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**MECHANISMS USED
BY THE NATIONAL
SUPREME COURT OF
JUSTICE IN CASES IN
WHICH THERE IS A
CONSIDERATION OF
HUMAN RIGHTS**

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CHAPTER 1

THE NEW MECHANISMS FOR THE PROTECTION OF HUMAN RIGHTS

Mechanisms for the protection of human rights are a concept that for the development of this investigation must be understood as those legal and/or doctrinal systems that exist for the sole purpose of monitoring and cooperating in compliance with the obligations adopted by a State. that has recognized respect for human or fundamental rights in its regulatory bodies.¹

In Mexico, the constitutional change initiated in 2011 established human rights as the basis of our legal system, substituting individual guarantees, this in turn meant a change in the legal methodology applicable to conflict resolution within institutions. jurisdictional, now the problems between laws and acts of authority that contravene a violated human right, can be resolved not only by applying the constitution as the supreme norm (constitutionality control), also since 2011 it is possible to apply international treaties, where that right is recognized violated, in order to give greater coverage to the legal sphere of people (conventionality control), this greater breadth in the foundation allows a better defense against arbitrary or discriminatory acts and norms by the authority, however, this new natural law approach presents great benefits while implying new challenges s both in the factual world and in the metaphysical, the latter being the one to which the laws belong.

One of the great challenges at present regarding human rights involves how

situations must be resolved where human rights oppose each other, in such a way that it is necessary to establish a criterion that allows the preponderance of only one of them in interaction with other rights under certain factual circumstances, in order to safeguard and optimize our dome of rights. In this sense, the ministers of the Supreme Court of Justice were able to adapt two methodologies of great importance to resolve this type of case, creating or perfecting new mechanisms for the control of human rights in our country.

Prior to the 2011 reform, the methodology used for weighting was mostly limited to applying constitutionality controls to laws², acts or decrees that violate individual guarantees or the areas of jurisdiction and competence of the same authorities, in this sense the mechanism used is interpretative³. It only involves analyzing the challenged content, with what is established by the constitution, and resolving the conflict by establishing whether such content is adapted to what the constitution indicates. On the other hand, a mechanism used to solve conflicts of fundamental rights collisions must be different from the one used to resolve conflicts between norms or laws that act as rules⁴. Distinguishing that the rules after going through a conventional mechanism such as the one already mentioned, result in the validity or invalidity of the same against the prevalence of what is already established in the higher legal frameworks (constitution and international treaties). Regarding human rights, such a conclusion would be inoperative, because human rights cannot be declared invalid under any circumstances,

1. United Nations High Commissioner for Human Rights. (February 22, 2011) United Nations Human Rights Mechanisms. OHCHR. <https://acnudh.org/mecanismos-de-derechos-humanos-de-naciones-unidas/>

2. Caballero, J, (2019) La interpretación conforme en el escenario jurídico mexicano. *Algunas pautas para su aplicación a cinco años de la reforma constitucional de 2011*, url: https://www.sitios.scjn.gob.mx/cec/sites/default/files/publication/documents/2019-03/06_CABALLERO_REVISTA%20CEC_03.pdf

3. Consejo de la Judicatura federal de México, *Test de proporcionalidad* [video] minuto 07:05, YouTube url: <https://youtu.be/No4OJkLsjf0>

4. Alexy, R, (1993) *Teoría de los Derechos Fundamentales*, Centro de Estudios Constitucionales Madrid, pag. 88.

compared to other rights, their substantive doctrinal characteristics completely prevent it, this difference is based on the reason why New control mechanisms were incorporated, such as the proportionality test and judging from a gender perspective. Each of these control mechanisms have very different characteristics, but in turn coincide in similarities that can cause confusion at the time of their application, for this reason, it is necessary to study them in depth and categorize their argumentative elements, evidencing which of the two mechanisms leads to a greater benefit for the citizenry.

Human Rights Characteristics

In the previous chapter, mention was made of the characteristics of human (or fundamental) rights and due to those, the invalidity or nullity of a right cannot be declared as a solution to a conflict, on the other hand, the controversies between norms that act as rules if they can result in the invalidity of the rule or law, because of this we must specify what is a human right at this point? And what are the characteristics that cause such differentiation?

