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THE COST OF THE HUMAN RIGHTS IN THE MEXICAN JURISDICTION

The recognition and the implementation of human rights have generated that their fulfillment is in some cases at the cost of the budget. This article will analyze if public rights requested as human rights must be granted without conditions, or if, on the contrary, a mechanism must exist in order to prevent abuse concerning their enforceability and justiciability, taking for example the Mexican jurisdiction.

Keywords: Human rights, enforceability, justiciability, interpretation, social justice.

1. INTRODUCTION

Laws are the reflection of a society. They are the expression of the sovereign that ensures rights and guarantees. They undoubtedly identify and allow the destiny of a nation to be directed, in order to achieve justice, the common good, security, etc.¹ At the same time, in order to have access to goods, rights, and benefits offered by the State, their legal requirements for its operation must be known.²

On the other hand, as is known, Human Rights (HR) are a universal moral construction, recognized and reconstructed by various treaties, conventions, declarations, among others, which serves as the probative values to measure the legitimacy of the State.³ Also, it should be noted that human rights are mandatory and intrinsic, and do not require adjective laws to be requested and completed. They do not need organic

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¹ Ackerman, B. 1980. *Social Justice in the Liberal State*. New Haven: Yale University Press p. 164.

² Ojesto Martínez Porcayo, J. F. 2003. Poder, derecho y jueces: la jurisdicción como participación política. In: Martínez Porcayo, O. & Fernando, J. (eds.). *Testimonios sobre el desempeño del TEPJF México*, D.F.: Tribunal Electoral del Poder Judicial de la Federación, p. 469.

³ See SCJN. 2011. *Los derechos humanos y su protección por el P/JF.*. SCJN, México,.

legislation for their operation, nor they consider the economic capacity or infrastructure of the State to implement them.

Fundamental rights are political triumphs of society and human rights⁴ which come from recognizing the individuals with certain minimal prerogatives so that they can live with dignity and freely develop their lives.⁵ There is a space in which both spheres converge in their identity and objectives, but not in the form of their fulfillment. However, fundamental rights are provided to the population through a law that guarantees the rights, obligations, requirements, operation, and execution of these rights. Unlike human rights, its main asset is its intrinsic value, which serves as a guideline and a brake on the actions of the authorities.⁶

So, it is necessary to ask if human rights must have more recognition than fundamental rights in a given country or, in other words, if a person demands the fulfillment of human rights, must it be granted to him/her and consummated without preconditions, unlike any citizen, without considering the positive laws?⁷

This work will try to propose some requirements for granting some human rights, which would be the same for everyone, and how their enforceability could be considered in a jurisdictional system, without depriving them or demeaning the fundamental rights of other citizens.⁸

It will begin by stating that they are the benefits and then diverse fears that come from Human Rights such as their recognition and protection and whether their fulfillment must be absolute and unconditional. The *pro personae* and progressive principles that extend the implementation of human rights will also be presented. In order to achieve the foregoing, some cases of State entitlements (health, education, water supply, electricity minimum living energy), the legal elements for their application will be analyzed, as well as the institutional requirements for them to be effective and to find out what the limits are to be enforceable in Mexico. This will be done through the study of the jurisprudence issued by the Mexican Supreme Court of Justice (SCJN).

This research makes an exposition and dissertation, considering whether a human right should be protected and implemented unconditionally, or whether there should be requirements for its enforceability and justiciability, a policy of automatic concession without restrictions and at no cost, based on human rights.⁹

⁴ Ronald Dworkin believes that legal principles are not extralegal standards and are binding on the judge. Dworkin, R. 1995. *Los derechos en serio*. Barcelona: Ariel, pp. 19-22.

⁵ Lara Sáenz, L. 2003. *Derechos Humanos. Colección de cuadernos de Divulgación sobre aspectos doctrinarios de la Justicia Electoral*, 4, pp. 39-40.

⁶ Bix, B. 2004. *Jurisprudence*. Carolina: Carolina Academic Press, p. 87.

⁷ Sundara Rajan, M. 2011. *Moral Rights*. Oxford: Oxford University Press, p. 94.

⁸ Williams, M. & Waldron, J. 2008. *Toleration and Its Limits*. New York: New York University Press, p. 371.

⁹ Contradicción de Tesis 293/2011 of the Court Supreme of Mexico (SCJN).

2. BENEFIT RIGHTS

The public service is described as a service provided either by an authority or, as the case may be, a contractor, who serves or requests another.¹⁰ That is one of the most publicized terms generated in relation to social benefits.

The State or a private company is obliged to provide public services through its employees and to guarantee goods or services to improve the quality of life, such as health care. The State must meet the basic needs of society, especially that of population at risk and not on an equal footing.

The State redistributes wealth, and at the same time provides public services, the aim of which is achievement of a decent life. The fulfillment of the social role of the State must have an adequate infrastructure assistance and must allocate sufficient resources for the programs that sustain and support it.¹¹

As a general rule, benefit entitlements are programmatic entitlements, because entitlements require a budgetary and logistical effort on the part of the State, which can only be realized with due planning and resource choice through the procedure established by the Constitution and the organic laws.¹² Gradually, benefit entitlements are given conditions of effectiveness, which makes it possible for a subjective right to emerge. Therefore, at the theoretical level, in fact, the initial status of a benefit right is its programmatic condition, which then tends to become a subjective right.¹³

In certain situations, the benefit policy gives rise to a subjective right. This means that the right holder can demand its enforcement through judicial channels. On other occasions, the rights to benefit have programmatic content, that is, their effectiveness cannot be demanded through judicial mechanisms. In the latter case, in fact, rather than rights, they are guiding principles of the civil service. Entitlements with programmatic content have such an entity because they are just a program of State action, an institutional intention.¹⁴

3. HUMAN RIGHTS

The content of human rights lies in the expectations of an action on the part of the authorities, so that people must have the means to guarantee the reality of such aspirations. To that end, guarantees of the protection of human rights are techniques and

¹⁰ Wade, H. W. 1971. *Estudio del derecho administrativo*. Madrid: Instituto de Estudios Políticos, p. 18.

