THE INTERPRETATIVE CONSTITUTIONAL RULES ON HUMAN RIGHTS REFERRED TO INTERNATIONAL INSTRUMENTS. RECENT DEVELOPMENTS IN LATIN AMERICA

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One of the features of Latin America Law on Human Rights is the progressive and direct enforcement by the national courts, of international treaties and instruments on human rights. This has been the consequence not only of the progressive incorporation in the national Constitutions of the open clauses on human rights, referred to those rights that although not being enumerated are considered inherent to human beings and of the progressive constitutionalization of the international instruments on human rights; but also, of the insertion in the Constitutions of specific rules for constitutional interpretation of rights according to what is establish those international declarations or treaties, or according to the principle of progressivness, allowing for the use of the more favorable provisions contained in international treaties.

Thus, even in absence of express constitutional regulations regarding the hierarchy of international treaties on human rights in the internal legal system, -whether constitutional, supra statutory or statutory rank-, such instruments can also acquire constitutional value and rank by means of different constitutional interpretation rules referred to the universal declarations on human rights.

1. The principles for constitutional interpretation according to the international declarations or instruments

Some Constitutions expressly set forth guiding rules for interpreting human rights declared in their text, requiring that such interpretation must be made in accordance to what is set forth in the international treaties on human

rights. This is the technique found for example in the Spanish Constitution, where article 10,2, states:

> "The norms concerning fundamental rights or freedom recognized in the Constitution, must be interpreted in accordance to the Universal Declaration of Human Rights and the international treaties and conventions referred to the same matter ratified by Spain".

In similar way, the Portuguese Constitution (article 16,2) also sets forth, that "The provisions of the Constitution and laws relating to fundamental rights are to be read and interpreted in harmony with the Universal Declaration of Human Rights".

These two constitutional provisions, without doubt, influenced the drafting of the 1991 Colombian Constitution, whose Article 93 establishes:

> "Article 93**.** The rights and duties enshrined in this Charter shall be interpreted pursuant to the international treaties on human rights ratified by Colombia".

Following this constitutional provision, all State bodies, not just the courts, have to interpret the constitutional regulations regarding human rights pursuant to what is set forth in the provisions of the international treaties on the matter. The result of this constitutional principle of interpretation is the recognition of an equal rank and constitutional value for those constitutional rights declared in international treaties, which are the ones that must guide the interpretation of the rights enshrined in the Constitution.

This interpretative technique has been frequently used by the Constitutional Court in Colombia when interpreting the extent of constitutional rights, as was the case in a decision dated February 22, 1996 issued when deciding a judicial review action filed on the grounds of unconstitutionality against the statute which regulates Television networks, considered by the plaintiff as being contrary to the constitutional right to inform.

The Constitutional Court began its decision by arguing that:

> "the internal validity of a statute is not only subjected to the conformity of its regulations to what is set forth in the Constitution, but also to what is prescribed in the international treaties approved by Congress and ratified by the President of the Republic".
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> As clearly set forth in Article 93 of the Constitution, the conformity of the internal legislation to international treaties and obligations of the Colombian State regarding other States and supranational entities is imposed more severely by the Constitution when the matter relates to the enforceability and exercise of fundamental rights. According to such article of the Constitution, the international treaties and covenants approved by

Congress and ratified by the Executive in which human rights are recognized and its limitations are prohibited in states of exception, prevail regarding the internal legal order.

The constitutional article declares in a straightforward manner that the rights and duties enshrined in the Constitution must be interpreted in accordance to the international treaties on human rights ratified by Colombia"[1].

Based on the abovementioned, the Constitutional Chamber then referred in its decision to the constitutional right to freedom of expression of thoughts and of information, following what is set forth in Article 19,3 of the International Covenant on Human Rights and in Article 13,2 of the American Convention on Human Rights, particularly regarding the universality of the exercise of such rights "without any considerations of frontiers"; concluding by ruling that:

"To forbid in the national territory the installation or functioning of land stations devoted to receive and later to diffuse, transmit or distribute television signals coming from satellites, whether national or international, is a flagrant violation of the right to be informed which everybody has pursuant to Article 20 of the Constitution"[2].

The interpretative technique of human rights regulations according to what is established in international instruments on the matter has also been established in the Peruvian Constitutional Procedure Code, by article V that sets forth:

"Article V. *Interpretation of constitutional rights*. The content and the scope of constitutional rights protected by means of the constitutional process established in this Code (including habeas corpus and amparo) must be interpreted according to the Universal Declaration on Human Rights, the treaties on human rights, as well as to the decisions issued by the international courts on human rights established according to treaties in which Peru is a Party".

