 5/1990.
[58] *Ibidem*.
[59] See X. Medellín, *Principio Pro persona*, Ciudad del México, SCJN, 2013.
[60] J. Malem, J. Orozco e R. Vázquez, en *La función judicial*, 2003.

obliges judges to guarantee constitutional supremacy and the conventional guarantee in the cases to be resolved"[61].

As regards its acceptance as a constitutional right, the Supreme Court has delegated the applicability of ex officio control to judges through case law: "The expression ex officio does not mean that always and without exception, judges are required to review the constitutionality of the rights contained in the Constitution of the United Mexican States and in international treaties to which the Mexican State is a party; This expression means that this type of control can be done by virtue of their position as judges, even if: 1) they are not judges of constitutional control; and, 2) there is no express request from the parties".[62]

As regards the object of ex officio control, the SCJN has determined that it should be done by means of three steps:"Thus, the expression ex officio that is preached of judicial control means that the judges have the power to control the norms that they will apply with regard to the Constitution and the international treaties to which Mexico is party, for the simple fact of being judges, but not that they must "necessarily" carry out such control in all cases, in any of its three steps: 1) interpretation in a broad sense; 2) interpretation in a strict sense; and, 3) non-application; but in those in which it is incidentally requested by the parties or they warn that the rule merits such control, without setting aside the formal and material budgets of eligibility"[63].

10. Interpretation in accordance with.

The interpretation of norms in accordance with the Constitution has traditionally been based on the principle of preserving the law, which in turn is based on the principle of legal certainty and the democratic legitimacy of the legislator[64]. In the case of the law, the result of the will of the democratically elected representatives, the general principle of the preservation of the rules is reinforced by a stronger presumption of validity[65], In addition, the principle of the interpretation of all legal norms in conformity with the Constitution is reinforced by the pro persona principle, which requires the maximization of compliance in those scenarios in which

[61] J. Mejía, *El control de convencionalidad en México, Centro América y Panamá,* Guaymas, 2016, p. 11.
[62] Control of constitutionality and conventionality ex officio. Its meaning and scope.
[63] Ídem.
[64] A.M. Bickel, *The least dangerous branch,* Yale, Yale University Press, 1986, pp. 23-33, 58-59 and 199.
[65] C. Guarnieri and P. Pederzoli, *Los jueces y la política*, Madrid, Taurus, 1999, p.16.

the such an interpretation would enable people's fundamental rights to be effective in the face of the legislative vacuum[66].

The application of the principle of interpretation of the law in accordance with the Constitution requires the court to choose the one from which it derives an appropriate result. In case the secondary rule is obscure and admits two or more possible understandings. Thus, in the exercise of judicial control of the law, the constitutional judge must, if possible, choose the interpretation by which it is feasible to preserve the constitutionality of the contested rule, in order to guarantee constitutional supremacy and at the same time, to enable the proper and constant application of the legal order[67].

The principle of consistent interpretation is based on the different principle of legal preservation, which implies that this interpretation is limited by two aspects: one subjective and another objective; on the one hand, it finds its limit in the will of the legislator, that is, it relates to the functionality and scope that the legislator gave to the the norm in question[68]. In the case of the objective will of the legislator, the interpretation of conformity may be carried out provided that the normative meaning resulting from the law does not entail a distortion, but a tempering or conformity with the original text of the contested normative provision; In addition, the principle of conformity of interpretation is based on a general presumption of validity of the rules intended to preserve laws; therefore, it is a method that operates before considering a legal precept unconstitutional or unconventional[69].

In this sense, only when there is a clear incompatibility or contradiction that becomes insurmountable between an ordinary norm and the Constitution, will a declaration of unconstitutionality be made, therefore, the legal operator, when using the principle of consistent interpretation, it must exhaust all possibilities of finding in the contested normative provision a meaning that makes it compatible with the Constitution[70].

Interpretation under the Constitution must prevail as the valid, effective and functional interpretation, i.e., The most important of these interpretations must always be the one that best

[66] Jurisprudence 37/2017, supported by the First Chamber of the Supreme Court of Justice of the Nation, with electronic registration number 2014332, item: "INTERPRETATION CONFORMING. NATURE AND REACH IN THE LIGHT OF THE PRINCIPLE PRO PERSONA.".

[67] See R. Posner, *How judges think,* Harvard, Harvard University Press, 2008.

[68] A. Squella, *Justificar decisiones jurídicas y justificar decisiones judiciales,* in *Revista de derecho*, 2006, p.277 y ss.