First, human rights are defined on the website of the National Human Rights Commission (CNDH, 2018) as “The set of prerogatives based on human dignity, whose effective realization is essential for the integral development of the person” (Single page), this definition is very broad, its legal exegesis in turn requires the concept of dignity, for which we will attend to the following “the inherent interest of every person, by the mere fact of being so, to be treated as such and not as an object, unless it is humiliated,

5. Suárez, F, Patiño, C, (2017) *La Validez del Derecho en la Escolástica. Desobediencia, Iusnaturalismo y Libre Albedrío*, Biblioteca Jurídica Virtual del Instituto de Investigaciones Jurídicas de la UNAM. pág. 155. url: <https://archivos.juridicas.unam.mx/www/bjv/libros/10/4663/8.pdf>

6. González Martínez, C, (fecha de consulta 22 de mayo de 2022) *Iusnaturalismo Vs. Iuspositivismo*, UNIVA. <https://www.univa.mx/blog/iusnaturalismo-vs-iuspositivismo/#:~:text=En%20el%20caso%20del%20Iuspositivismo,toda%20idea%20de%20derecho%20natural.>

degraded, degraded or objectified” (SCJN S. C., 2016), the laws, on the other hand, are “a precept or set of precepts, dictated by the authority, through which something is commanded or prohibited agreed by the competent legislative bodies, within the prescribed legislative procedure” (SEGOB, 2005). The laws or norms are characterized by being positivist ius, emanating from a legislative power⁵, they are not inherent to the human being and their recognition is subject to current law, so once the law is repealed it will lose its value, no one will be obliged to continue singing to it (except in cases of retroactivity applied for the benefit of a person).

Human rights, on the other hand, stem from the philosophical current of natural law, they are inherent to the human being, metaphysical⁶, its application can only be limited or restricted under certain cases and very specific circumstances, but this is not the same as declaring its invalidity, because in this last concept the rights continue to be recognized but the State in order to do justice and/or or protect the citizenry or itself, will limit the exercise of certain fundamental rights, temporarily, such as prison or the state of emergency caused by war or health risk, among others.

The recognition of the timeless prevalence of fundamental rights throughout a person's life is so important that doctrinally it is recognized as the characteristic of inalienability which establishes that a fundamental right “must not be suppressed, except in certain situations and according to the due procedural guarantees. For example, the right to liberty can be restricted if a court of justice rules that a person is guilty

of having committed a crime” (CNDH, 2018, single page).

In addition to the previous characteristic, the principle of interdependence is added, which “Consists that each of the human rights are linked to each other, in such a way that the recognition of one of them, as well as its exercise, implies that they are respected.” and protect other related rights” (CNDH, 2018, single page). As an example; enjoying the right to “life” would be of no use if it is exercised in conditions of slavery and vice versa, the right to freedom cannot be enjoyed if a person is not alive, the correct operation of human or fundamental rights is only possible when everyone is respected allowing optimal interaction that strengthens the legal dome of individuals.

A law or norm that acts as a rule, instead of submitting to a process of control of constitutionality or conventionality, could be repealed in whole or in part; totally when the entire law must be repealed for contravening the provisions of the constitution and/or international treaties; or partially when there is no need to declare the entire law invalid but only one or some articles of it that do not prevent its general application, as an example of both cases respectively, in Mexico the case of unconstitutionality action 6/2018, was resolved by declaring unconstitutional all the articles that dealt with the scope of application (jurisdiction and competence) of the “Internal Security Law” which was subjected to constitutionality control as described in the section of its final note:

With the purpose of carrying out the control of the constitutionality of a legal norm, and at all times favoring people with the broadest protection, it provides that the information generated from the application of the aforementioned Internal Security Law, will be regulated under the terms of the provisions applicable to the matter, that is,

the Federal Law on Transparency and Access to Public Information, and the General Law on Transparency and Access to Public Information; achieving with the above, a control of the constitutionality of the legal norm, where the existence of a presumption of constitutionality is glimpsed, where there is a normative interpretation in light and in accordance with the human rights recognized in the Constitution and international treaties, favoring at all times people with the broadest protection. (REBOLLEDO, 2017, p. 363)

Corollary to the above, in the second case, partial invalidity of a rule acting as a rule, we have as an example the decision given by the SCJN. Regarding the action of unconstitutionality 33/2015 where only a couple of articles of the General Law for the Care and Protection of People with the Autism Spectrum Condition were declared unconstitutional, after applying a constitutionality control based on the jurisprudence “Equality. Criteria that must be observed in the control of the constitutionality of norms that are considered to be in violation of said guarantee” (MINISTER ALBERTO PÉREZ DAYÁN, 2016, p. 24), it was estimated that the normative precepts that provide for the authorization certificate, a document that certifies that the person is fit to perform work activities, violates various human rights of people with disabilities.