2. The constitutional general references to the universal declarations on human rights

The second interpretative technique through which international declarations on human rights have acquired constitutional rank and value, results

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1 See in *Iudicum et Vita, Jurisprudencia nacional de América Latina en Derechos Humanos*, nº 5, Instituto Interamericano de Derechos Humanos, San José, Costa Rica, Diciembre 1997 pp. 34-35.

2 *Idem*, p. 37.

from the general declarations enshrined in the Preambles or the constitutional text precisely referring to those international declarations on human rights.

Regarding the Preambles of the Constitution, many of the Post War Constitutions contain general declarations regarding human rights, with particular reference to universal declarations. The classic example is the 1958 French Constitution in which, without containing in its text a Bill of Rights, the following general declaration is contained in its Preamble:

> "The French people hereby solemnly proclaim their dedication to the Rights of Man and the principle of national sovereignty as defined by the Declaration of 1789, reaffirmed and complemented by the Preamble to the 1946 Constitution".

By means of this general declaration, the French Constitutional Council has extended the "block of the Constitution", attributing constitutional value and rank to all the fundamental rights contained in the 1789 Declaration of Rights of Citizens and Man[3].

In other Constitutions, the Preambles contain general declarations in order to define a general purpose of the Constitution and to give a general orientation to State and society actions seeking the respect and full enforcement of human rights. For instance, the Preamble of the 1999 Venezuelan Constitution declares that the Constitution itself was sanctioned in order to "assure the rights to life, to work, to cultural heritage, to education, to social justice and to equality without any kind of discrimination", promoting "the universal and indivisible guarantee of human rights".

The Constitution of Guatemala also expressly declares in its Preamble that its text shall "encourage full enforcement of human rights within a stable, permanent and popular institutional order, where governed and governors shall proceed in strict observance of the law".

Being in those cases the general purpose of the countries' Constitution to guarantee, promote and encourage the full enjoyment and enforcement of human rights referred to their universal context, the rights enshrined in the international declarations and treaties have been considered or interpreted as having the same value and rank to those expressly declared in the Constitution's texts themselves.

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[3] See the reference in Allan R. Brewer-Carías, *Judicial Review in Comparative Law*, Cambridge University Press, Cambridge 1989.

Other Constitutions contain similar general declarations, not in their Preambles, but within their texts, when regulating specific aspects of the State bodies functioning and setting forth, for instance, the need for the effective guaranty that must be given to anybody to enjoy and exercise constitutional rights. In these cases, upon constituting as a State obligation the respect of human rights or to assure that they are properly enforced, it has been interpreted that such rights generally acquire constitutional rank and value even if not expressly listed in the constitutional declarations.

Such is the case of the Constitution of Chile, whose 1989 reform included a declaration pursuant to which it was expressly recognized that the exercise of sovereignty is limited by "respect for the essential rights to be found in human nature", also prescribing as a "duty of State bodies to respect and promote such rights guaranteed by this Constitution, as well as by international treaties ratified by Chile and currently in force" (Art. 5,II). Hence, if it is the State's duty to respect and promote human rights that are guaranteed by international treaties, such rights acquire the same rank and value as the constitutional rights expressly listed in the constitutional text itself. Moreover, the reference to "essential rights to be found in human nature" permits and requires that not only those expressly listed in the Constitution be identified as such, but also those established in international treaties and, what is more, those not expressly declared but that are part of human nature itself.

The Constitution of Ecuador also prescribes the State's obligation "... to respect and have respected the human rights guaranteed by this Constitution" (Article 16); assuring to "all its citizens, with no discrimination whatsoever, the free and effective exercise and enjoyment of the human rights established in this Constitution and in the declarations, covenants, agreements and other current international instruments in force."

Therefore, in these cases, the State's obligation refers not only to its guaranteeing the exercise and enjoyment of the rights listed in the Constitution, but all those named in international instruments too, which therefore can be considered as acquiring the same rank and value of constitutional rights.

In this regard, special reference should be made to the Constitution of Nicaragua which establishes the general declaration that all people shall not only "enjoy State protection and the recognition of rights inherent to the human person and the unrestricted respect, promotion and protection of their human rights", but also the protection of the State for the "full enforcement of the rights enshrined in the Universal Declaration of Human Rights; in the

American Declaration of the Rights and Duties of Man; in the United Nations' International Covenant on Civil and Political Rights; and in the American Convention on Human Rights of the Organization of American States."

In this case, the Constitution's reference to certain international instruments, due to the international dynamic on these matters, can only be interpreted as a non-exhaustive statement, given the preceding declarations referred in general to human rights and to those inherent to the human person.