[69] D.E. Herrendorf, *El Poder de los Jueces*, Buenos Aires, Abeledo-Perrot, 1994, pp.97-109.

[70] Y. Gómez, *Estado Constitucional y protección internacional*, en *Presente, pasado y futuro de los DDHH*, 2014, pp. 231-280.

meets the constitutional requirements, given that it is the most senior normativity and that must govern the entire normative system. The aim of the interpretation is to ensure that the principles and values enshrined in the Constitution prevail[71].

11. Constitutional supremacy.

The Constitution is the political embodiment of the sovereign, through his representatives, to whom the delegation and the obligation of carrying it out are conferred. So obedience to the Constitution is intrinsic, because it contains the will of the people, becoming the basis of political and social unity of the people[72].

The Constitution is placed as the legal source of the entire normative order and as the basis of all national institutions. From the above, it can be glimpsed that there is a hegemony in its position, which must be warned first of all at the time of any issue of the country[73].

There is no doubt that what Hamilton said on the subject of the Treaties should be noted: "Treaties should be considered the supreme law of the nation; opposing the idea that treaties, like other acts of a legislative assembly, should be able to be revoked when it seems convenient"[74].

The Constitution, as a fundamental norm of the Mexican legal system, implies that the rest of the legal norms must be in accordance with it, both formally and materially. In such a way, that "when the Constitution has an express restriction on the exercise of human rights, it must be in accordance with the constitutional norm"[75], so in the event of an express restriction , this will be given by the conditions of normative application, which do not depend on affirming their

[71] Case law I.4o.A. J/41, supported by the Fourth Collegiate Court on Administrative Matters of the First Circuit, with electronic registration number 177591, title: *Interpretation in accordance with the federal Constitution. According to it the ordinary Courts may classify the contested act and define the effects of applying a provisione declared unconstitutional*.

[72] R. Fallon, *The dynamic constitution*, Nre York, Cambridge University Press, 2004, p. 33.

[73] B. Ackerman, *We the people. Foundations*, Harvard, Harvard University Press, 1991, p. 224.

[74] J. Madison, *El federalista*, Ciudad del México, FCE, 2007, p. 66.

[75] In this sense it expresses the contradiction of thesis 293/2011 that "The express restrictions of a constitutional nature to the exercise of human rights can have two possible causes in a democratic regime: a) be the result of an exercise of proper weighting of the Constituent of the same human rights (the obligations generated by these rights are often in conflict) and b) be the result of a democratic exercise of weighting between certain rights and others constitutionally protected property, such as democratic rule, federalism, division of powers, etc.".

binding nature, but on the nature of their content; thus it is stated that speaking of human rights standards all are equally binding, but with differentiated conditions of application.

The idea that is put to observation, is the pre-eminence of the Constitution as a body that predominates to the rest of the existing norms and to be created, and in the event of a conflict with some international treaty (regardless of its subject matter)should be resolved in accordance with the Constitution, placing its supremacy above any international instrument[76]. The foregoing, without forgetting that it must be interpreted in the most favorable way to the person, although in a restricted sense in accordance with what the constitution itself postulates[77].

12. Inapplicability of human rights.

The administration of justice as a subjective public right is increasingly distant for the following reason. The tendency to turn judicial decisions into theoretical treaties of law, forgetting that academia (theory) is the responsibility of universities, whereas the proper function of the State organs responsible for the administration of justice is precisely that, the administration of justice, where technology must be at the service of justice.

The requirement that all the points raised by the parties be dealt with in an express manner, line by line, point by point, despite the fact that many of them do not reveal a serious intention to defend, but rather to open up a range of possibilities to see which one prospers, with the serious risk to the judge of any omission[78].

The guarantees underlying the fundamental right of access to justice provided for: "1. The right of every person to a fair hearing within a reasonable time by a competent, independent and impartial Judge or Court previously established by law; in the handling of any criminal charges brought against it or for the determination of its civil, labour, tax or other rights and obligations; 2. The existence of an effective judicial remedy against acts that violate fundamental rights; 3. The requirement that the competent authority provided for by the respective legal system

[76] C.M. Rosales, *Una propuesta para su ponderación y otorgamiento de los Derechos Humanos*, in *Revista Justicia y Derechos Humanos*, No. 2/2018.