The examples already mentioned show how the methodology of control of constitutionality or that of conventionality can only be used with the purpose of invalidating a law or norm, respecting at all times the rights of people, which are not affected, on the contrary, these processes seek the prevalence and respect of human rights above the laws that do not contemplate them or that conceptualize them inadequately.

The constant evolution of society and its needs create increasingly diverse conflicts, as far as fundamental rights are concerned, the

same principles that shape them and solidify their prevalence over the legal norm, such as inalienability and interdependence, are the same ones that can put in check to jurists and legislators, who for the benefit of the citizenry defend different positions with different and equally valid arguments on issues that exclusively involve fundamental rights, this kind of conflicts were not neglected by the SCJN, in response to this, it innovated in the creation of analysis methodologies that could clarify this kind of conflict by adding to its catalog new control mechanisms, where rights cannot be invalidated as it happens in the case of norms and laws that act as rules.

Fundamental rights collision

As commented in the previous chapter, the confrontation between a norm that acts as a rule against another norm of that same category results in its validity or invalidity, but in the case of human rights this is not the case, because You cannot invalidate a human right, only suspend its application under certain circumstances already contemplated in the normative bodies. However, from the beginning when reviewing a legal fact, a law or a case among others, it is necessary to specify if the parties in conflict are facing a collision of fundamental rights, in order to demonstrate such a situation, jurists such as Robert Alexy, Manuel Atienza or Daniel Vázquez suggest the analytical system of “prima facie” being literally translated as “at first sight”⁷ With this legal perspective, a norm, an act or a legal fact is superfluously verified, in order to identify the human rights that support the application of the norm, the act or the legal fact, in the absence of a justification emanating directly from the protection of a fundamental right, it is clear that a mechanism for the protection of human rights cannot be applied, in this

situation applying a prima facie analysis will make it easier for us to correctly specify the moment in which a collision of rights occurs in the factual world.

Relationship between the consideration of human rights, the proportionality test and the gender perspective

Once we can identify when a collision of rights occurs, we must understand that this conflict is resolved through a weighting, also known as the “balancing” technique, according to Mocoora (2014) “It is an argumentative structure usually invoked both by the dogmatists who deal with studying “fundamental rights” and their conflicts, as well as by various constitutional courts” (p. 23).

The consideration of human rights can be understood as the argumentative technique through which the judge objectively resolves a collision of fundamental rights. In this sense, the weighting attends to the type of argument that the judge decides to use, it is for this reason that we can determine the existence of various methodologies which support the reasoning of the sentence.

“Manuel Atienza fights for the establishment of a method in the theory of legal argumentation, which must allow adequately representing the real process of reasoning” (MARTÍNEZ, 2017, p. 116)

The proportionality test, as well as the gender perspective, are structured methodologies, whose designs try to solve questions where different violations of human rights are presented, their logical schemes aim to reach a correct reasoning, culminating in a resolution that must strengthen the dome of legal persons. From this point of view, however, both the proportionality test and the gender perspective share the similarity of being, for practical purposes, not only a

7. Pérez, J. Gardey, A. (2013. Actualizado: 2015.) Definición: Definición de prima facie. <https://definicion.de/prima-facie/>

methodology, but also a mechanism for the protection of human rights. Such resemblance has caused confusion as to its correct scope of application, corrupting the purpose for which each one of them was conceived.

The principle of optimization and its need to understand the implementation of the new mechanisms for the protection of human rights

To understand the principle of optimization, we must first make an analysis of the codification of the law, because in it we find the bases that allow us to understand the operation of our legal system.