Based on Article 46 of the Nicaraguan Constitution, statutes have been challenged on the grounds of unconstitutionally because they violate rights declared in international treaties. It was the case of the judicial review process of the 1989 General Law on Medias (*Ley General sobre los medios de la Comunicación Social (Ley nº 57*), in which the Supreme Court, in its decision dated August 22, 1989, even if it rejected the "*amparo* of unconstitutionality" recourse filed against the statute, in order to decide, the Court extensively considered the denounced violations not only regarding Article 46 of the Constitution but, through it, also considered articles of the Human Rights Declaration, the International Covenant on Civil and Political Rights and the American Convention on Human Rights[4].

Finally, the Constitution of Brazil proclaims that the State in its international relations, is ruled by the principle of the prevalence of human rights (Article 4,III); and that being constituted as a democratic rule of law State, it has as one of its foundations the dignity of human person (Article I, III). Regarding in particular human rights, Article 5,2 of the Constitutions declares, that:

> "The rights and guarantees set forth in the Constitution do not exclude others which can result from the regime and principles therein set forth or from the international treaties on which the Federative Republic of Brazil may be part".

This article has been interpreted as a mean for inserting the Constitution in the general trend of Latin American constitutionalism that gives a special treatment in internal law to the rights and guarantees internationally guarantied.

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4 See the text in *Iudicum et Vita, Jurisprudencia nacional de América Latina en Derechos Humanos*, nº 5, Instituto Interamericano de Derechos Humanos, San José, Costa Rica, Diciembre 1997, pp. 128-140. See the comments in Antonio Cançado Trindade, "Libertad de expresión y derecho a la información en los planos internacional y nacional", *Idem*, p. 194.

3. The principle of progressive interpretation of constitutional rights

Finally, mention must be made to the principle of progressive interpretation of human rights, which implies that as a matter of principle, no interpretation of statutes related to human rights can be admitted if the result is the diminishing of the effective enjoyment, exercise or guarantee of constitutional rights; and also that in case involving various provisions, the one that should prevail is the one that contains the more favorable regulation[5].

As stated by the former Supreme Court of Justice of Venezuela, the principle of progressiveness in human rights "implies the need to preferably apply the most favorable provision to human rights, whether of constitutional law, international law or ordinary law"[6]. Consequently, the interpretation of statutes must always be guided by the principle of progressiveness, in the sense that it must always result in more protection regarding rights.

The principle of progressiveness is expressly regulated, for example, in the 1999 Constitution of Venezuela, where Article 19 provides that the enjoyment and exercise of human rights shall be guaranteed to everybody by the State, "pursuant to the principle of progressiveness and without any discrimination."

This principle of the progressive interpretation of human rights regulations is equivalent to the *pro homines* principle of interpretation, which has been defined as "the hermeneutical criteria that conditions all the human rights law, according to which the widest and most protective provision must be applied in the sense that one must always prefer the provision that is in favor of man (*pro homine*)"[7].

The principle has been incorporated in the Ecuadorian Constitution when specifying the method of interpretation that must be applied in matters of rights and guaranties established in the Constitution, in the sense that the interpretation must be done in the way "that most favors its effective enforce-

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5 See in general, Pedro Nikken, *La protección internacional de los derechos humanos. Su desarrollo progresivo*, Instituto Interamericano de Derechos Humanos, Ed. Civitas, Madrid 1987.

6 See decision dated July, 30, 1996, in *Revista de Derecho Público*, nº 67-68, Editorial Jurídica Venezolana, Caracas 1996, p. 170.

7 See Mónica Pinto, "El principio *pro homine*. Criterio hermenéutico y pautas para la regulación de los derechos humanos", in *La aplicación de los tratados sobre derechos Humanos por los tribunales locales*, Centro de Estudios Legales y Sociales, Buenos Aires, 1997, p. 163; Humberto Henderson, "Los tratados internacionales de derechos humanos en el orden interno: la importancia del principio *pro homine*", in *Revista IIDH, Instituto Interamericano de Derechos Humanos*, no. 39, San José, 2004, p. 92.

ment" (article 18)[8]. It also has been deducted as incorporated in other Constitutions, as is the case of Chile and Peru, when they provide as one of the essential purposes of the State the protection of human rights. It was the case of the 1993 Peruvian Constitution which stated that "the defense of human beings and the respect of their dignity are society and State goal" (Article 1); and is the case of the Chilean Constitution when it provides that it is "the duty of the State to respect and promote human rights guaranteed in the Constitution, as well as in the international treaties in force ratified by Chile" (art. 5)[9]. In Peru, the Constitutional Tribunal, when choosing the most favorable interpretation for the protection of human rights, has defined "the *pro homine* principle as the one according to which a rule referred to human rights must be interpreted 'in the most favorable way for the person, that is, for the beneficiary of the interpretation' "[10]

This *pro homine* principle has various application forms: first, when various provisions on human rights can be applied in the case, the one to be chosen is the one with the best and must favorable provisions regarding the individual; second, in cases rulings succession, it must be understood that the last provision does not repeal the previous one if this has better and more favorable provisions which must be preserved; and third, when it is a matter of application of just one legal provision on human rights, the same must be interpreted in the way resulting more favorable to the protection of the person[11].