[77] Case law 2a. /J. 163/2017 (10a.), supported by the Second Chamber of the Supreme Court of Justice of the Nation, with electronic registration number 2015828, title: *Constitutional restrictions on the enjoyment and execcis rights and freedoms. Its content does not prevent the Supreme Court of Justice of the Nation from interpreting them the way most favorable to the people in terms of constitutional postulates themselves*.

[78] See R. Dworkin, *Virtud Soberana*, Madrid, Paidos, 2003.

decides on the rights of any person who interposes it; 4. The development of possibilities for judicial recourse; and, 5. Compliance by the competent authorities with any decision in which the appeal has been deemed appropriate"[79].

The fundamental right of access to justice is considered to be a gender with the principles that derive from that precept (prompt, complete, impartial and free justice), and must be interpreted in the principle pro personae, is the most favourable interpretation that allows the widest access to the delivery of justice[80].

The justiciable must give the guidelines to seek the value of justice, that is, it must not fall to the point that absolutely everything is written, without any effort of the intellect to reach the final point[81].

Judgements must be made to resolve disputes, do justice, attend to the serious approaches of the parties, reason to justify and convince, it can be said that the principles of completeness and consistency associated with the satisfaction of the public service of administration of justice are fully complied with[82].

13. Anti-progressivity.

The principle of progressivity was originally linked to Economic, Social and Cultural Rights (ESCR), because they were deemed to be imposed on States, positive obligations to act that involved the provision of economic resources, and that their full realization was conditioned by the economic, political and legal circumstances of each country.

In this way, in the international instruments that recognized these rights, the principle of progressivity was included with the aim of demonstrating that these rights do not constitute mere "programmatic objectives", but genuine Human Rights that impose immediate compliance obligations on States, such as ensuring minimum levels of the enjoyment of those

[79] Case law VI.1o.A. J/2, supported by the First Collegiate Court in Administrative Matters of the Sixth Circuit, with registration number 2001213, title: *Access to the delivery of justice. The guarantees and mechanisms contained in articels 8, 1 and 25 of the american convention on human rights, which are intended to give effect to their protection, underlie the fundamental right provided for in articole 17 of the Constitution*.

[80] See R. Hirschl, *Towards juristocracy*, Harvard, Harvard University Press, 2007.

[81] M.C. Redondo, *La justificación de las decisiones judiciales*, in *Revista Isegoria*, No.21/1999, p.149 et ss.

[82] Isolated thesis VIII.4o.16 K, issued by the Fourth Collegiate Court of the Eighth Circuit, with electronic registration number 178560, under the heading *Administration of Justice. Compliance with the principles of completeness and consistency correlated to that subjective public right provided for in articole 17 of the Federal Constitution*.

rights, ensuring their enjoyment without discrimination, and the obligation to take deliberate, concrete and targeted measures to their satisfaction; as well as medium-term performance obligations to be undertaken progressively in the light of the specific circumstances of each country[83].

Thus, progressivity constitutes the commitment of States to adopt measures, both at the domestic level and through international cooperation, especially economic and technical, to achieve progressively the full realization of the rights deriving from economic, social and educational standards, science and culture, a principle which cannot be understood as meaning that governments do not have an immediate obligation to strive for the full realization of those rights, but in the possibility of progressing gradually and steadily towards its fullest realization, according to its material resources; thus, this principle requires that as the level of development of a State improves, improve the level of commitment to ensuring economic, social and cultural rights[84].

The principle of progressivity that governs in the field of Human Rights implies both graduality and progress[85]. Gradual means that, generally speaking, the effectiveness of human rights is not achieved immediately, but involves a whole process that involves defining short-, medium- and long-term goals. For its part, progress meant that the enjoyment of rights must always be improved. In this regard, the principle of progressivity relates not only to the prohibition of regressivity in the enjoyment of fundamental rights but also to the positive obligation to promote them progressively and gradually.

The State has a constitutional mandate to carry out all the necessary changes and transformations in the economic, social, political, and cultural structure of the country, so as to guarantee that all people can enjoy their rights[86]. The principle in question, therefore, requires all State authorities, within their sphere of competence, to increase the degree of protection in the promotion, respect, protection, and guarantee of human rights and also prevents them, by virtue of their expression of non-regressivity, To adopt measures that, without full constitutional

[83] Jurisprudence no. 86/2017, *Principle of progressivity. Applies to all human rights and not only so-called economic, social and cultural rights. Scjn*.
[84] I.4o.A.9 K: *Principles of Universality, Interdependence, Indivisibility of Human Rights. What they consist of. Scjn*..
[85] See C. Wolfe, *The rise of modern judicial review*, New York, Littlefield Adams Quality paperbacks, 1994.
[86] C.S. Nino, *The Constitution of deliberative democracy,* Yale, Yale University Press, 1996, pp. 1-5.

justification, diminish the level of protection of the fundamental rights of those who submit to the legal order of the State[87].

