Regional and Domestic Courts' (Over)Interpretation of Human Rights treaties:

Shaping the rights or creating new ones?

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Executive summary

Since the Universal Declaration of Human Rights, practically all legal systems worldwide have shifted from paradigms, moving from different types of positivism, or other philosophical frameworks, towards a humanistic approach. Traditionally core rights and liberties, such as the right to life, freedom of speech, freedom from slavery, just to mention a few, are now looked from a Human Rights approach. The guidelines to understand these rights are now found in the international treaties and conventions on Human Rights, in both global and regional levels. The signing States parties of such conventions and treaties have undertaken the commitment to adopt and implement the principles crystalized in these binding instruments. This commitment includes legislative, administrative, and judiciary efforts to achieve the outlined system of rights. Ideally, the Legislature branch would reform the Constitution and enact laws; the Executive branch would implement public policies accordingly; and the Judiciary would interpret the other two powers' acts in the light of the treaties and conventions conforming the Human Rights system. This research will study the Inter-American context, at both regional as well as a domestic levels, taking as examples of the latter Mexico and Colombia. The object of this thesis is to analyze the role of the Courts, as they shape the rights covered by the Inter-American Convention on Human Rights. The aim is to pinpoint the cases where the aforementioned Courts' interpretations have gone beyond the text of the international instruments on Human Rights, and have ended up creating rights not covered (at least by the letter) in the signed treaties nor in the addendums. In some cases, even getting to the extent of locating these "newly found" rights at Human Rights level of protection. This research pays especial attention to the *Pro Hominem* principle, and the right to free development of the personality, as the main arguments used by the studied Courts.

Dedication

To my mother, Rosa Beatríz Ayala Medina. Without your support and trust I would never be able to start this journey.

To Mariana Mdzeluri. Without your constant motivation I would never have been able to accomplish this goal. You are my light post that guides me to the end of the world and beyond.

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Introduction

The process of shaping rights is part of the material function of the Courts. It is the Courts' duty to interpret the legal normativity of their respective jurisdiction, from the public policies to the constitutional texts. For regional Courts, the interpretation of international treaties on human rights represents a challenging task when it comes to controversial and delicate topics such as drug consumption for recreational purposes, sex change, same-sex marriage, or abortion.[1]

This research is based on how the Courts use their interpretations of fundamental rights to "shape" them, while applying the international system of human rights. The main issue this thesis will address is when the interpretation of the Courts go from shaping to creating rights?

The relevance of this research is to contribute in the differentiation between the protection of fundamental rights and the judicial activism in Latin America. The jurisdictions covered in this research are: Inter-American Court of Human Rights (from now on IACtHR), Colombia (Constitutional Court), and Mexico (Supreme Court of Justice).

The judgments produced by the IACtHR will shape the vision and understanding of the concept of human rights in the States members of the Organization of American States (from now on OAS). The impact of the Court's decisions goes to the extent of requiring legal changes to the States involved in the case (changes might even go beyond the competence of the Executive

[1] Brems, E., Gerards, J. (Eds.)., *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights*. Cambridge: Cambridge University Press. 2014, p. 1.

branch).[2] Taking this into account, the IACtHR must be cautious when producing a resolution that might be perceived as a violation of the States' sovereignty. On the other hand, as this thesis will show with the Mexican, and the Colombian examples, national courts might not be so shy to take a stance on whether an activity should be protected as a human right, arguing in favor of the *pro hominem* principle, or locating that activity under the umbrella of the right to free development of the personality.

A critical issue is in the law-making process is "to find morally justifiable ways of making binding collective decisions in the face of continuing moral conflict."[3] As the courts are the least democratic organ should not be the best option for solving this issue. Their decisions, involving embracing rights that were not considered by the Drafters of the international treaties may involve legitimacy issues. Another problematic arises with rights discovered by the Courts is the topic of the practical issues. The rights that are born in the Courts do not have any legal provision to be enforced, and the only guideline provided is the frame established in the Courts' decisions.

The practice of the national Courts' leading to the creation of new rights may provide a shortcut to the legislative process which could be exploited by both the government and the private initiative to advance their political agenda trough judicial activism. By granting this level of protection, the Courts are removing a particular human activity from the political debate. And once the Courts have decided over a matter regarding human rights, the Legislative, and

[2] Krsticevic, Viviana, Tojo, Liliana (Coord.) *Implementación de las decisiones del Sistema Interamericano de Derechos Humanos: Jurisprudencia, normativa y experiencias nacionales,* Center for Justice and International Law – CEJIL, 1ed ed., Buenos Aires, Argentina, 2007, p. 17.

[3] Gutmann, Amy, Thompson, Deniss,, *Why Deliberative Democracy?*, Princeton University Press, 2004, p. 125.

Executive branches will have to comply with those decisions through legislation, and public policy.

This thesis argues that removing topics that were not intended to be part of the spectrum of human rights diminishes democracy. Not all human conducts, and activities, should amount constitutional protection. As Gutmann and Thompson argue, converging Habermas and Rawls, democracy should incorporate procedural (such as free political speech) and substantive principles (such as individual liberties and equal opportunity) into a "coherent theory".[4]

With the intention of providing a better understanding of the constitutional traditions of Colombia, and Mexico, this thesis will look into the constitutional developments of both Countries. In order to understand the current stance of Mexico, and Colombia, it is important to have context and background on their constitutional approach to individual rights, to understand that individual rights have not always being human rights.

To talk about constitutions in general is to talk about power struggles, which most of the times emerge as military uprisings. This is exactly the case for Colombia. A Colombian jurist sentenced: "each of the 19th century constitutions was the consequence of a war and the cause of another. Each of the 20th reforms has been consequence of a conflict and the cause of another."[5] The same applies to the Mexican reality. It is in this context that this thesis will analyze their constitutional development with the aim to understand the judicial tradition.

[4] Gutmann, Amy, Thompson, Deniss,, *Why Deliverative Democracy?*, Princeton University Press, 2004, pp. 23-26.

[5] From the original in Spanish: "Cada una de las constituciones del siglo XIX fue la consecuencia de una guerra y la causa de otra. Cada una de las reformas del siglo XX ha sido consecuencia de un conflicto y causa de otro".

This thesis will study the case law developed by the Courts of the three selected jurisdictions. By doing this, this thesis will analysis the cases where each of the three studied Courts reasoned that a given human activity is part of an existing human right, or alternatively they found that it is another right that should be protected as a human right regardless that such activity is not textually included in any of the treaties part of the international system of human rights. This thesis will also compare the approach to the *pro hominem* principle, and the free development of the personality that the Courts apply in their decisions.

The *first chapter* will provide a brief background on the evolution of the human rights law in a general context. Once this background has been set, the chapter will look into the jurisprudence of the IACtHR, discussing cases where the IACtHR is shaping rights, and even creating rights previously not considered within the frame of the American Convention on Human Rights (from now on ACHR)

The *second chapter* will present a comparison between the constitutional developments of Colombia and Mexico. The first part of the chapter will study the genesis of constitutionalism of both jurisdictions. The second part of the chapter will present the changes in the Colombian regime that were introduced by the promulgation of the Constitution of 1991, and also to the changes in the Mexican regime produced by the constitutional reforms of 2011.