Centuries ago, in the Eastern Roman Empire, Emperor Justinian made the first codification of law⁸, which laid the foundations for the current classification of this science, one of the ways in which the different types of laws were cataloged is as norms of substantive law and norms of adjective law, according to Dr. Gloria Moreno Navarro et al. al, (2014) “The substantive law is the one that is found in the norm that gives life to a certain legal figure, legal act or typical figure” (p. 29) while the same author defines the adjective right as “the right in a way, that is, it constitutes the set of norms and principles that tend especially to regulate legal relations, putting judicial activity into exercise, including procedural and prosecution laws” (p. 30). We can conclude that the norms of a subjective nature are those that deal with the substance of the matter or in other words grant the right, while the norms of an adjective nature grant us the procedure.

Under this classification we can deduce that human rights belong to substantive law, because they grant us a very broad list

of freedoms, but they do not indicate how to use them or how the State must respect them in a procedural way, a good example is what is established in article 11 paragraph 2 of the Universal Declaration of Human Rights which establishes “No one shall be sentenced for acts or omissions that at the time they were committed were not criminal under national or international law. Nor will a heavier penalty be imposed than the one applicable at the time the crime was committed” (single page) This article frames the human right not to apply the retroactivity of the law to the detriment of any person, but does not indicate the procedure to enforce it, the same applies to all other human rights enshrined in the Universal Declaration.

In Mexico, since the constitution, there is already a mixture that contributes to blur the difference between the classification of the different norms, since although our supreme norm is divided into two parts, the organic and the dogmatic, the first enunciates human rights and the individual guarantees of the individual while the second places the rules of an administrative nature that correspond to the division of the Powers of the Union and the fundamental functioning of the institutions of the State⁹. When reviewing the first section we find a mix between substantive and adjective norms that operate as equals, while article 17 establishes the fundamental right to due process, article 19 already describes some of the protocols required to carry out the procedure such as the term of 72 hours from the arrest of a person, to issue or not an order linking the process. The previous example denotes that even in the most important legal bodies of a state, sufficient importance has not been given to the codification of laws and this can

8. López, H, (2014) *LA CODIFICACIÓN DE JUSTINIANO*, Derecho Romano. <https://derechoromanounivia.wordpress.com/2014/08/26/la-codificacion-de-justiniano/>

9. López, F. (04 de febrero 2016) *PROMULGACIÓN DE LA CONSTITUCIÓN POLÍTICA DE LOS ESTADOS UNIDOS MEXICANOS 5 DE FEBRERO*, Gaceta del Senado. https://www.senado.gob.mx/64/gaceta_del_senado/documento/60476

eventually permeate other currents or legal doctrines.

Understanding the classification of the norms we can conclude its essence and its purpose. Fundamental rights must be respected by the authority, adjective or procedural rules are those that establish the system and its operation, in order to preserve access to such rights. This differentiation is necessary for jurists, it allows formal errors to be corrected when there are violations of the procedure or substance when the course of a sentence is determined.

If the study of human rights makes up the background of judicial processes, we must ask ourselves: How are human rights asserted in a sentence? for Robert Alexy it is through optimization, fundamental rights cannot have an all-or-nothing application in the factual world, such a conception applies exclusively to norms that act as rules (for example, all adjective or procedural norms) in Because the latter constitute a definitive mandate, demanding that what is demanded be carried out, Alexy calls this characteristic “subsumption”, delving into the “Theory of Fundamental Rights” he introduces a new approach to understanding Human Rights, considered as a principle of optimization¹⁰, describing them in the following way “they can be fulfilled to different degrees and that the due measure of their fulfillment depends not only on the real possibilities but also on the legal ones. The field of legal possibilities is determined by the opposing principles and rules” (Alexy, 1993, p. 86) the author specifies the lack of subsumption because he considers that only the rules are final as described in the first chapters of this work, the laws are repealed or remain in force, just like the rules for Alexy, while human rights are more complex they cannot be repealed, but they can be optimized depending on the

factual circumstances surrounding the fact, for this reason we talk about the “possibility of its fulfillment” when it requires an argument that adapts to specific conditions in reality, not only to the metaphysical “must be” of the world of ideas to which the norms belong.

10. Alexy, R, (1993) *Teoría de los Derechos Fundamentales*, Centro de Estudios Constitucionales Madrid, pag. 86

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