Therefore, it could be considered that the inapplicability of a Human Right is against their progressivity. However, if a Human Right on the Constitution were recognized, it would break the harmony and logic of the normative system, The constitutional history would be ignored and the self-determination of the people would be subject to the criteria of international human rights courts.

14. Normative pragmatism.

For judges, as public servants they are subject to the principle of legality and, above all, to the preservation and enforcement of the Constitution. Therefore, the principle of legality and constitutionality are paramount to the performance of their functions and as a limit to their actions[88]. The judge's action must always be based on the law (legality) or what others have called the government of judges, where the legal norm means the basis of institutions. Thus, legality is based on the fact that the authority is only entitled to act as prescribed by law and to comply fully with the law.

The principle of constitutionality consists of "to recognize the existence of a State governed by the rule of law, a State in which the acts of public authority are always and necessarily subject to the Constitution; it also requires the existence of a democratic system from which the decisions taken, the legitimacy of the decisions taken, on a democratic basis; requires full respect for fundamental rights; requires the existence of various methods or possibilities for the provision of material benefits or individuals, and an understanding that the Constitution must govern with respect to the totality of the accusations of the public power"[89].

In this sense, an articulating arm of this principle is the conventional control ex officio. In Mexico, to refer to the *control of constitutionality* means to analyze directly the conformity of ordinary legal elements with any precept of the Fundamental Law in the strict sense -although

[87] Isolated thesis CXXVII/2015: *Principle of progressivity of human rights. Its nature and function in the Mexican State*. SCJN.
[88] A. Bickel, *The least dangerous branch*, Yale, Yale University Press, 1986, p.78.
[89] J.R. Cossío Díaz, *Problemas de la Justicia Constitucional*, in *Sistemas de Justicia electoral: Evaluación y perspectivas*, 2007, p. 397.

implicit or indirectly international norms are also protected-, but also refers to the direct analysis of international human rights norms that bind the Mexican State, primarily the American Convention on Human Rights, since the observance of these rights also has constitutional status. On the other hand, as developed by inter-American jurisprudence, the expression "control of conventionality" is more restricted, because it refers only to the direct analysis of conformity with international requirements, although implicit, but indirectly, constitutional norms are also protected"[90].

The problem of judicial control of laws based on human rights treaties, in relation to systems in which centralization exists or had existed in the area of constitutional control of laws, is that the structuring, principles and guarantees of the constitutional court, are not applicable to the ordinary court, with the result that the objection based on the democratic value of the law (effect against majority), in conjunction with the principle of legal certainty, is transferable, in principle, to that possibility, since the degree of indeterminacy of the rules on guaranteed constitutional rights is comparable to the degree of abstraction of the human rights standards recognized in international treaties. In other words, because the ordinary judge, in order to apply the international human rights treaty, must first assign a content to the standard of rights and freedoms,"(...) shall be in a position, at the same time, of being a subject, but also of superiority, over the ordinary law (...)", since he has the power to define the scope of the rule that will serve as a parameter for this purpose[91].

As a result, sometimes judges in the simplest and most practical solution, and in the face of obvious opposition to the Constitution, disregard international instruments that protect the human right required by the individual. This means that there is an aporia between human rights and the positive system, and the futility of a false debate that must prevail.

15. Constitutional sovereignty.

Sovereignty is the way in which people are self-determined, and with it, can create the norms that identify them, that reflect their will in the laws. This implies that, in an exercise of

[90] E. Ferrer, *Control difuso de constitucionalidad y convencionalidad,* Ciudad del México, SCJN, 2013, p. 18.
[91] F. Silva, *Control de convencionalidad y constitucionalidad ex officio: condiciones de racionalidad para su ejercicio en el juicio de amparo*, in *Revista del instituto de la judicatura,* No.6/2013, p. 92.

normative primacy, whatever the people prefer will prevail in order to achieve their social objectives[92].

It can be observed that the Constitution was born with the aim of giving identity to the peoples, and the power of the capacity to endow itself with a democratic government,[93] and to enable them to equip themselves with the norms that they require for their objectives as a society.[94]

In this way, each State designs and selects the laws that will govern within it. In the case of norms derived from international human rights treaties, the representatives of the country assume a State representation and validate the content of these international instruments. However, care must be taken to ensure that none of them exceeded the will reflected in the popular will and did not violate the principles that constituted it.