¹¹ Nino, C. S. 1996. *The Constitution of Deliberative Democracy*. Yale: Yale University Press, pp. 1-5.

¹² Randy Barnett believes that the legitimacy of the rules is obtained by the process of drafting them; therefore, when the legislators more conform to the legislative procedure and respect it, more legitimate will be the rules produced. See Barnett, R. 2004. *Restoring the Lost Constitution*. Princeton: Princeton University Press.

¹³ Sentence of the Colombian Constitutional Court T 207/95.

¹⁴ Cossío Díaz, J. R. 1999. Problemas de la Justicia Constitucional. In: *Sistemas de Justicia electoral: Evaluación y perspectivas*. México: IFE, p. 397. See Carbonell, M. 2007. *Corte, jueces y política*. México: Fontamara, p. 23.

means of achieving their effectiveness; in their absence, the enjoyment of the rights recognized by the constitutional order cannot be realized in individuals.¹⁵

Human dignity serves as a legal principle that permeates the whole order, but also as a fundamental right that must be respected in any case, whose importance stands out as the basis and condition for the enjoyment of other rights and the integral development of the personality.¹⁶ Thus, human dignity is not merely an ethical declaration, but a legal norm that enshrines a fundamental right in favor of the individual and by which the constitutional mandate is established for all authorities (including private) to respect and protect the dignity of every individual, understood at its most essential core as the inherent interest of every person, by the mere fact of being so, to be treated as such and not as an object, not to be humiliated, degraded, or objectified.¹⁷

Accompanied by dignity, it is indispensable that the free development of personality is enjoyed,¹⁸ this means the recognition by the State of the natural ability of every person to be individual as he or she wishes to be, without coercion or unjustified controls, in order to meet the goals or objectives you have set yourself, in accordance with your values, ideas, expectations, etc.¹⁹

All authorities, within the scope of their competencies, have an obligation to promote, respect, protect and guarantee human rights in accordance with the principles of universality, interdependence, indivisibility and progressivity, which consist of the following:²⁰ i) universality: they are inherent to all and concern the international community as a whole; to this extent, they are inviolable competence, which does not mean that they are absolute, but that they are protected because human dignity cannot be infringed because it is reasonable to think that they are appropriate to the circumstances; therefore, because of this flexibility, they are universal, since their nature allows it. When adapting to contingencies, always be with the person. ii) interdependence and indivisibility: that they are interrelated, that is, no separation can be made and no one can think that they are more important than others, that they should be interpreted and taken as a whole and not as an isolated element.²¹

¹⁵ Derechos humanos. Naturaleza del concepto “garantías de protección”. SCJN.

¹⁶ Carmona, E. 2006. Los derechos sociales de prestación y el derecho a un mínimo vital. *Anuario multidisciplinar para la modernización de las administraciones públicas*, 2, p. 185.

¹⁷ Human dignity. It is a legal norm that enshrines a fundamental right in favour of individuals and not a mere ethical declaration.

¹⁸ See SCJN. 2013. *Dignidad humana*. PJJ, México.

¹⁹ Derecho al libre desarrollo de la personalidad. Aspectos que comprende. SCJN.

²⁰ Alexy, R. 2010. *La construcción de los derechos fundamentales*. Buenos Aires: Ad hoc, pp. 24 and 44.

²¹ Principios de universalidad, interdependencia, indivisibilidad y progresividad de los derechos humanos. SCJN.

4. PRINCIPLES *PRO PERSONAE* AND PROGRESSIVITY²²

In the event that the same fundamental right is recognized in the two supreme sources of the legal system, namely, the Constitution and international treaties, the choice of the rule that will be applicable - in the field of human rights - will meet the one that favors the people or what has been called the principle *pro personae*. According to this interpretative criterion, if there is a difference between the scope or protection recognized in the rules of these different sources, the one that represents the greatest protection for the person or implies a lesser restriction should prevail.²³

In this logic, the catalog of fundamental rights is not limited to what is prescribed in the constitutional text, but also includes all those rights contained in international treaties ratified by the State.

In this context, from the doctrinal field, it has been considered that the aforementioned principle *pro personae* has two variants: a) Guideline of interpretative preference, by which one must seek the interpretation that optimizes a constitutional right. This variant, in turn, is composed of: 1) *Favor libertatis* principle, which postulates the need to understand the normative precept in the sense most conducive to freedom in trial, and includes a double aspect: i) Limitations on human rights by law should not be interpreted extensively but restrictively; and, ii) the rule should be interpreted in a manner that optimizes its exercise; 2) Principle of protection of victims (or principle favoring weaknesses); concerning the interpretation of situations which compromise conflicting rights, it is necessary to consider especially the party placed at a disadvantage, when the parties are not on an equal footing; and, 3) Rule Preference Guideline, which provides that the judge shall apply the rule most favorable to the person, irrespective of the formal hierarchy of the person; which compromises conflicting rights, it is necessary to consider especially when the party is placed at a disadvantage, when the parties are not on an equal footing; and, 4) Rule Preference Guideline, which provides that the judge shall apply the rule most favorable to the person, irrespective of the formal hierarchy of the person.²⁴

The principle of progressivity was originally linked to economic, social and cultural rights (ESCR) because they were deemed to be imposed upon States as 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.²⁵ Thus, in the first international instruments that recognized these rights, the principle of progressivity was included in order to make it clear that these rights do not constitute mere “programmatic objectives”, but genuine Human Rights that impose immediate compliance obligations upon States, such as guaranteeing minimum levels in the enjoyment of those rights, guaranteeing their exercise without discrimination and the obligation to take deliberate, concrete and satisfaction-oriented measures; as well as

²² See Medellín, X. 2013. *Principio Pro persona*. México: SCJN.