The *third chapter* will focus on the jurisprudence emerged from the Colombian, and the Mexican Judiciaries, paying especial attention to the right to free development of the

Valencia Villa, Hernando, *Cartas de Batalla: Una Crítica al Constitucionalismo Colombiano*, Fondo Editorial CEREC, Second Edition, 1997, p. 149.

personality. In the first part of the chapter, this thesis will review and discuss some decisions from both jurisdictions prior to the enforcement of human rights as such. The intentions is to see how the judges used to solve controversies involving the same set of rights under a different denomination and legal theory. The second part of the chapter will analyze some of the most significant resolutions were the Courts used human rights theory, and international treaties to reach to their conclusions.

1. Human Rights Interpretation from an International Perspective.

1.1 International Human Rights Law: A Change of Paradigm.

With the foundation of the United Nations, and the proclamation of The Universal Declaration of Human Rights (UDHR), and the subsequent development of the international human rights law, a new era of legal philosophy spread widely through the globe. Legal scholars turned from positivism and realism to humanism to allocate the source of the rights in the "human dignity"[6]. This phenomenon occurred as a result of the growing concern of the international community regarding the raise of totalitarianism.

Both the international treaties on human rights, and the creation of regional entities in charge of the administration of these treaties, reflect the joint efforts made to avoid repeating the horrors brought by democratically-elected totalitarian regimes during the first half of the 20th century, and "to hold governments accountable for purely internal activities."[7]

Democracy and human rights are strongly interdependent.[8] From international treaties related to commercial matters such as the Economic Partnership, Political Coordination and Cooperation Agreement between the International Community and the Latin American States, all include formulations like "in a democratic society" "democratic institutions" or "democratic principles". The inclusion in those multilateral instruments of the term "democracy" leaves

[6] As recognized in the UDHR's preamble.
[7] Moravcsik, Andrew, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, International Organization 54 (2), 217-252, Cambridge University Press. Accessed on June 15, 2019, available on https://www.princeton.edu/~amoravcs/library/origins.pdf
[8] American Convention on Human Rights arts. 15, 16, 22, 29 and 32.

without a doubt that it is one of the most concerning topics for developed and developing nations.

The United Nation itself has stated that "The majority of States in the world today describe themselves as democratic. However, democracy is a dynamic social and political system whose ideal functioning is never fully 'achieved'."[9]

One of the biggest issues of totalitarianism was the fact that these regimes were based on constitutional law. The impact of totalitarianism reached the contemporary constitutional theory and discussion,[10] and it has been translated into constitutional designs aiming to prevent the formation of new illiberal democracies. The signing States acquired the commitment to adapt their domestic system to be in harmony with the provisions of the treaties.[11]

In the American context, the Organization of American States has created international bodies, which have developed the approach to human rights in the continent. One of the biggest issues of this development is the use of soft law from the global and the American context to interpret the ACHR.[12] These references to external sources are sometimes founded in the lack of own

[9] United Nations *Guidance Note of the Secretary-General on Democracy,* p. 1, viewed 20 December 2016 (http://www.un.org/democracyfund/sites/www.un.org.democracyfund/files/file_attach/UNSG%20Guidance%20Note%20on%20Democracy-EN.pdf)

[10] Primus, Richard, *A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought*, The Yale Law Journal, vol. 106, no. 2, 1996, p 423.Accessed on June 15 2019, available on http://www.jstor.org/stable/797214.

[11] e.g., International Covenant on Civil and Political Rights art. 2.2 establishes "Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant."

[12] De Pauw, Marijke, *"The Inter-American Court of Human Rights and the Interpretative Method of External Referencing. Regional Consensus v. Universality."*, in Haeck, Yves, Ruiz-Chiriboga, Oswaldo, Clara Burbano-Herrera (eds.), "*The Inter-American Court of Human Rights: Theory and Practice, Present and Future."*, Intersentia Ltd, Cambrige, 2015, p. 16.

definitions of concepts subject to dispute, like the definition of "child".[13] The question here is if these kind of practices by the IACtHR rest legitimacy or if these practices are accepted and justified? To accept these practice could lead to a "is the best we got" approach, where it is permissible to allow the use of tools that were not part of the negotiation of the Organization in order to achieve a greater good (to grant a broader protection to the persons). This will depend on the behavior of the IACtHR, the effectiveness and the reception of its decisions by the State members of the OAS.

As a regional system, the Organization of American States' IACtHR is the ultimate international body that oversees the compliance of the obligations undertaken by the States members. In the 21th century, it is clear that all individuals are subjects to international law.[14] It is in this understanding that all interactions between the individual and the States need to be evaluated. The actions of the States related to human rights are susceptible of interpretation, and the judgment of the IACtHR. Some authors claim that the IACtHR has the tendency "for a universalist interpretive approach over finding a common ground among its member states."[15]

The methodology use by the IACtHR to interpret the ACHR, and other binding and non-binding international instruments on human rights is based on two principles: the *pro*

[13] De Pauw, Marijke, *"The Inter-American Court of Human Rights and the Interpretative Method of External Referencing. Regional Consensus v. Universality."*, in Haeck, Yves, Ruiz-Chiriboga, Oswaldo, Clara Burbano-Herrera (eds.), "*The Inter-American Court of Human Rights: Theory and Practice, Present and Future."*, Intersentia Ltd, Cambrige, 2015, p.17.

[14] Kumar, Dinesh, "*Inter-American System of Human Rights : An Analysis*", Saarbrüchken, LAP Lambert Academic Publishing, 2014, p.82.

[15] De Pauw, Marijke, *"The Inter-American Court of Human Rights And the Interpretative Method of External Referencing. Regional Consensus v. Universality."*, in Haeck, Yves, Ruiz-Chiriboga, Oswaldo, Clara Burbano-Herrera (eds.), "*The Inter-American Court of Human Rights: Theory and Practice, Present and Future."*, Intersentia Ltd, Cambrige, 2015, p. 5.

homine[16]*m* principle, and the free development of the personality.[17] It is been sustained that "it should be noted that the evolutive, universalist and integrationist approach adopted by the Court as regards treaty interpretation is also supported by the most important characteristics of human rights; that they are all interrelated, interdependent and indivisible."[18] Additionally, "it has also been argued that more attention should be given to the effects of this interpretative approach, rather than the never-ending debate on legitimacy."[19] However, the dangers of this methodology is precisely that the conclusions reached by the IACtHR may lack of legitimacy, due to the fact that some concepts and arguments are taken from documents that were not intended to be binding. Furthermore, "a 'detached' conception of democracy cannot provide a sufficient basis for any convincing notion of political equality."[20] This generates a more complex issue when the IACtHR "finds" a new right, as the Drafters of the ADCH did not negotiate the newly discovered right in the terms of the opinion of the IACtHR, as it might infringe contractual principles like the free will of the parties. This is also consistent with the notion that "for the rights are meaningful to us - morally significant - only insofar as they represent a moral value, but if a given proposed 'right' cannot be understood in a way which is morally valuable to us, we have no reason to endorse that right in the first place."[21]