Now, in the event that there is a rule from an international treaty, which is contrary to or incompatible with the Constitution, the judge must pay attention to the content of the will of the people contained in the national political code. Specifically, with regard to the object of ex officio control, the Mexican SCJN has determined that it should be done by means of three steps: "Thus, the expression ex officio that is preached of judicial control means that the judges have the power to control the rules that they will apply with regard to the Constitution and the international treaties to which Mexico is a party, simply by being judges, but not that they "necessarily" have to carry out such control in all cases, in any of its three steps: 1) conforming interpretation in the broad sense; 2) conforming interpretation in the strict sense; e, 3) non-application; but in those in which it is incidentally requested by the parties or they warn that the rule merits such control, without setting aside the formal and material presuppositions of admissibility"[95].

16. Independence and autonomy of judges[96].

[92] R. Peralta, *Soberanía Nacional y Estado Constitucional*, in *Revista de Estudios Políticos*, No.155/1999, pp. 309-310.

[93] R. Alexy, *La construcción de los derechos fundamentales,* Buenos Aires, Ad hoc, 2010, pp. 24 and 44.

[94] J.M. Serna, *El principio de soberanía en la Constitución mexicana*, in *Revista de la Facultad de Derecho,* Vol.70/2020, p. 687.

[95]Control of constitutionality and conventionality ex officio. its meaning and scope. In the review of direct amparo 3113/2014, the First Chamber of the SCJN stated that constitutional supremacy corresponds to all human rights incorporated in the country's legislation, since it is part of the same catalogue, including those referred to in the international instruments ratified by the Mexican State that are integrated into the national legal order, becoming part of the catalogue of rights, which operates as a parameter of constitutional regularity, therefore, such rules cannot contravene the principle of constitutional supremacy.

[96] See C.M. Rosales, *Independencia judicial*, in *Revista Argumentos. Estudios transdisciplinarios sobre culturas jurídicas administración de justicia*, No 9/2020.

At present, Western constitutional democracies share a fundamental characteristic: the independence of the judge, that is, a set of guarantees designed to ensure his or her impartiality, vis-à-vis the parties and political and social institutions[97].

More particularly, judicial independence is the only thing that can be achieved except with the security of the judges' work, with the certainty of appointment and of being subject to promotion and with adequate remuneration and incentives, to provide them with personal peace of mind, which as a whole will mean the existence of a Judiciary that is not dependent in any sense and, much less of any hierarchical relationship with the other officials of the other public authorities, in order to be in a position to fulfil the role assigned to them by the Constitution[98].

Judicial independence means that judges are not subject to any hierarchical, political, administrative, economic, bureaucratic or other authority, since the essence of the exercise of their functions is the freedom to act, without taking into account any element other than the law[99]. The purpose of this judicial guarantee is to maintain the impartiality of the judiciary and to avoid any influence on the judiciary[100].

The subordination of the judge is only to the law and that is, precisely, his most effective protection and, his guarantee for full judicial independence: "The breadth and effectiveness of the personal guarantees that surround the judge are closely connected with the particular characteristics of the judicial organization, which are largely dependent on the type of recruitment"[101].

The rationale behind the principle of judicial independence is undoubtedly the need for genuine impartiality in the administration of justice. Not only to protect individuals against any form of arbitrariness or abuse, but above all to allow only an impartial body, authorized to determine the meaning of the legal norm[102].

Interference with their work can be external or internal: "External independence arises before the other formal powers. The Judiciary -or jurisdictional- does not depend on the Executive or the Legislature in the fulfillment of the powers reserved to it by the Political Constitution, based on the division of powers. Internal independence arises when the judge is able to know or

[97] C. Guarnieri and P. Pederzoli, *Los jueces y la política*, Madrid, Taurus, 1999, p. 16.
[98] Herrendorf, Daniel E., *El Poder de los Jueces,* Argentina, Abeledo-Perrot, 1994, pp.97-109.
[99] Melgar Adalid, Mario, *El consejo de la judicatura federal,* México, Porrúa, 2000, p.29.
[100] Guarnieri, Carlo y Pederzoli, Patrizia, *op. cit.*, p.17.
[101] *Ídem,* p.46.
[102] Caballero Juárez, José Antonio y Concha Cantú, Hugo Alejandro, *Diagnóstico sobre la administración de Justicia en las entidades federativas,* México, UNAM-IIJ, 2002, p. 309.

resolve without being distracted by circumstances of his own -often originating from his personal relationships or situations- that could divert the legitimacy of the judgment"[103].