²³ Principio pro personae. Criterio de selección de la norma de derecho fundamental aplicable. SCJN.

²⁴ Principio pro homine. Variantes que lo componen. SCJN.

²⁵ Arango, R. 2002. *Jurisprudencia constitucional sobre el derecho mínimo vital*. Los Andes: Facultad de Derecho, Universidad de los Andes, p. 16.

medium-term performance obligations that must be undertaken progressively according to the specific circumstances of each State.²⁶

In this way, 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 as 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, so improves the level of commitment to ensuring economic rights, social and cultural.²⁷

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 human rights.²⁸ Consequently, the principle of progressivity 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 to prevent violation of them, by virtue of their expression of non-regressivity. The State shall not adopt measures that, without full constitutional justification, reduce the level of protection for the human rights of those who submit to the legal order of the Nation.²⁹

5. RECOGNITION

Human rights have two characteristics, a moral, and the normative one. As for the first, the person is recognized by the simple fact of being human; he/she possesses a set of inalienable, indivisible, imprescriptible, and universal rights that do not need to be included in any adjective or substantive norm for their fulfillment.³⁰ The other system known as positivism gives its value to human rights from being incorporated into a national legal body. These legal systems are adapted and adopted on the basis of treaties, conventions, declarations, and other international human rights instruments ratified by that State.

²⁶ Principio de progresividad. Es aplicable a todos los derechos humanos y no sólo a los llamados económicos, sociales y culturales. SCJN.

²⁷ Article 1 of the Federal Constitution of Mexico.

²⁸ Salet, W. I. *Mínimo existencial y justicia constitucional*, p. 623. Available at <https://archivos.juridicas.unam.mx/www/bjv/libros/8/3977/29.pdf> (3. 9.2022).

²⁹ Principio de progresividad de los derechos humanos. Su naturaleza y función en el Estado mexicano. SCJN.

³⁰ *Ibid.*, p. 630.

6. GUARDIANSHIP AND PROTECTION

One of the elements that refine the rules is that they are protected through the action of the State.³¹ This means that the rules will be effective when they are fully guaranteed to the population, and thus their effectiveness will be safeguarded. In the case of human rights, guardianship is a consequence of their recognition, which causes the authority to take care of the exercise and performance of these.³²

Guardianship serves as a guide or protection for individuals when they request that their rights be protected against the actions of public or private agents. Protection is the defence that puts a limit on the action of the State, so that they are not violated, and if necessary, the violations or omissions are investigated, and such conduct is punished.³³

Both are complementary, the guardianship gives us a directive of action and the protection is carried out in two ways.³⁴ In the first, as a preventive function to ensure that human rights are not infringed, and in the second, if some of these prerogatives have been infringed, their rights will be restored, and set to rights, and the offending party brought to trial and held accountable for its actions.³⁵

7. ENFORCEABILITY AND JUSTICIABILITY OF HUMAN RIGHTS

Enforceability is a request to the authority to perform an act that protects or respects a right.³⁶ Enforcement is an act by which the authority is ordered to act and by which it is evident that a human right is being violated. If this happens, the legal operator shall examine the substance of the claim.³⁷ Given this, a decision will be issued that validates the use and enjoyment of the human right.

This enforceability, as noted, is accompanied by justiciability, so it is effective.³⁸ This implies the action of the public authority to determine if there is a violation of the rights set forth by the complainant, or to disqualify it, because it does not have elements of form or substance of the exposed petition. Between the elements for granting it, without prior study of the merits, there could be the irreparability for the damage caused, which

³¹ Ackerman, B. 1991. *We the people. Foundations*. Cambridge: Harvard University Press, p. 224.

³² Silva Henao, J. F. 2012. Evolución y origen del concepto de 'Estado Social' incorporado en la Constitución Política colombiana de 1991. *Ratio Juris*, 7(14), pp. 141-158.

³³ Villar Borda, L. 2007. Estado de derecho y Estado social de derecho. *Revista Derecho del Estado*, 20, pp. 73-96.

³⁴ Gómez, Y. 2014. Estado Constitucional y protección internacional. In: Pérez Marcos, R. M. & Gómez Sánchez, Y (eds.). *Presente, pasado y futuro de los DDHH*. Madrid: Comisión Nacional de los Derechos Humanos : UNED - Universidad Nacional de Educación a Distancia, pp. 231-280.

³⁵ Picard de Orsini, M. & Useche, J. 2006. Una nueva dimensión del Estado de Derecho: El Estado Social de Derecho. *Provincia*, número especial, pp. 189-218.

³⁶ Kojéve, A. 2005. *La noción de autoridad*. Buenos Aires: Nueva visión, p. 36.

³⁷ Carmona, E. 2006. Los derechos sociales de prestación y el derecho a un mínimo vital. *Anuario multidisciplinar para la modernización de las administraciones públicas*, 2, p. 187.