[16] American Convention on Human Rights article 29, visited on 01.Jun.2019, https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm
[17] Universal Declaration of Human Rights article 22, visited on 01.Jun.2019, http://www.oas.org/es/cidh/expresion/showarticle.asp?artID=163&lID=2
[18] De Pauw, Marijke, *"The Inter-American Court of Human Rights And the Interpretative Method of External Referencing. Regional Consensus v. Universality."*, in Haeck, Yves, Ruiz-Chiriboga, Oswaldo, Clara Burbano-Herrera (eds.), "*The Inter-American Court of Human Rights: Theory and Practice, Present and Future."*, Intersentia Ltd, Cambrige, 2015, p. 24
[19] De Pauw, Marijke, *"The Inter-American Court of Human Rights And the Interpretative Method of External Referencing. Regional Consensus v. Universality."*, in Haeck, Yves, Ruiz-Chiriboga, Oswaldo, Clara Burbano-Herrera (eds.), "*The Inter-American Court of Human Rights: Theory and Practice, Present and Future."*, Intersentia Ltd, Cambrige, 2015, p. 23.
[20] Sadurski, Wojciech, *Equality and Letitimacy,* Oxford University Press, p. 79.
[21] Sadurski, Wojciech, *Equality and Letitimacy,* Oxford University Press, pp. 37-38.

1.2 The Inter-American Court's Jurisprudence.

As the States members of the OAS have been requested appear, and respond to claims of infringements to human rights cover by the Inter-American Convention, a large jurisprudence has been, and still is in development. The following cases and advisory opinions are examples organized in three sets: the first one is where the IACtHR has clearly shaped rights from the "Pact of San Jose", the second set is where the IACtHR has reached the point of finding new rights, and finally the vision of the IACtHR on the free development of the personality.

1.2.1 Shaping rights of the ACHR.

In the case I.V.* VS. BOLIVIA[22], where Mrs. I.V. (the name of the plaintiff was requested to be kept anonymous) file a complaint against the State of Bolivia. Mrs. I.V. while pregnant, attended to the *Hospital de la Mujer* to receive treatment for spontaneous rupture of membrane. The medic decided to practice a cesarean delivery. After the delivery, the surgical team performed a tubal ligation, without Mrs. I.V. knowledge and informed consent, and without being an urgent intervention. Because of this procedure, Mrs. I.V. lost permanently her reproductive function. According to the IACtHR, the State of Bolivia infringed the articles 5.1, 8.1, 11.2, 13.1, 17.2, and 25.1.

With this decision, the IACtHR protected the rights of Mrs. I.V. to: personal integrity, personal freedom, to dignity, to private life and family, to access to information, to found a family, and

[22] Serie C No. 329, visited on 03.Jun.2019, available on http://www.corteidh.or.cr/docs/casos/articulos/seriec_329_esp.pdf

the recognition to the judicial personality, in relation to the obligations to respect and guarantee the rights to no discrimination.

The IACtHR recognized in this decision that "the liberty and autonomy of the women on sexual and reproductive health have been historically limited, restricted or nullified with base on negative and prejudicial gender stereotypes."[23]

By producing this statement, the IACtHR linked all the concepts of infringement to shape the rights of physical integrity, and family into the "right to sexual and reproductive health". From the narrative of facts, it is possible to see how the act performed by the agents of the State (the medical team of a State hospital) fit in part of each of the invoked articles. However, it is not clear at *prima facie* that the conjunction of this rights results in a previously unnamed right direct from the text of the ACHR. Although under a newly named concept, all those rights existed previously in the ACHR, it was the IACtHR interpretation that linked into the right to sexual and reproductive health.

In the case of the Penal Miguel Castro Castro vs. Peru, the IACtHR received a complaint regarding a series of relocations that took place in the prison system of maximum security in Peru, where a number of inmates (females, and males) were victim of lesions of different nature

[23] Serie C No. 329, Para. 243, visited on 03.Jun.2019, available on http://www.corteidh.or.cr/docs/casos/articulos/seriec_329_esp.pdf

(from physical injuries, including sexual acts, to death), as a result of a State operative performed by agents of the State.[24]

The IACtHR resolved that the following rights were infringed: the right to life (article 4, in relation with article 1.1), the right to personal integrity (article 5.1, and 5.2, in relation with the articles 1, 6, and 8 of the Inter American Convention to Prevent and Punish Torture), and the right to fair trail (articles 8.1, and 25, in relation with article 7.b) from the Inter American Convention on the Prevention, Punishment and Eradication of Violence Against Women, and articles 1, 6, and 8 from the Inter American Convention to Prevent and Punish Torture).[25]

By linking the aforementioned rights from the diverse international instruments (all of them of binding nature), the IACtHR established that unconsented sexual acts, especially rape, are forms of gender-based torture.[26] In this way, the IACtHR shaped the reach of what "torture" means, and what conducts are to be consider as "torture". This notion has been reiterated in subsequent cases, and is now part of the jurisprudence system of the IACtHR.[27]

[24] Serie C No 160, visited on 03.Jun.2019m available on http://www.corteidh.or.cr/docs/casos/articulos/seriec_160_esp.pdf
[25] Serie C No 160, visited on 03.Jun.2019m available on http://www.corteidh.or.cr/docs/casos/articulos/seriec_160_esp.pdf
[26] Cuadernillo de Jurisprudencia de la Corte Interamericana de Derechos Humanos N. 4: Género, visited on 03.Jun.2019, available on http://www.corteidh.or.cr/sitios/libros/todos/docs/genero1.pdf
[27] See Caso Velásquez Paiz y otros Vs. Guatemala, Serie C 307, and Caso Favela Nova Brasilia Vs. Brasil, Serie C 333.

1.2.2 Finding "New" Rights in the ACHR.

In relation with the right to health, the IACtHR in the case Gonzales Lluy y otros Vs. Edcuador,[28] found that the State is responsible of regulate and to supervise the activities of the institutions that provide health services.[29]

In the aforementioned decision, the IACtHR linked the articles 4 and 5 of ACHR to the responsibility of the State to "overseeing and inspecting the health service delivery."[30]

The article 4 covers the right to life, but in a general way in the sense of:

a) Prohibition to deprive anybody from her or his life.
b) Limitations of the death penalty.
c) The right of those condemned to death to apply for amnesty, pardon, or commutation of sentence.[31]

While article 5 is related to the right to humane treatment, in the sense of:

a) Physical, mental, and moral integrity.
b) The prohibition of torture, cruel, inhuman, or degrading punishment or treatment.
c) The limitation of the punishment to the criminal (prohibition of transcendental punishments).
d) To distinguish the treatment of those accused from those convicted, and minors from adults.