The principle of judicial independence is laid down in the Code of Ethics of the Judicial Branch of the Mexican Federation, such as the "attitude of the judge in the face of influence alien to the law, coming from the social system. It consists of judging from the perspective of law and not from pressures or interests foreign to it"[104].

The purpose of the independence of the Judiciary is to provide a system of mutual guarantees, to avoid the possibility of an actor being able to unilaterally manipulate the rules of the political system[105].

The principle of independence refers to the guarantees and attributes available to the organs and authorities of the Tribunal, to ensure that their deliberative and decision-making processes are conducted in complete freedom and are solely and exclusively subject to the rule of law, with full independence from any established power[106].

Likewise, the principle of independence means "freedom in the sense of absence of subordination. Then, the authority must resolve in a free way, without accepting any kind of interference in the making of its jurisdictional decisions, either of public authorities or of any type of persons, organizations and political entities[107].

When judges are given independence, impartiality is ensured for the judge, and an institutional democratic order is maintained[108]. Therefore, it is crucial to have independent authorities to remove any doubts in their actions and, above all, to guarantee the conditions for optimal performance[109]. It follows, then, that judicial independence depends on ethical values and the training of the judge, "hence all the determinations of the dispenser of justice"[110].

Judicial independence is an attribute of the officials responsible for administering justice, by which they must not be subjected to any kind of pressure, insinuations, recommendations,

---

[103] García Ramírez, Sergio, *Poder Judicial y Ministerio Público*, México, Porrúa, 1997, pp.30-31.
[104] Código de ética del Poder Judicial de la Federación, México, SCJN, 2004, p.17.
[105] G. Negretto and M. Ungar, *Independencia del Poder Judicial y Estado de Derecho en América Latina*, in *Política y Gobierno*, Vol. IV, 1997, p. 83.
[106] TEPJF, *El Sistema mexicano de justicia electoral*, México, TEPJF, 2003, pp.14-15. See S. Nieto, op.cit., p. 308.
[107] J. Canto Presuel, op. cit., p. 49.
[108] C.M. Rosales, *Comparación jurisdiccional entre jueces y jurado*, in *Revista de estudios de la justicia*, No. 28/ 2018.
[109] H. Andaluz, *La posición constitucional del Poder Judicial*, in *Revista de derecho de la Pontificia Universidad Católica de Valparaíso*, No.XXXV/2010, pp. 229-243.
[110]For example, we had the Warren Court has been regarded as a liberal court, while the Court headed by Rehnquist, a had a conservative tendency. C. Wolfe, *The rise of modern judicial review*, New York, Littlefield Adams Quality paperbacks, 1994, pp. 258-291.

demands, or advice by parts of other organs of the judiciary or even of the same judicial branch"[111]. Again, this meaning indicates that interference can be internal and external. That, by compromises with his superiors, he must obey an order, which would undermine his independence. On the other hand, corrupt requests can be from the outside, in which an agent invites you, suggests, invites, proposes not to use the rule to define, but the private interests of the parties[112].

The Code of Ethics of the Judicial Branch of the Mexican Federation refers to judicial independence as: "The attitude of the judge in the face of influences foreign to the Law, coming from the social system. It consists of judging from the perspective of law and not from pressures or interests foreign to it. Therefore, the judge: 1. He rejects any kind of recommendation that tends to influence the processing or resolution of matters that are subject to his authority, including those that could come from servants of the Federal Judiciary. 2. It preserves the proper exercise of its functions by denouncing any act likely to infringe on its independence. 3. Avoid engaging in activities or situations that may directly or indirectly affect your independence. 4. Refrains from recommending, insinuating or suggesting, for an illegitimate purpose, the meaning in which the other judges must make any judicial determination which has an effect on the resolution of a matter".

It should be noted that judges must be guaranteed various guarantees for the proper performance of their duties[113]. These guarantees, in the words of Professor Héctor Fix-Zamudio, are: "the set of instruments established by the constitutional rules with the aim of achieving the independence and impartiality of the judge and which, in addition, have a dual approach, since they are used for the benefit of the members of the Judiciary.[114] They also favour the actions of the petitioners of justice. These judicial guarantees include a number of instruments that apply to members of the judiciary concerning the stability, remuneration, responsibility and authority of judges"[115].