³⁸ Linz, J. J. 1996. *Problems of Democratic Transition and Consolidation*. Baltimore: The Johns Hopkins University Press, p. 7.

gives effect to a precautionary measure, a suspension of the act or temporary protection, while the merits of the case are resolved.³⁹

It should also be noted that the enforceability and justiciability of human rights do not imply gratuitousness without restriction. Although human rights are recognized and protected, it cannot be a factor in obtaining goods or services at no cost. This implies that the recognition of human rights should not mean a door for abuse of the rights provided by the State (as could be issues in health, education, water, among others), in which the population, as recipients of a service, recognises its obligation to make a financial contribution for the goods supplied, whether they come from a public or private undertaking.⁴⁰

The possibility of getting services or rights free of charge on the basis of human rights could be or appear to be an act to gain advantage or abuse of the normative system. So each request must be considered, and resolved under the circumstances and the context in which it is made.⁴¹

It is necessary to understand and reason why the borrowed rights demanded as human rights are not a blank check. To the contrary, they must be weighed, as the case may be, by applying a test to consider their enforceability and recognize their justiciability and grant themselves this right. For this process, a control is proposed that will qualify whether the State should give, deliver or perform an act to protect some human rights. This would safeguard and build a just, pristine and impartial legal system.⁴²

We must point out that the limitation in the fulfilment of a human right is not necessarily synonymous with violation, because in order to determine if a measure respects it, it is necessary to analyze if: (I) The essential purpose of this reduction is to increase the level of protection of a human right; and (II) to create a reasonable balance between the fundamental rights at stake, without unduly affecting the effectiveness of any of them. In this sense, to determine whether the limitation to the exercise of a right violates the principle of progressivity of human rights, the legal operator must carry out a joint analysis of the individual affectation of a right in relation to the collective implications of the measure, in order to establish whether it is justified.⁴³

³⁹ STA 175, Rel. Min. Gildar Mendes, enjuiciada el 17.03.2010, Federal Court of Brasil.

⁴⁰ Salet, W. I. *Mínimo existencial y justicia constitucional*, p. 629. Available at <https://archivos.juridicas.unam.mx/www/bjv/libros/8/3977/29.pdf> (3. 9. 2022). These so-called “triumphs” are coined by Ronald Dworkin, who warns that the rights obtained are triumphs of social or political movements. Dworkin, R. 1996.

⁴¹ Waldron, J. *Law and Disagreement*. Oxford: Oxford University Press, pp. 5, 21-48.

⁴² The same interpretation is reiterated in the SSTC 134/1989 and 140/1989, both of 20 July. In the case law of the German Federal Constitutional Court, we can also find a tacit recognition of the right to a minimum of life, in the opinion of Robert Alexy, if two sentences of 1975 and 1951 are considered (BverfGE 1, 97 y BverfGE 40, 121). See Alexy, R. 2007. *Teoría de los derechos fundamentales*. Madrid: Centro de estudios constitucionales, pp. 422-423.

⁴³ Principio de progresividad de los derechos humanos. Criterios para determinar si la limitación al ejercicio de un derecho humano deriva en la violación de dicho principio. SCJN.

8. UNCONDITIONAL, INTRINSIC AND ABSOLUTE FULFILMENT OF HUMAN RIGHTS

The first thing to consider is to place a context for human rights, to determine them within a normative system.⁴⁴ Human rights are seen as a guiding axis of the State, but they could surpass the rest of the national order. This gives rise to two assumptions: that they are granted almost automatically for their moral weight, even if they demerit or diminish some fundamental right, which has a regulation to make it effective.⁴⁵ Or to consider whether the requested protection collides with substantive or adjective rights, noting that such a determination will create an administrative and/or jurisdictional precedent.⁴⁶

But is it more important to protect human rights than the Constitution itself?⁴⁷ Everything depends on two factors, the legal operator (administrative personal or judiciary) and the context in which the act is performed. In the first case, the conduct of the legal operator may be that of a guarantor who maximizes the rights of individuals and restricts the action of the State, guaranteeing human rights, automatically, imprint and indubitable. The mere enforceability ensures its justiciability in this model, which we will call a positive reaction. In the other model, certain elements will be taken into consideration such as: graduality; if there is a danger of life; if some freedom is restricted; if it is *sine qua non* to be able to develop as a person; if the denial violates his/her dignity, etc.

9. CASE STUDIES

In the following section, various cases will be presented in which applicants demanded constitutional protection of their human rights so that they could access several goods or services provided by the State or private companies, at no cost, and be able to live a dignified life or freely realize his/her personality.⁴⁸ In addition, the most relevant legal cases and jurisprudential criteria on each of the topics presented are attached, to explain their interpretation of each Human Right, and how they decided that these should be protected.⁴⁹

⁴⁴ In the case of Mexico, they are an integral part of the legal framework, and are under the national constitution. Human rights are contained in the Constitution and international treaties. They constitute the parameter for the control of constitutional regularity, but when there is an express restriction on the exercise of these rights in the constitution, it must be in accordance with the provisions of the Constitution.

⁴⁵ Hart, H.L.A. 1988. *The Concept of Law*. London: Clarendon, pp. 7, 14.

⁴⁶ Vanossi, J. R. 1987. *El Estado de derecho en el constitucionalismo social*. Argentina: EUDEBA, p. 146.

⁴⁷ Bickel, A. M. 1986. *The Least Dangerous Branch*. Yale: Yale University Press, pp. 23-33, 58-59, 199.

⁴⁸ Elster, J. 2007. *Explaining Social Behavior*. Cambridge: Cambridge University Press, p. 179 *et seq.*

⁴⁹ Picard de Orsini, M. & Useche, J. 2006. Una nueva dimensión del Estado de Derecho: El Estado Social de Derecho. *Provincia*, número especial, pp. 189-218.

10. RIGHT TO HEALTH WITHOUT COST TO THE PATIENT

The first case happened when some elements belonging to the Secretary of Navy (SEMAR) were fired because it was known that they had an infection of the human immunodeficiency virus (HIV). The Social Security Institute for the Mexican Armed Forces (ISSFAM) Act of that time was the means to resolve this situation.

It should now be pointed out that, as part of the main functions of the ISSFAM, they must provide social, economic, and health benefits to retired military personnel, their dependents, pensioners, and beneficiaries.