[28] Serie C N. 298, visited on 03.Jun.2019, available on http://www.corteidh.or.cr/docs/casos/articulos/seriec_298_esp.pdf
[29] Serie C N. 298, Par. 176, visited on 03.Jun.2019, available on http://www.corteidh.or.cr/docs/casos/articulos/seriec_298_esp.pdf
[30] Serie C N. 298, Resolution point 3, visited on 03.Jun.2019, available on http://www.corteidh.or.cr/docs/casos/articulos/seriec_298_esp.pdf
[31] ACHR article 4, visited on 03.Jun.2019, available on https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm

e) To aim the punishment towards the reform and readaptation of the convicted.[32]

From the harmonic interpretation of the text in both articles, it is not possible to obtain the obligation of the State reasoned by the IACtHR. To reach to the conclusion that the IACtHR provided in its opinion, it is necessary to undergo through "legal gymnastics" in the sense of adapting the rights, that at the time of the drafting of the ACHR were guarantees of due process (article 5), and the right to life (in the sense that the State should respect the life of all the inhabitants, and should aim to the abolition of the death penalty), into a protection required in modern times.[33]

In another case[34] related to the international responsibility of the State for the death and lesions of children inmates of the *Instituto de Reeducación del Menor* "Coronel Pnachito López", in Paraguay, the IACtHR developed the concept of "dignified life".[35] This concept, was founded from the interpretation of the IACtHR of the articles 4.1, 5.1, 5.2, and 5.6 from the ACHR. The reasoning in this opinion was that

> "…the Court observed that the State, besides of not creating the conditions and not taking the necessary measures for the inmates of the Institute to have and develop a dignified life while they were deprived of their freedom and besides of not fulfilling with its complementary

[32] ACHR, article 5, visited on 03.Jun.2019, available on https://www.cidh.oas.org/basicos/english/basic3.american%20convention.htm
[33] De Pauw, Marijke, *"The Inter-American Court of Human Rights and the Interpretative Method of External Referencing. Regional Consensus v. Universality."*, in Haeck, Yves, Ruiz-Chiriboga, Oswaldo, Clara Burbano-Herrera (eds.), "*The Inter-American Court of Human Rights: Theory and Practice, Present and Future."*, Intersentia Ltd, Cambrige, 2015, p. 8.
[34] Serie C N. 112, visited on 03.Jun.2019, available on http://www.corteidh.or.cr/docs/casos/articulos/seriec_112_esp.pdf
[35] Cuadernillo de Jurisprudencia de la Corte Interamericana de Derechos Humanos N. 21: Derecho a la vida, visited on 03.Jun.2019, available on http://www.corteidh.or.cr/sitios/libros/todos/docs/cuadernillo21.pdf

obligations regarding the children, [the State] kept the Institute in such conditions that made possible the fires and to these fires to have the terrible consequences for the inmates..."

With this reasoning, linked to the previously cited articles from the ACHR, the IACtHR established the obligations of the States "to ensure that such persons may still enjoy a *vida digna* or a right to a dignified life."[36] This is yet another example where the IACtHR has taken the interpretation of the ACHR to the extent of creating a right that was not negotiated by the States members of the OAS at the time of the drafting of the convention. However, in a sense, the IACtHR has found resonance of the intentions of the Drafters of the convention with the method of interpretation used by the IACtHR.[37]

From the previous examples, it is possible to identify when the IACtHR reached to the conclusions that certain acts are part of a category of rights protected, like sexual violence being part of torture or the sexual and reproductive health as part of the right to physical integrity in relation to the right of not to be abusively interfered in her family. It is also possible to distinguish when the IACtHR has reasoned in a way where a totally new obligations is found, like the duty of the State member to oversee and to supervise the private institutions that provide health services, or even has defined what a "dignified life" is (and that the State member is obliged to procure). The first kind of opinions are a direct result of the nature of the human rights treaties that must me as broad as possible to allow the national legislator to adapt them to the national reality and judicial tradition.[38] But when the IACtHR adds a duty or right

[36] Antkowiak, Thomas, *"Social, Economic, and Cultural Right: The Inter-American Court at a Crossroad",* in Haeck, Yves, Ruiz-Chiriboga, Oswaldo, Clara Burbano-Herrera (eds.), "*The Inter-American Court of Human Rights: Theory and Practice, Present and Future."*, Intersentia Ltd, Cambrige, 2015, p. 270.
[37] De Pauw, Marijke, *"The Inter-American Court of Human Rights and the Interpretative Method of External Referencing. Regional Consensus v. Universality."*, in Haeck, Yves, Ruiz-Chiriboga, Oswaldo, Clara Burbano-Herrera (eds.), "*The Inter-American Court of Human Rights: Theory and Practice, Present and Future."*, Intersentia Ltd, Cambrige, 2015, pp. 7-9.
[38] Brems, E., Gerards, J. (Eds.)., *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights*. Cambridge: Cambridge University Press. 2014, pp. 1-5.

not foreseen by the Drafters, the Court stops being an interpreter and starts legislating without being democratically elected for such task. On the representative versions of the deliberative democracy theory, "citizens rely on their representatives to do their deliberating for them, but representatives are expected not only to deliberate among themselves but also to listen to and communicate with their constituents, who in turn should have many opportunities to hold them accountable."[39]

The creation of rights done by courts through a jurisprudence system devalues the participation of the individuals in the democratic process, where "MR [majority rule] coexists with intensity-sensitive mechanisms is as follows. To say that when 'we vote' each vote counts equally, without regard to the motives for voting and thus to the intensity of preferences underlying the vote, is correct but only as a shorthand of something much more complex, which in fact *does* recognize the unequal intensities of preferences."[40] This participation is even more diluted when an international court acts a creator of rights, and thus the individuals are left as complete spectators and subjects to the decisions of a supranational body.

1.2.3 Free Development of the Personality, in the Vision of the IACtHR.

The IACtHR has also use the concept of "free development of the personality", but as a principle guaranteed by other rights and not as a right itself.[41] In the same line of thought, the IACtHR alleged that "it is possible to conclude that the right of each person to define in an autonomous way her or his sexual identity and of gender and that the information found in the

[39] Gutmann, Amy, Thompson, Deniss,, *Why Deliverative Democracy?*, Princeton University Press, 2004, p. 30.
[40] Sadurski, Wojciech, *Equality and Letitimacy,* Oxford University Press, p. 49.
[41] Cuadernillo de Jurisprudencia de la Corte Interamericana de Derechos Humanos N. 19: Derechos de las Personas LGTBI, para. 106, visited on 03.Jun.2019, available on http://www.corteidh.or.cr/sitios/libros/todos/docs/cuadernillo19.pdf

registries, as the documents of identity to be according or corresponding to the definitions that the person has of her or himself, it is protected by the American Convention through the dispositions which guarantee the free development of the personality (articles 7 and 11.2)…"[42]

In the Advisory Opinion OC 24/7 requested by Costa Rica,[43] the IACtHR affirmed that "the private life includes the way in which the person sees her or himself and how the person decides to project her or himself towards the others, being this an indispensable condition for the free development of the personality."[44]

In addition, the IACtHR stated in the same Advisory Opinion that "in accordance with the principle of free development of the personality or to the personal autonomy, each person is free and autonomous to follow a model of life according to their values, beliefs, convictions and interests."[45]