In a certain way this *pro homine* interpretation was the one that guided *Chief Justice Warren* of the United States Supreme Court in its 1954 opinion

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8 See Hernán Salgado Pesantes, *Manual de Justicia Constitucional Ecuatoriana*, Corporación Editora Nacional, Quito, 2004, p. 92.

9 See Iván Bazán Chacón, "Aplicación del derecho internacional en la judicialización de violaciones de derechos humanos" in *Para hacer justicia. Reflexiones en torno a la judicialización de casos de violaciones de derechos humanos*, Coordinadora Nacional de Derechos Humanos, Lima, 2004, p.27; Humberto Henderson, "Los tratados internacionales de derechos humanos en el orden interno: la importancia del principio *pro homine*", en *Revista IIDH, Instituto Interamericano de Derechos Humanos*, no. 39, San José, 2004, p.89, nota 27.

10 See decisión 1049-2003-AA/TC dated January 30, 2004 in Alfonso Gairaud Brenes, "Los Mecanismos de interpretación de los derechos humanos: especial referencia a la jurisprudencia peruana", in José F. Palomino Manchego, *El derecho procesal constitucional peruano. Estudios en Homenaje a Domingo García Belaunde*, Tomo I, Editorial Jurídica Grijley, Lima, 2005, p.138.

11 See Humberto Henderson, "Los tratados internacionales de derechos humanos en el orden interno: la importancia del principio *pro homine*", in *Revista IIDH, Instituto Interamericano de Derechos Humanos*, no. 39, San José, 2004, pp. 92-96.

in *Brown vs Board of Education of Topeka, Kansas*, 347 U.S. 483 (1954). in which, when referring to the XIV Amendment, he said that:

> "In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Fersugon* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws".

From this, he concluded saying:

> "We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment".

This principle of progressivism, regarding the interpretation of constitutional rights, has also been incorporated in the American Convention on Human Rights in which Article 29 provides the following rules referred to "restrictions regarding interpretation", in the sense that "no provision of this Convention shall be interpreted as":

a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;
b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;
c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or
d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

Regarding the specific principle of progressiveness that as abovementioned, is set forth in the Venezuelan Constitution, it also has implied that if a

constitutional right is regulated with different contexts in the Constitution and in international treaties, then the most favorable provision must prevail and be applicable to the interested party. Accordingly, in an *amparo* suit ruling issued by the former Venezuelan Supreme Court of Justice dated December 3, 1990, the Court applied the principle regarding the rights of a pregnant public officer not to be unjustifiably dismissed of her job during pregnancy. At that time, the Organic Law on Labor did not regulate such right, and it was only set forth in the Covenant nº 103 of the Labor International Organization and in the Convention Eliminating all forms of Discrimination Against Women. Regarding the constitutional provisions, Article 74 of the Constitution only provided for the general right to maternity protection. Notwithstanding the Supreme Court in the concrete case, after analyzing the protection asked by the employee whose dismissal impede her to enjoy the pre and post natal rest, admitted the *amparo* and declared the requested protection. In its decision, the Supreme Court ruled as followed:

> "The right not to be dismissed when pregnancy and the right to enjoy a pre and post natal rest are rights inherent to human beings that are constitutionalized due to Article 50 of the Constitution which stated that "the enunciation of rights and guarantees contained in the Constitution must not be understood to deny others not expressly within regulated. The lack of regulatory statute regarding such rights does not impede its exercise…"
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> Consequently, from all these supranational regulations and particularly due to the protection set forth in article 74 of the Constitution, which guaranties the protection of maternity and of the pregnant women, such protection being materialized through the right of the pregnant working women not to be dismissed and the right to enjoy the pre and post natal rest…
>
> Based in such clear and conclusive dispositions, this Court considers that any attempt from the employer to diminish the right of the pregnant women not to be dismissed without justification or disciplinary reasons, and the consequent effect of denying the right to pre and post natal rest, constitute an evident and flagrant violation of the constitutional principle set forth in Articles 74 and 93 of the Constitution…"[12]

The progressiveness principle of interpretation on human rights, thus, allowed for the protection of a not declared right in the Constitution, by enforcing a most favorable provision on the matter provided in international conventions, considered to prevail regarding the interested party.

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[12] See in *Revista de Derecho Público*, nº 45, Editorial Jurídica Venezolana, Caracas 1991, pp. 84-85. Also see decision dated July 30, 1996, in *Revista de Derecho Público,* nº 97-98, Editorial Jurídica Venezolana, Caracas 1996, p. 170.