But when the condition of the Navy elements became known, they were separated from their duties, and then discharged without justified cause. They also determined that they should not take care of their right to health, because it is not a disease acquired by the development of their work. In the development of the topic, the Supreme Court of Justice of the Nation (SCJN) analyzed the content and scope of the guarantees of equality, non-discrimination and access to health for the specific case.

The Court also considered it appropriate to refer to the scope of the guarantee of discrimination in the sense that the Constitution establishes that all men are equal before the law without any discrimination on grounds of nationality, race, sex, religion or any other personal or social condition or circumstance, so that the public authorities must take into account that individuals in the same situation must be treated equally, without privilege or favour. Thus, the principle of equality provides that this is one of the higher values of the legal order, which means that it must serve as a basic criterion for the normative production and its subsequent interpretation and application.

It was felt, however, that it should be borne in mind that not every inequality of treatment or exclusion resulted in a discriminatory act, while it was necessary that such acts affected the dignity of persons or resulted in the restriction or nullification of their rights and freedoms.

In addition to the foregoing, account was taken of the fact that, by recognizing in international treaties the possibility of expanding the catalogue of fundamental rights, particularly, in the case of those relating to persons suffering from a physical, mental or sensory impairment, and in that understanding the contents of the international norms on the subject were taken up and a special protection for this group of people was established.

It was considered that any violation of human dignity would be in contravention of the right to health protection or the mandate of non-discrimination, but not, as in the cases exposed, for the existence or non-existence of major or minor requirements in the law for granting the right to receive assistance provision of medicinal products, especially if they were objectively justified requirements.

In this case, the distinction made with regard to the number of years required under each social security scheme was linked to the differentiation made in the Constitution, referring to the social security laws applicable to the open population, which dealt with those who belonged to the army. This purpose was therefore considered constitutionally admissible.

The Social Health Protection System must be provided for persons who are not beneficiaries of social security institutions or who do not have any other social health insurance mechanism; it shall be financed in solidarity by the Federation, the States, Mexico City, and the beneficiaries themselves, except when the “inability of the family” to cover the relative quota exists, in the sense that it will not prevent the sick from joining and being subject to the benefits deriving from the Social Health Protection System. From the foregoing, it was concluded in the respective judgment that the guarantee of access to health places the responsibility of the State to establish the necessary mechanisms for all Mexicans to have access to health services, in which we find medical care and the supply of medicines.

As an argument in the case, the power to require a certain institution to provide health services was not directly derived from the constitutional mandate but requires the necessary existence of a law enabling the exercise of this right, the creation of which is assigned to the ordinary legislator. In this way, the Supreme Court resolved a matter of great importance with regard to the guarantees of equality, non-discrimination, and the right to health provided for in the Constitution. The Supreme Court has also produced a number of jurisprudential theses in which it recognizes the importance and value of the right to health. It is assumed that, although in a democratic constitutional State the ordinary legislator and government authorities and administrative bodies have a very wide margin to translate their vision of the Constitution and, in particular, to implement in one direction or another the public policies and regulations that must give substance to the effective guarantee of rights, the Constitutional Judge may contrast his/her work with the standards contained in the Supreme Law itself and in the Human Rights Treaties that form part of the regulations and bind all state authorities.

The Court has stated that the right to health protection provided for in the mentioned constitutional provision has, among other purposes, the purpose of guaranteeing the enjoyment of health services and social assistance that meet the needs of the population, and that health services means actions aimed at protecting, promoting and restoring the health of the individual and of the community. Thus, the foregoing is compatible with a number of international human rights instruments, including Article 25, paragraph 1, of the Universal Declaration of Human Rights, which states that everyone has the right to an adequate standard of living to which he or she is entitled, and their families, health and welfare and especially food, clothing, housing, medical care and necessary social services; Article 12 of the International Covenant on Economic, Social and Cultural Rights, which refers to the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, and states that States must take measures to ensure the full realization of this right; and Article 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador”, according to which everyone has the right to health, understood as the enjoyment of the highest standard of physical, mental and social well-being. In this regard, and consistent with the United Nations Committee on Economic, Social, and Cultural Rights, the right to health should be understood as a

fundamental and indispensable guarantee for the exercise of other human rights and not just the right to be healthy.⁵⁰

Furthermore, the protection of the right to health includes, *inter alia*, obligations to adopt laws or other measures to ensure equal access to health care and related services; monitor that the privatization of the health sector does not pose a threat to the availability, accessibility, acceptability, and quality of services;⁵¹ monitor the marketing of medical equipment and medicines by third parties, and to ensure that medical practitioners and other health professionals are provided with the necessary conditions of education and experience; hence the right to health should be understood as a right to the enjoyment of a range of facilities, goods, services and conditions necessary to achieve the highest attainable standard of health.

The Social Health Protection System provides for persons who are not beneficiaries of social security institutions or who do not have any other social health insurance mechanism, which will be financed jointly by the Federation, the States and the beneficiaries themselves by means of family contributions to be determined on the basis of the socio-economic conditions of each family, without the level of income or lack thereof being a limitation for access to such a system.

The foregoing makes it clear that the right to health protection translates into the obligation of the State to establish the necessary mechanisms to ensure that all persons have access to health services and that this is a shared responsibility of the state, the society and the interested parties, the financing of the respective services is not exclusively the charge of the State, since also, *provision is made for the establishment of recovery quotas by users of public health services and the health social protection system, which are determined on the basis of the cost of services and the socio-economic conditions of users. Thus, health is a responsibility that is indissolubly shared by the State, society, and stakeholders, based on criteria of contributory capacity and income redistribution.*

The Supreme Court has also pointed out that Article 2 of the International Covenant on Economic, Social, and Cultural Rights establishes obligations of content and result; the latter, immediately, refers to the fact that rights are exercised without discrimination and that the State adopts within a short period of time deliberate, concrete and targeted measures aimed at satisfying treaty obligations, while those of result or measure are related to the principle of progressivity,⁵² which must be analyzed in the light of a flexibility mechanism that reflects the realities of the world and the difficulties that imply for each country to ensure the full effectiveness of ESC rights.