From the reviewed statements produced by the IACtHR, it is possible to argue that the vision of the Court related to the free development of the personality is as principle, and not as a right itself. The Court, when applies the free development of the personality, explores the rights in the ACHR and then links the dimension of right in question to the free development of the personality as a goal, and not as the source of rights. The Court expresses that the protection of the rights of the ACHR (and the whole international law on human rights) is the condition to

[42] Cuadernillo de Jurisprudencia de la Corte Interamericana de Derechos Humanos N. 19: Derechos de las Personas LGTBI, para. 115, visited on 03.Jun.2019, available on http://www.corteidh.or.cr/sitios/libros/todos/docs/cuadernillo19.pdf
[43] Visited on 04.Jun.2019, available on http://www.corteidh.or.cr/docs/opiniones/seriea_24_esp.pdf
[44] OC 24/7, para. 87, visited on 04.Jun.2019, available on http://www.corteidh.or.cr/docs/opiniones/seriea_24_esp.pdf
[45] OC 24/7, para. 88, visited on 04.Jun.2019, available on http://www.corteidh.or.cr/docs/opiniones/seriea_24_esp.pdf

ensure the free development of each person. From the way the Court formulates its opinions, the infringement of the human rights are barriers to the free development of the personality.

2. The Development of Constitutionalism in Colombia and Mexico.

2.1 Evolution of Constitutional Orders in Latin America.

2.1.1. Colombia.

Colombian constitutionalism has been reinventing itself since its first constitution promulgated on 1821. This constitution already included a sort of bill of rights under the title *dispocisiones generales* (general dispositions), which granted personal freedoms (freedom of press, profession, and property rights), and due process, but some considered fundamental rights such as the freedom of religion was not included.[46] Politician Vicente Rocafuerte (1783-1847) commented about this constitution:

> "Here the whole system is founded in the same moral and physical nature of the man; there is no ridiculous dogma of legitimacy, nor divine origin of the laws. The public convenience proposes every law project, it discusses it with cold reason, it is approved by the collective prudency of the nation, represented by the congress, and once the law is formed, it is executed by patriotic disinterest".[47]

[46] Colombian constitution of 1821, Title VIII, visited on 17.Jun.2019, available on https://www.wdl.org/en/item/16725/view/1/70/

[47] In the original in Spanish: "Aquí todo el sistema está fundado en la misma naturaleza moral y física del hombre; no hay ni dogma ridiculo de legitimidad, ni origen divino de las leyes. La Conveniencia pública propone todo proyecto de ley, lo discute la fria razon, lo aprueba la prudencia colectiva de la nación, representada en un congreso, y formula la ley, la executa el patriótico desinteres." In: Rocafuerte, Vicente, *Ensayo político: El Sistema Colombiano, Popular, Electivo, Y Representativo, es el que mas conviene á la America independiente.* En la imprenta de A. Paul, 1823, Harvard University, digitized on 25 Jul 2008, pp. 82-83, visited on 18.Jun.2019, available on https://books.google.com.mx/books?id=0i8qAAAAYAAJ&source=gbs_navlinks_s (translation by Rosendo J. Alvarez Ayala)

Although in the preamble the opening phrase is "In the name of God, author and Legislator of the Universe"[48], in the constitution's body the framers located the sovereignty in the concept of "Nation", without defining it. [49] The aforementioned comment contributes in the understanding of the nature of the rights granted in the constitution. It appears clear that the source of rights is the legislative process, based on the democratic principle, through representation in the congress.

In 1830, the new constitution replaced the Title VIII *dispocisiones generales* with the Title XI the civil rights and warranties (*de los derechos civiles y garantías)*[50]. However, the new Title does not offer more protection to the personal freedoms and rights than the constitution of 1821.

In a sense, the constitution of 1830 represented a major step back in the liberties granted to the Colombian people. In its text, the constitution established the Catholic religion as the official religion of the Colombian Republic.[51] Going even further, the constitution its article 7 set "it is a duty of the Government, in the exercise of its patronage of the Colombian church, to protect it (the church) and to not tolerate the public cult to any other (religion)."[52]

[48] In the original in Spanish: "En el nombre de Dios, autor y Legislador del Universo" (translation by Rosendo J. Alvarez Ayala).
[49] Colombian constitution of 1821, article 2, visited on 17.Jun.2019, available on https://www.wdl.org/en/item/16725/view/1/18/
[50] Colombian constitution of 1830, Title XI, visited on 17.Jun.2019, available on https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=13692
[51] Colombian constitution of 1830, article 6, visited on 17.Jun.2019, available on https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=13692
[52] Colombian constitution of 1830, article 7, visited on 17.Jun.2019, available on https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=13692 (translated by Rosendo J. Alvarez Ayala) Words in parenthesis added.

The same opening phrase used in the previous constitution remained as it was, but this constitution contributed to the definition of the "Colombian nation" establishing that it is "... the reunion of all the Colombians under the same political pact."[53] Following the previous conception of the source of rights, the constitution of 1830 limits the exercise of political power to the constitutional text.[54]

From 1832 to 1863 the territory that is currently known as Colombia was named as Republic of Granada ("with different constitutional modifications: Confederación Neogranadina, República de la Nueva Granada, and la Nueva Granada)."[55] Regardless of the geographical, and political change, the constitutions from 1832 and 1843 kept the Catholic religion as the official religion of the State, and the only tolerated religion of the country.[5657] It was until the constitution of 1853 when the freedom of religion was granted.[58] Also, another novelty for this constitution is the incorporation of international law (although only limited to the attribution of the Judiciary to dispatch the cases related to foreign diplomatic agents).[59] From that point on, the freedom of religion has been preserved, and from 1853 to 1858 more personal freedoms and individual rights were added to the constitutional texts (freedom of assembly, right of

[53] Colombian constitution of 1830, article 1, visited on 17.Jun.2019, available on https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=13692 (translated by Rosendo J. Alvarez Ayala).
[54] Colombian constitution of 1830, article 3, visited on 17.Jun.2019, available on https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=13692
[55] Rodríguez, David Armando, *Constitucionalismo "Colombiano": Originalidad en los Horizontes Del Pensamiento Constitucional de la Independencia,* Pensamiento Jurídico N. 43, April 2016, p. 249, foot note 5. Visited on 17.Jun.2019, available on https://revistas.unal.edu.co/index.php/peju/article/view/60743/pdf (translation by Rosendo J. Alvarez Ayala).
[56] Constitución del Estado de Nueva Granada 1832, visited on 17.Jun.2019, available on https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=13694
[57] Constitución de la República de Nueva Granada 1843, visited on 17.Jun.2019, available on https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=13695
[58] Constitución de la República de Nueva Granada 1853, article 5 (5), visited on 17.Jun.2019, avalible on https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=13696
[59] Constitución de la República de Nueva Granada 1853, article 42 (2), visited on 17.Jun.2019, avalible on https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=13696

petition, prohibition of slavery, and industrial property, and freedom of mobility).[60] It is important to remark that, even in this period of progressiveness, the preambles kept using a Catholic oriented formulation to state the constitutional will.