[111] Judgment of the Colombian Constitutional Court C037-1996.
[112] C.M. Rosales, *Las garantías jurisdiccionales de los impartidores de justicia*, in *Revista Nuevo Derecho,* Vol.7, No.9/2011, pp. 59-70.
[113] C.H. Sheldon, *Essential of the American constitution*, New York, West, 2003, p. 20.
[114] G. Marshall, *Teoría Constitucional*, Madrid, Espasa, 1982, pp.157, 158 and 163.
[115] H. Fix-Zamudio and J.R. Cossío Díaz, *El Poder Judicial en el Ordenamiento Mexicano*, Ciudad del México, FCE, 1999, p. 31. See F.J. Barreiro Pereira, in *Sistemas de Justicia Electoral*, México, TEPJF, 1999, pp. 405-430.

It can therefore be concluded that judicial independence not only benefits the judiciary as a public authority or the administration of justice as judges, but also benefits the population, since the rule is the only canon for resolving legal disputes.

In addressing the issue of the relevance of ex officio conventional control, the highest Mexican constitutional court has warned, but with the proviso that, based on the autonomy and independence of the judge, it can decide whether to consider the application of the same: "In the judicial function, as indicated in the last part of article 133, in conjunction with article 1., both of the Constitution of the United Mexican States, the control of conventionality ex officio implies that judges are obliged to prefer the human rights contained in the Constitution and in international treaties, notwithstanding any provisions to the contrary found in any inferior rule, which even implies that those that conflict with the aforementioned rights should not be applied. However, not in all cases in which the judge warns of the possible non-conventionality of a legal provision, should carry out the respective ex officio control, since there are cases in which its exercise is irrelevant because it is not suitable or effective to vary the meaning of the judgment claimed"[116].

The SCJN has defined the Parameter for the Control of Conventionality ex officio in the field of Human Rights as follows: "The mechanism for the ex officio control of conventionality in the field of human rights by the judiciary must be in accordance with the general model of control established by the Constitution. The analysis parameter for this type of control, to be exercised by all judges in the country, is as follows: a) all the human rights contained in the Federal Constitution (based on articles 1. and 133), as well as the jurisprudence issued by the Judicial Branch of the Federation; b) all human rights contained in international treaties to which the Mexican State is a party; c) the binding criteria of the Inter-American Court of Human Rights derived from the judgments to which the Mexican State has been a party, and d) the guiding criteria of the jurisprudence and precedents of the aforementioned Court when the Mexican State has not been a party".[117]

[116]Control of constitutionality and conventionality ex officio. its meaning and scope. In the review of direct amparo 3113/2014, the First Chamber of the SCJN stated that constitutional supremacy corresponds to all human rights incorporated in the country's legislation, since it is part of the same catalogue, including those referred to in the international instruments ratified by the Mexican State that are integrated into the national legal order, becoming part of the catalogue of rights, which operates as a parameter of constitutional regularity, therefore, such rules cannot contravene the principle of constitutional supremacy. SCJN.

[117] Décima Época, Registro: 160526, Pleno, Tesis: P. LXVIII/ 2011 (9a.), p. 551[TA]; 10a. Época, S.J.F., Libro III, 2011, Tomo I, p.551. SCJN.

17. Economic cost.

There is a cross-cutting and multidisciplinary theme in various sciences and branches of the State when the human rights demands of the justiciables are recognized. Not only because of the question of the progressivity of universal moral rights, but also because the granting of such rights will generate a financial cost for the authority.

It should be noted that the means or goods for the fulfilment of human rights are not given free of charge, but that the cost is transferred to the treasury, producing a redistribution of the treasury by an indirect means, and therefore, it is the same society that is sponsoring the petition of the affected party in its legal sphere. But it should be considered that it is not always possible to comply absolutely with a judicial decision or judgment, because of the obstacle to be able to satisfy the request made by the person(s). Given this situation, it is possible that in the face of the physical or material impossibility of obedience to the rule, order or sentence to carry it out, the authority responsible for consummating the request or order may declare its execution inadmissible[118].

The economic cost becomes an element to be taken into account for the fulfillment of several Human Rights, since many of them are related to material goods (such as health or the payment of the tariff for education), the market influences the price (based on supply and demand), and therefore, being a commercial good, it must be acquired through the exchange of goods and resources from the authority to enforce that Human Right.