In this business, bearing in mind the right of everyone to the enjoyment of the highest attainable standard of physical and mental health contained in Article 12 of the Covenant, the State is under an immediate obligation to ensure that individuals enjoy the highest attainable standard of physical and mental health, at least one essential level of

⁵⁰ See: Cervantes, M. 2014. *¿Hay justicia para los DESC?* México: UNAM.

⁵¹ Salazar, P. 2007. Justicia constitucional y democracia. In: en Vázquez, R. (ed). *Corte, jueves y política*. México: Fontamara, p. 39.

⁵² Derecho a la salud. Su regulación en el artículo 4º de la Constitución política de los Estados Unidos Mexicanos y su complementariedad con los Tratados Internacionales en materia de Derechos Humanos. SCJN.

the right to health and, on the other hand, one of progressive fulfillment, consisting in achieving its full realization by all appropriate means, to the maximum of the resources available to it. Hence, a direct violation of the obligations of the Covenant will arise when, *inter alia*, the State does not take appropriate legislative, administrative, budgetary, judicial or other measures to give full effect to the right indicated.⁵³

The Court has also extended the protection of health as a fundamental right that the State is obliged to guarantee; and which is protected by the Constitution, Article 25th of the Universal Declaration of Human Rights, 12 of the International Covenant on Economic, Social and Cultural Rights and 10 of the Additional Protocol to the American Convention on Human Rights⁵⁴ in the Field of Economic, Social and Cultural Rights, of which it is noted that basic health services consist, among other aspects, in the availability of medicines and other essential health inputs, for which there will be a basic table and catalog of health sector inputs.⁵⁵

However, it *should not be understood as an impediment or restriction to the beneficiaries of the units and entities providing the health protection service, the fact that any medicine is not included in that basic plan*. Mindful, therefore, of the progressive approach to assessing the fundamental rights of the governed, such units and entities, including the provision of such medicines to their beneficiaries, even if they are not in that basic framework, provided that there is a medical prescription to support it.⁵⁶

11. FREE EDUCATION

Education is one of the goals of the 2030 United Nations development agenda. It is a key element for the sustainable progress of nations. Education seeks to achieve the full development of individuals, at each and every stage of their lives, so that it does not end with the completion of basic studies, and has a progressive and permanent scope in women and men in order to perfect their abilities, and skills, to reach their maximum development.

This idea is reflected in international treaties signed and ratified by the State, such as the Universal Declaration of Human Rights (Art. XII), the American Declaration of the Rights and Duties of Man (Art. 12), the International Covenant on Economic, Social and Cultural Rights (Art. 13), the American Convention on Human Rights (Art. 26), the Convention on the Rights of the Child (Art. 28), the Convention on the Rights of Persons with Disabilities (Art. 24) or Convention 169 of the International Labour Organization on the Rights of Indigenous and Tribal Peoples (arts. 26, 27 and 29).⁵⁷

⁵³ Derecho a la salud. Su naturaleza normativa. SCJN.

⁵⁴ Cervantes, M. 2014. *¿Hay justicia para los DESC?* México: UNAM.

⁵⁵ Salud. Derecho al nivel más alto posible. Éste puede comprender obligaciones inmediatas, como de cumplimiento progresivo. SCJN.

⁵⁶ El Instituto Mexicano del Seguro Social debe suministrar a sus beneficiarios los medicamentos que se les prescriban, aun cuando no estén incluidos en el cuadro básico y catálogo de insumos del sector salud. SCJN.

⁵⁷ The scope of the right to education has now been broadened with new judicial interpretations. This highlights the cases in which it was determined that a private institution can be considered as a responsible

On several occasions,⁵⁸ the SCJN has issued resolutions against private educational institutions; recently, in the state of Chiapas,⁵⁹ a judgment was issued, that determined that a private university can be considered a responsible authority. It was pointed out that constitutional protection against individuals was appropriate when they created, modified, or extinguished legal situations unilaterally and compulsorily, on the basis of a concession granted by the State to exercise that function, in such a way that it is assimilated to the service that would be provided instead by the public body, without it being necessary for it to form part of a State body.

The Court established that education should have the following characteristics: availability, accessibility, acceptability, and adaptability. In other words, the Court found that the right to education is a complex structure for authorities with imposed obligations that must be fulfilled.

The decisions of the judiciary have set precedents that have opened the way for a review of public policies or the functioning of education systems and have generated transformations in the implementation of the right to education.

In another landmark, a student of the Michoacan University of San Nicolás Hidalgo (UMSNH), obtained the constitutional protection from the Supreme Court of Justice of the Nation that guaranteed free education of her until the completion of her degree.⁶⁰

The citizen challenged the constitutionality of the Agreement of the University Council that determined that from the 2014 school year students of higher secondary education should cover enrolment fees or re-registration in their respective schools and faculties.

However, the student resorted to constitutional protection against the agreement, considering that it violates the Human Right to Education and the principle of progressivity. It was based on Article 138 of the Constitution of Michoacán de Ocampo, which establishes that higher education provided by the entity shall be free, and on Article 1 of the Federal Constitution, which stipulates the duty to respect human rights in conformity, among others, with the principle of progressivity.

Thus, the student was granted protection in order to divest her legal sphere of the obligation to cover the fees in subsequent school cycles. However, the rector and the treasurer of the University filed a review of the constitutional protection.