After these three turbulent decades, the name Colombia was retaken with the promulgation of the constitution of 1863, now as United States of Colombia. This United States included Antioquia, Bolívar, Boyacá, Cauca, Cundinamarca, Magdalena, Panamá, Santander, and Tolima.[61] With this new constitutional arrangement, the individual freedoms and rights also included the abolition of the death penalty, individual freedom, freedom of speech, and the right to keeping arms.[62] In this constitution, the General Government had the attribution of judicial and penal legislation in the cases of international law violations.[63]

This constitution represents the most liberal version of the Colombian State to the date. Victor Hugo allegedly said that this was a "constitution for the angels",[64] due to the liberal approach to the State structure, and the individual freedoms enshrined in its text. At this point in Colombian history, this was the most individual based constitution, both structurally and dogmatic.

[60] Constitución para la Confederación Granadina 1858, visited on 17.Jun.2019, available on https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=13697
[61] Constitución de los Estados Unidos de Colombia 1863, article 1, visited on 17.Jun.2019, available on https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=13698
[62] Constitución de los Estados Unidos de Colombia 1863, visited on 17.Jun.2019, available on https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=13698
[63] Constitución de los Estados Unidos de Colombia 1863, article 17 (15), visitd on 17.Jun.2019, available on https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=13698
[64] Restrepo Restrepo, Juan Cristóbal, *Uso Autoritario del Derecho: Aproximación desde la Configuración Constitucional colombiana,* Pap. Polít., Vol. 18, No 2. Bogotá, Colombia, Jul-Dec 2013, pp 504, visited on 15.Jun.2019, available on https://revistas.javeriana.edu.co/index.php/papelpol/article/view/7344/5852

Finally, after seven constitutions in less than 6 decades of independent life (including a few changes of name, and territories), a 105 years long-lasting constitution was promulgated in 1886. However, this stability was not the result of an efficient constitutional technique, but due to the political hegemony held by the Conservative party. [65]

The preamble of this constitution is clearly Catholic, as the preambles of all its predecessors. The Catholic religion is re-taken as the national religion, however this constitution retains the freedom of religion conquered by the previous constitutions, but limiting practice of all other religions to be compatible with the catholic morality.[66] Other individual rights also suffered a recoil: the death penalty was reintroduced for some crimes;[67] the freedom of association was reduced, and more restrictions were added in comparison with the previous constitution;[68] the freedom of speech was covered in the new text only in relation to the freedom of press;[69] and the individual freedom was removed from the liberties explicitly granted in the constitution.

There is one element in the constitution of 1886 that sets it apart from the all other seven constitutions: the inclusion of the notion of natural rights.[70] In its full text, the 1886 constitution article 19 reads:

[65] Restrepo Restrepo, Juan Cristóbal, *Uso Autoritario del Derecho: Aproximación desde la Configuración Constitucional colombiana,* Pap. Polít., Vol. 18, No 2. Bogotá, Colombia, Jul-Dec 2013, pp 504-505, visited on 15.Jun.2019, available on https://revistas.javeriana.edu.co/index.php/papelpol/article/view/7344/5852
[66] Constitución Política de Colombia 1886, article 40, visited on 17.Jun2019., availble on https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=7153
[67] Constitución Política de Colombia 1886, article 29, visited on 17.Jun2019., availble on https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=7153
[68] Constitución Política de Colombia 1886, article 47, visited on 17.Jun2019., availble on https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=7153
[69] Constitución Política de Colombia 1886, article 42, visited on 17.Jun2019., availble on https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=7153
[70] Constitución Política de Colombia 1886, article 19, visited on 17.Jun2019., availble on https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=7153

> "The authorities of the Republic are instituted to protect all the persons residing in Colombia, in their lives, honor and goods, and to ensure the reciprocal respect to the natural rights, preventing and punishing crimes."[71]

For the first time in the history of Colombian constitutionalism, there is a provision related to individual rights and freedoms which can be interpreted beyond the literality of the article. The concept of "natural rights" used by the Framers gives a constitutional permission to the State institutions to procure a set of rights which are not enumerated nor delimited by the text, but by the concept of what is "natural rights".

It is necessary to keep in mind that by that time (1886) there was no conception of human rights as known in the international human rights law. However, the concept "natural rights" is intertwined with *ius naturale* (natural law) and "that concept ultimately traces its ancestry from the long history of the idea of natural law."[72]

A teleological interpretation of the article 19 of the Constitution of 1886 is that the Framers move from the legal positivism philosophy that inspired the previous constitutions to a natural law stance. As article 19 recognizes the existence of natural rights, it could be argued that there is no reason for the Framers to enumerate each of these rights and that it is only necessary to group them as "natural". Following this line of argumentation, it could be the reason why

[71] In the original in Spanish: "Las autoridades de la República están instituidas para proteger a todas las personas residentes en Colombia, en sus vidas, honra y bienes, y asegurar el respeto recíproco de los derechos naturales, previniendo y castigando los delitos." In Constitución Política de Colombia 1886, article 19, visited on 17.Jun2019., available on https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=7153

[72] Maritain, Jacques, *On the Philosophy of Human Rights,* June 1947, visited on 16.Jun.2019, available on https://en.unesco.org/courier/2018-4/human-rights-and-natural-law

previously mentioned rights like "individual freedom" are not required to be mention separately anymore.

In a historical interpretation, it is possible to argue something very different. Under this argument, the Constitution of 1886 represents the victory of a party aiming for an authoritarian republic. In this light, it was the triumph of the conservatives over the liberals who drafted the constitution of 1863.[73]

Regarding the international law issue, the 1886 constitution reverted to the approach of the constitution of 1853.[74] This element could be an indicator of the intentions of the Framers to go back to an older version of the Colombian State, where the liberal ideas where not yet included in the constitution.

Taking into account the aforementioned arguments and facts, it is possible to assume that the omission of the individual rights previously granted, and the inclusion of the term "natural rights" without further elaboration, could be a way to keep the interpretation of what is "natural right" open to the Supreme Court, or as mechanism of authoritarian control for the political Branches of the Government based on the vague nature of the concept "natural rights". This assumption will be retaken in the section 3.1.1 of this thesis.

[73] Vasquez, Teofilo, *La Constitución del 91, entre los derechos y el modelo de desarrollo,* Essay, July 2006, visited on 16.Jun.2019, available on http://www.institut-gouvernance.org/en/analyse/fiche-analyse-238.html
[74] Constitución Política de Colombia 1886, article 151 (8), visited on 17.Jun2019., available on https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=7153

2.1.2. Mexico.

After the Mexican war of Independence, the first federal constitution was promulgated in October 24th 1824. In this constitution, the Framers did not include a chapter on individual rights, or guarantees. However, what the Framers provided were limits to protect the legal certainty, like the prohibition to enact retroactive laws, or the prohibition to arbitrary detention.[75]

Other than that, individual rights and freedoms were not considered in the constitutional text. Furthermore, this constitution did not recognize the freedom of religion. Instead, its article 4 established the Catholic religion as the official religion of the Mexican territory and prohibited the practice to any other religion.[76]The opening phrase of the preamble is: "In the name of God Almighty, author and supreme legislator of the society." [77] This statement located the supremacy and legitimacy of the document in the Catholic God.