18. The material impossibility of the State.

One of the issues in recognizing human rights, is that its requests will have an action on the part of the authority so that the(s) person(s) either as a guideline in its performance and as a mandate of an authority, so he would be obliged to submit to the rule of law. However, the

[118] C.M. Rosales, *La gratuidad de los derechos prestacionales como Derechos Humanos*, in *Revista Anales de la Facultad de Ciencias Jurídicas y Sociales*, No. 48/2018.

judicial authority, when ordering compliance with human rights, does not consider the material and economic possibility of the State[119].

It may also be that the obstacle is not for the resources of the treasury, but that it involves going against fundamental rights (the informal pre-trial detention in Mexico that violates the presumption of innocence or the arraigo that violates personal freedom) or the institutions that make up the national positive system (an exclusive drug whose cost should be absorbed by the public health system). In view of this, it is impossible for the State to obey in an absolute manner the customary practice of human rights or the order of a judge.

The impossibility of the State's enforcement of a sentence must be justified by arguments beyond the law, arguing its social, political or economic cost that could lead to compliance with judicial decisions. This failure to apply for failure to comply with human rights is based on the law, but compliance with it leads to the consideration of material circumstances, and in many cases will have to involve expenditure by the authorities.

For example, in the face of the change in form for classes by the public education system, the Internet, computers and/or telephones are required to serve this purpose, Should the State pay for all these material goods in order to enjoy the human right to education? Or in medical treatment of recent experimentation (which is quite onerous, in addition to transportation abroad)[120].

Should the human right to health be financed, at the expense of the rest of the beneficiaries or by the State? And there is one question. Should the judge be aware of the economic cost to the protection of human rights or should he only ensure that the human rights of the justiciable are respected and protected, regardless of their price?

19. Epilogue.

The inapplicability of Human Rights is an issue that does not cause aporias in normative systems but gives coherence to it by generating exceptions in its general applicability (for example, arraigo being an administrative figure that goes against the human right of personal

[119] C.M. Rosales, *Justiciabilidad de los derechos sociales*, in *Revista de Investigações Constitucionais*, vol. 6, no. 2/2019.

[120] In Mexico, the Amparo Law provides that, in the event of the impossibility of serving a sentence, a substitute fulfillment is given, and with this protecting the rights of the individual who requested the protection of the State.

freedom and assembly). It was shown that human rights are not absolute, but that their realization depends on the circumstances of the prerogative required and the ability of the authority to give, to do or not to do an act.

There are certain rules that conflict with the positive system of a country, therefore reservations should be made to international instruments recognized by States (for example, restrictions on political rights for ministers of religion in Mexico, which goes against the human right to be a candidate or associate in order to form a political party), so it is right that countries when ratifying manifest these reservations, to establish the limits to the fulfilment of any human right, Inapplicability is not as exceptional as one might imagine, it is a practical exercise of authority, in which he considers that constitutional supremacy or the impossibility of the observance of human rights should be safeguarded for circumstantial reasons (for example, access to drinking water, free internet access or decent housing). And here there is a problem, to what extent human rights should be recognized and granted as legally enforceable letters to redistribute goods and rights, based on their justiciability and moral weight, returning to the judiciary in an office of parts of the persons tan claim justice[121].

The issue of human rights compliance is a case-by-case one. Each matter will have its own importance and resolution because there is no model for the general and unconditional fulfillment of them; but depending on each question will be resolved. Taking into account the effectiveness of Human Rights and proportionality, so that they are recognized and granted. This text is controversial and provocative, this being the intention, not to reproduce concepts or products of others, nor copy, or comment, nor reinterpret the ideas of third parties, but as Borges mentioned: “I am proud of what I have read, and not, of what I have written”.

Abstract: Il discorso dei diritti umani si convalida nel modo nel quale loro si intendono e si usano. Ma ci sono casi o eventi nei quali l’autorità può disapplicare una sezione di qualche strumento internazionale sui diritti umani, questo lavoro sviluppa i diversi motivi per non attendere il rispetto di un diritto umano specifico.

Abstract: The discourse of human rights is validated by the way in which they are understood, protected, and used. However, there are certain cases or circumstances in which the authority may derogate from or violate a paragraph of an international human

[121] See C.M. Rosales, *Entre la norma y la justicia*, in *Revista Pensamiento Jurídico*, No. 52/2020.

rights instrument, This paper, therefore, sets out the various reasons for failing to comply or recognize a given human right.

Parole chiave: Costituzione – diritto umano – trattato – disapplicazione – giustificazione.

Key words: Constitution – Human Rights – Treaty – Inapplicability – Justiciability.