In ruling on the appeal, the Court upheld the judgment under appeal and protected the student by finding that the actions claimed: “*violated their Human Right to Education as provided for in Article 3 of the Federal Constitution and developed by Article 138th of the Constitution of the State of Michoacán*”.

authority for the purposes of constitutional protection; on the obligation of educational institutions to avoid situations of violence and discrimination; with respect to the commitments made by the State to ensure education for individuals; and with respect to the right of indigenous persons to bilingual or multilingual education. Amparo en revisión (AR) 35/2014.

⁵⁸ AR 78/2014, AR 323/2014, Incidente de suspensión 87/2015, Queja 213/2015, AR 261/2015.

⁵⁹ Amparo 902/2016.

⁶⁰ AR 1374/2015.

It also found that the principle of progressivity was violated, because the responsible authorities did not demonstrate conclusively the lack of financial resources to guarantee free higher education provided by the state of Michoacán, nor that they would have made every effort to obtain them.

The judges of the Supreme Court pointed out that university autonomy does not exempt the University from respecting the right to free higher education recognized by the local Constitution, since this figure constitutes an institutional guarantee of the right to education for the purpose of maximizing, not restricting, the right to education.

In addition, the Court indicated that, under the principle of progressivity, once that entity has extended free education to higher education, it is prohibited to adopt regressive measures.⁶¹

When granting constitutional protection to the student, the state government shall be obliged to transfer to the Michoacana University the necessary resources to guarantee the free education that the complainant receives up to the bachelor level, which includes at least the resources needed to cover the registration fees. Meanwhile, the University and its authorities must refrain from violating the free higher education received by the student, that is to say, avoid, as a minimum, charging her the registration fees during her higher education.

The Supreme Court has established in Article 3 of the Constitution a minimum content of the right to education which the Mexican State is obliged to guarantee with immediate effect; this content can and should be gradually extended by the imperative of the principle of progressivity.

In fact, free education can be established by virtue of the principle of progressivity; and, in addition, it must respect other principles such as access on the basis of abilities and non-discrimination in access, permanence and completion, among others.

Article 1 of the Mexican Constitution states that the main sources of recognition of human rights are the Constitution itself and international treaties. The human right to education is recognized both in articles 3 and 4 of the Constitution and in various international instruments, including articles XII of the American Declaration of the Rights and Duties of Man; 13 of the International Covenant on Economic, Social and Cultural Rights; 13 of the Additional Protocol to the American Convention on Human Rights in the Field of Economic, Social and Cultural Rights, "Protocol of San Salvador" and 28 of the Convention on the Rights of the Child.

*The above-mentioned rules are essentially consistent, inter alia, with the fact that the right to education belongs to everyone; where the content of basic education should be geared towards enabling the autonomy of its holders and empowering them as members of a democratic society; where basic education should be accessible to all without discrimination, on a compulsory basis, universal and free, and the State must guarantee it; and that parents have the right to choose the education to be given to their children and individuals, provided that they respect the minimum content of that right.*⁶²

⁶¹ Derecho a la educación. Su configuración mínima es la prevista en el artículo 3º Constitucional. SCJN.

⁶² Derecho fundamental a la educación. Su referente normativo en el sistema jurídico mexicano. SCJN.

Now, while the minimum configuration of the right to higher public education, as provided for in the Federal Constitution, does not require the State to provide for higher education free of charge, but only to promote it in order to achieve the various collective objectives necessary for the development of the nation, the fact is that the State assumed the duty to extend free education also to higher education, in accordance with the principle of progressivity provided for in Article 1 of the Constitution and in the various international standards, as well as in the undertaking given in Article 13, paragraph 2, subparagraph c) of the International Covenant on Economic, Social and Cultural Rights, and Article 13, paragraph 2 c), of the Additional Protocol to the American Convention on Human Rights on Economic, Social and Cultural Rights, (Protocol of San Salvador), which establish that free higher education should be progressively introduced.

12. FREE WATER SUPPLY

In 2017, in the state of Tamaulipas, a person requested a free drinking water supply. In this case, the supply of the vital liquid was canceled because of the lack of payment of the service. The appellant defended herself against the act of authority for omitting access to drinking water, which in her view violated her human rights. The judgment notes that the right to water includes the guarantee of access to the vital liquid, which is why several mechanisms have been established so that all people can count on it.⁶³

The United Nations adopted its fifteenth general comment on the right to water, in which it defined it as follows: “The human right to water is indispensable for a dignified human life.” The observation also conceptualized the right to adequate, healthy, acceptable, physically accessible and affordable water for personal and domestic use.

Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights establish the fundamental right to a dignified life for individuals and their families, which includes food, clothing and the continuous improvement of their living conditions. In its fifteenth general comment, the ESCR Committee clarified the scope and content of the right to water, explaining that it means to have sufficient, healthy, acceptable, physically accessible and affordable water for personal and domestic use, and which include consumption, laundry, food preparation and personal and domestic hygiene. The declaration of water as a right derives from the idea of water as a social and cultural asset, and not as an economic asset.

The right also implies the possibility of unwavering access and, with it, a constant transition to systems of supply in equal opportunities for the whole community, without forgetting that paradoxically. The biggest problem is the lack of access to safe drinking water.

In order to be able to exercise the right to water, it varies according to different conditions, therefore, in the aforementioned general comment number fifteen the factors to be applied in all circumstances were specified, namely: a) Availability; b) Quality, and c) Accessibility. For the SCJN, the right to water is precisely one of the implicit rights of the right to a dignified life, that is, to the very dignity of the person as a human being in the

⁶³ Amparo 374/2017-b. SCJN.

sense that the State cannot absolutely or totally deny access to or supply of a vital minimum for non-payment.