The division of powers drafted in this constitution favored the Executive Branch naming it "Supreme Executive Power".[78] The president under this constitution had legislative powers,[79] which is a clear intromission to the sphere of competence of the Legislative Branch. The Judiciary was headed by a Supreme Court, which was entitled to know about the infractions to

[75] Constitución Federal de los Estado Unidos Mexicanos 1824, articles 143 to 156, visited on 10.Jun.2019, available on http://www.diputados.gob.mx/biblioteca/bibdig/const_mex/const_1824.pdf
[76] Constitución Federal de los Estado Unidos Mexicanos 1824, article 4, visited on 10.Jun.2019, available on http://www.diputados.gob.mx/biblioteca/bibdig/const_mex/const_1824.pdf
[77] In the original in Spanish: "En el nombre de Dios Todopoderoso, autor y supremo legislador de la sociedad." visited on 10.Jun.2019, available on http://www.diputados.gob.mx/biblioteca/bibdig/const_mex/const_1824.pdf (Translated by Rosendo J. Alvarez Ayala)
[78] Constitución Federal de los Estado Unidos Mexicanos 1824, Title IV, visited on 10.Jun.2019, available on http://www.diputados.gob.mx/biblioteca/bibdig/const_mex/const_1824.pdf
[79] Article 105 granted the power to propose laws and reforms to the Legislative. Constitución Federal de los Estado Unidos Mexicanos 1824, visited on 10.Jun.2019, available on http://www.diputados.gob.mx/biblioteca/bibdig/const_mex/const_1824.pdf

the constitution, and the general laws, according to the legal provisions.[80] According to this framework, the Legislative Branch was entitled to legislate the level of interaction of the Supreme Court with the constitutional issues. However, that law was not promulgated.[81]

With the promulgation of a new constitutional text in 1836, Mexico stopped from being a federation and turned in a republic divided by Departments. The constitution of 1836 is known as the Seven Constitutional Laws due to the style in which it was drafted. The First Law is related to the rights and obligations of the citizens. This Law introduced the first catalog of individual rights and freedoms to the Mexican constitutional system. The rights covered by the text are due process rights, and the freedom of press.[82]

Regarding the freedom of religion, it was deemed as an obligation of the Mexicans to profess the religion of the country (Catholic), and the foreigners visiting the country were obliged to respect the official religion.[83]

The First Law also included an open clause, which granted to the Mexicans the enjoyment of "all other civil rights", and "all the obligations of the same order", established by the laws.[84] This clause beyond being ambiguous, the Framers left these innominate civil rights to the common legislator to elaborate secondary laws to enshrine and to limit the rights.

[80] Article 105 granted the power to propose laws and reforms to the Legislative. Constitución Federal de los Estado Unidos Mexicanos 1824, article 137 V (6), visited on 10.Jun.2019, available on http://www.diputados.gob.mx/biblioteca/bibdig/const_mex/const_1824.pdf

[81] Fernández Fernández, Vicente, Samaniego Behar, Nitza, *"El Juicio de Amparo: Historia y Futuro de la Protección Constitucional en México"*, Revista IUS vol. 5, No 27, Puebla, México, Ene/Jun 2011, visited on 11.Jun.2019, available on http://www.scielo.org.mx/scielo.php?script=sci_arttext&pid=S1870-21472011000100009#nota

[82] Constitución 1836, First Law, article 2, visited on 10.Jun.2019 http://www.diputados.gob.mx/biblioteca/bibdig/const_mex/const_1836.pdf

[83] Constitución 1836, First Law, article 3 and article 12, visited on 10.Jun.2019 http://www.diputados.gob.mx/biblioteca/bibdig/const_mex/const_1836.pdf

[84] Constitución 1836, First Law, article 4, visited on 10.Jun.2019 http://www.diputados.gob.mx/biblioteca/bibdig/const_mex/const_1836.pdf

All the rights granted to the individuals by the Seven Constitutional Laws could be suspended, and even revoked, if the citizen, or the foreigner saw her or himself in one of the scenarios marked in the constitution.[85] This disposition represented a gateway to abuses performed by the Government against the population of the country.

The division of powers in this constitution had also a strange setting. A forth Branch was created under the name of Supreme Conservator Power.[86] This Branch was integrated by five individuals in charge of the constitutional control, and reviewing of laws to make a declaration of unconstitutionality.[87] The Branch also was in charge of declaration of nullity of acts performed by the Executive, Legislative, and Judicial Branches.[88] The members of the Supreme Conservator Power were responsible of their operations only to God,[89] and could only face destitution if after being accused of a crime, in which case the Congress had to qualify the accusation with an absolute plurality of votes.[90]

The Executive Branch was name as Supreme Power, with the same prerogatives as in the Constitution of 1824. However, with the creation of the Supreme Conservator Power, the Executive Branch was limited in its political power.

[85] These scenarios were very broad. It could be unsavory character, or vagrancy. Other scenarios were even in cases of commercial misbehavior like fraudulent bankruptcy. Constitución 1836, First Law, article 11, visited on 10.Jun.2019 http://www.diputados.gob.mx/biblioteca/bibdig/const_mex/const_1836.pdf
[86] Constitución 1836, Second Law, visited on 10.Jun.2019 http://www.diputados.gob.mx/biblioteca/bibdig/const_mex/const_1836.pdf
[87] Constitución 1836, Second Law, article 12, visited on 10.Jun.2019 http://www.diputados.gob.mx/biblioteca/bibdig/const_mex/const_1836.pdf
[88] Constitución 1836, Second Law, visited on 10.Jun.2019 http://www.diputados.gob.mx/biblioteca/bibdig/const_mex/const_1836.pdf
[89] Constitución 1836, Second Law, article 17, visited on 10.Jun.2019 http://www.diputados.gob.mx/biblioteca/bibdig/const_mex/const_1836.pdf
[90] Constitución 1836, Second Law, article 18, visited on 10.Jun.2019 http://www.diputados.gob.mx/biblioteca/bibdig/const_mex/const_1836.pdf

In this constitutional framework, the Judicial Branch was as reduced in its role in comparison with the previous constitution. The Supreme Court was also under the vigilance of the Supreme Conservator Power, making the role of the magistrates of the Supreme Court even less relevant in constitutional matters.

This constitution was the result of the ruling of Antonio López de Santa Anna, a dictatorship disguised as a democracy holding periodical elections yet meaningless. With a very similar constitutional framework as the previous constitution, the Bases of Political Organization reconfigured the division of powers. This constitution eliminated the Supreme Conservator Power, and granted more functions to the Executive Branch in the form of presidential powers, and prerogatives.[91]

Regarding the individual rights and freedoms, almost the same text of the previous constitution made its way to the 1843 version. One exception was the open clause granting "all the civil rights" from the First Law, article 4. Another concerning point was how the Framers polished the list of reasons for losing the individual rights. The list added one particular case: the religious state.