In this regard, the Court has noted that Article 11, paragraph 1, of the International Covenant on Economic, Social and Cultural Rights establishes the right of everyone to adequate housing, as well as the obligation of States parties to take appropriate measures to ensure its effectiveness. However, the fundamental right to decent and dignified housing has the following characteristics: (a) it must be guaranteed to all persons; (b) it must not be interpreted in a restrictive sense; (c) for a dwelling to be considered “adequate” it requires the elements to ensure a minimum level of well-being for those who inhabit it, essentially an adequate basic infrastructure, which protects against moisture, rain, wind and structural hazards, with sanitary and toilet facilities, an adequate space for rest, adequate lighting and ventilation, access to drinking water, electricity, and drainage.⁶⁴

Ratifying the above approach, the SCJN considered that the United Nations Committee on Economic, Social and Cultural Rights, the World Health Organization, the United Nations General Assembly, the International Covenant on Economic, Social and Cultural Rights (Article 11), recognize the right to water. While the Constitution warns that the right to drinking water is fundamental and indispensable for the realization, enjoyment and enjoyment of other human rights, the preservation of which in quantity, quality and sustainability is the fundamental task of both the State and society, as such a right is based on the premise of access to the well-being of the entire population, underpinned by the principles of equality and non-discrimination, independently of the social, gender, political, economic or cultural circumstances of the community in which it operates.

In this regard, the State shall ensure that the right to water is safe, acceptable, accessible and affordable for both personal and domestic use, establishing itself as a collective benefit that must be based on criteria of solidarity, mutual cooperation, equity and decent conditions, therefore the preference for urban public and domestic use in relation to any other use has been proclaimed as a priority and as a matter of national security, reasons which exclude the possibility that it can be conceived in terms of the interests of particular or minority groups. If that were the case, a system of water use without a human and social vision would prevail, thereby undermining human dignity.⁶⁵

Also, the Court interpreted that in order to obtain the drinking water service, the feasibility opinion for the connection to the general drinking water and sanitary drainage network must be submitted to the operator;⁶⁶ and, satisfied with the feasibility requirements, the competent authorities must construct the installations and connections for drinking water and sanitary drainage in accordance with the approved project, as well as any infrastructure works required. However, petitioners of the service must not, in order to enjoy the human right to health, as provided for in the Constitution, wait for the

⁶⁴ Derecho fundamental a una vivienda digna y decorosa. Su contenido a la luz de los Tratados Internacionales. SCJN.

⁶⁵ Agua potable. Como Derecho Humano, la preferencia de su uso doméstico y público urbano es una cuestión de seguridad nacional. SCJN.

⁶⁶ Fractions I and XXII of Article 14° Bis 5 of the National Waters Law of Mexico.

establishment of the infrastructure referred to in the aforementioned article, because in the absence of networks and the established need for water service, the State has a double obligation: the first, provided for in Article 12 of the International Covenant on Economic, Social and Cultural Rights, which requires the State party to give immediate attention to the right to health at the highest possible level; and the second, provided for in paragraph 2 of the Covenant, which requires States to take all appropriate measures to the maximum of their available resources.⁶⁷ In these terms, in the absence of a network or infrastructure to provide the water service, the authorities are obliged to provide immediately the vital liquid for which, as long as adequate distribution networks are built to ensure the supply.⁶⁸

The Supreme Court established the Human Right of Access to Water for Personal and Domestic Consumption and establishes that such access must be sufficient, safe, acceptable and affordable. The State must guarantee this and the law shall define the bases, support, and procedures for it. The Court also constituted the broad and favorable interpretation of the above-mentioned right.⁶⁹

13. CONCLUSIONS

- This has led to various cases of abuse by the appellants, so it is necessary to have limits for its granting, but not for its recognition.⁷⁰
- This research proposes that there should be no administrative or judicial bias *per se*, when a person claims an HR. Human rights have a moral foundation; however, the rights provided by a State are based on a binomial right/obligation that must be fulfilled by the entire population. Now, the justification for granting a Human Right at the expense of the Budget must depend on the specific case and under certain controls, because it could impoverish the Constitution.
- The recognition and granting of a right to benefit requested as a human right must be weighed against certain standards or parameters so that it does not undermine the fundamental rights of the population, which has met the substantive and adjective requirements for receiving that right.

⁶⁷ Article 34 the Water Supply and Sanitation Law for the State of Nuevo León.

⁶⁸ Human right to drinking water supply. The obligation to provide is an obligation of the State which must be carried out immediately, even if there is no general network and no feasibility assessment has been made. The judicial authority may provisionally indicate methods generally used for this purpose, such as the installation of a raised mother tank connected to a reservoir with a hydropneumatic pump, supplying the community with water in quantity and quality. Thus, the judiciary itself, with the support of Article 1 of the Constitution, guarantees and protects the right to water supply and health, as a basic and subsistence measure needed by the human being, until the drinking water and sewerage network is installed.

⁶⁹ Derecho humano de acceso al agua. Está reconocido constitucional y convencionalmente tanto para el consumo personal y doméstico, como para el uso agrícola o para el funcionamiento de otras áreas productivas del sector primario. SCJN.

⁷⁰ See Nino, C. S. 1989. El principio de autonomía de la persona. In: Nino, C. S. (ed.). *Ética y Derechos Humanos*. Buenos Aires: Astrea, pp. 199-236.

- On several occasions, the authority has recognized and fulfilled a service right as a Human Right free of payment. This allows another person to demand that same service, and who has seen the opportunity to use that good or public service. One of the problems is that the special situations in the case are not considered and that the appellant may not require State assistance.
- The judiciary power must propose a test like a mechanism that focuses on human rights. In this way, the judges do not accumulate petitions in Pandora's box. At the same time, their granting must be based on the weight of the legal operator, believing that not every demand based on human rights should be resolved or unconditionally released in favor of the applicant, therefore it must review each case, protecting and caring and staring both human rights and the fundamental rights of the population.

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