The Supreme Court in this constitution had an extra limitation. The court was not allowed to take notice of any governmental or economic issue of the Nation or the Departments.[92] To this point, each constitution has had a weaker Judiciary and a stronger Executive Branch.

[91] Bases de Organización Política para la República Mexicana 1843, Title V, visited on 10.Jun.2019, available on http://www.diputados.gob.mx/biblioteca/bibdig/const_mex/bases-1843.pdf

[92] Bases de Organización Política para la República Mexicana 1843, article 119 II, visited on 10.Jun.2019, available on http://www.diputados.gob.mx/biblioteca/bibdig/const_mex/bases-1843.pdf

This constitution was in force until August 1846, when the Constitution of 1824 was reestablished[93] with a reform act.[94] This act included an article with the mandate to enact a law to fix the guarantees of liberty, security, property, and equality, as well as the means to make the guarantees effective.[95] Another article in the same act introduced a procedure for the individuals to stand before a federal court to seek constitutional protection in the case of any attack to her or his individual rights from the authorities from the federation, or from the States.[96] However, the federal courts were limited by the same article to only "provide protection in the particular case related to the process, without making any general declaration in relation to the law or act that originated the process.[97] This process will evolve and become the "*Juicio de Amparo"* (Amparo trial).

After the Liberal Party overthrew Antonio López de Santa Anna's regime in 1855, a new constitution was promulgated in 1857. In its text, the winners of the upraising embodied their political views related to the individual and its relationship with the State. With this constitution, Mexico returns to a federal arrangement.

[93] García González, Vicente, *Constituciones que ha Tenido México*, El Nacional, 27.Nov.1949, Instituto Nacional de Estudios Históricos de la Revolución Mexicana, 1986, p.25, visited on 10.Jun.2019, availiable on https://archivos.juridicas.unam.mx/www/bjv/libros/7/3436/7.pdf

[94] Acta Constitutiva y de Reformas 1847, visited on 10.Jun.2019, available on http://webcache.googleusercontent.com/search?q=cache:http://www.ordenjuridico.gob.mx/Constitucion/1847.pdf

[95] Acta Constitutiva y de Reformas 1847, article 4, visited on 10.Jun.2019, available on http://webcache.googleusercontent.com/search?q=cache:http://www.ordenjuridico.gob.mx/Constitucion/1847.pdf

[96] Acta Constitutiva y de Reformas 1847, article 25, visited on 10.Jun.2019, available on http://webcache.googleusercontent.com/search?q=cache:http://www.ordenjuridico.gob.mx/Constitucion/1847.pdf

[97] From the original in Spanish: "limitándose dichos tribunales a impartir su protección en el caso particular sobre que verse el proceso, sin hacer ninguna declaración general respecto de la ley o del acto que lo motivare.", Acta Constitutiva y de Reformas 1847, article 25, visited on 10.Jun.2019, available on http://webcache.googleusercontent.com/search?q=cache:http://www.ordenjuridico.gob.mx/Constitucion/1847.pdf

This is the first Mexican constitution that clearly enumerates the individual rights and freedoms.[98] In this list all the civil and political rights of the time were included (right to life, freedom of speech, work, association, abolishing of slavery, due process, political rights, and freedom of religion).

This constitution divided the rights of the man and the rights of the citizen. For the first set of rights, a guarantee of state of exception was introduced in the article 29.[99] Although, the wording of the article 29 was very broad: it allowed the President to request to the Congress the suspension of rights (with the exception of the rights involved with the life of the individual) under the grounds of invasion, serious disturbance of the public peace, or any other cases that mean a great danger or conflict for the society. For the rights of the citizen (voting and being vote, taking part of associations dealing with political matters, etc.) it was allowed to suspend, and even to revoke them, but in this version the cases were left for the secondary legislation and it was also possible to rehabilitate these rights.[100]

This is also the first Mexican constitutions that locates the sovereignty in the people. This issue was not previously handled by none of the past three constitutions. Additionally, this constitutional frame limited the property rights for real state of civil, and ecclesiastic corporations allowing only those buildings designated for the immediate or directly to the

[98] Constitución Política de la República Mexicana 1857, articles 1 to 29, visited on 10.Jun.2019, available on http://www.diputados.gob.mx/biblioteca/bibdig/const_mex/const_1857.pdf

[99] In the original in Spanish: "En los casos de invasión, perturbación grave de la paz público o cualesquiera otros que pongan a la sociedad en grande peligro o conflicto, solamente el Presidente de la República, de acuerdo con el Consejo de Ministros y con aprobación del Congreso de la Unión, y en los recesos de éste de la Diputación permanente, puede suspender las garantías otorgadas en esta Constitución, con excepción de las que aseguran la vida del hombre; pero deberá hacerlo por un tiempo limitado, por medio de prevenciones generales y sin que la suspensión pueda contraerse a determinado individuo…" Constitución Política de la República Mexicana 1857, article29, visited on 10.Jun.2019, available on http://www.diputados.gob.mx/biblioteca/bibdig/const_mex/const_1857.pdf

[100] Constitución Política de la República Mexicana 1857, article 38, visited on 10.Jun.2019, available on http://www.diputados.gob.mx/biblioteca/bibdig/const_mex/const_1857.pdf

service or object of the institution.[101] Eventually, this disposition was reform to affect exclusively to religious corporations and institutions.[102]

Apart from the foregoing, the Catholic Church stopped from being the official religion of the country and the Congress had the constitutional prohibition on enacting laws establishing a national religion or banning any religion.[103] This reform consolidated the rupture between the Catholic Church and the Mexican State. For the first time in its independent history, Mexico was a secular State.

Regarding the division of powers, this constitutions dragged the now traditional supremacy of the Executive Branch. The President of the Federation kept the legislative power of initiative of law.[104] However, the list of the presidential prerogatives was way shorter than the previous version of 1843 (16 vs. 30).

The Federal Judiciary in this constitution was exercised by the Supreme Court, District Courts, and Circuit Courts.[105] In this arrangement, the Supreme Court was functioning as a Court of Appeals, or last resort.[106] Following the Act of Reform of 1847, the Federal Courts had the attribution to resolve all controversies originated by:

> "I. By laws or acts of any authority which violated the individual guarantees.

[101] Constitución Política de la República Mexicana 1857, article 27, visited on 10.Jun.2019, available on http://www.diputados.gob.mx/biblioteca/bibdig/const_mex/const_1857.pdf
[102] The article 38 was reformed on 25.Sep.1873.
[103] Additions of the 25.Sep.1873 article 1, visited on 10.Jun.2019, available on http://www.diputados.gob.mx/biblioteca/bibdig/const_mex/const_1857.pdf
[104] Constitución Política de la República Mexicana 1857, article 65 I, visited on 10.Jun.2019, available on http://www.diputados.gob.mx/biblioteca/bibdig/const_mex/const_1857.pdf
[105] Constitución Política de la República Mexicana 1857, article 90, visited on 10.Jun.2019, available on http://www.diputados.gob.mx/biblioteca/bibdig/const_mex/const_1857.pdf
[106] Constitución Política de la República Mexicana 1857, article 100, visited on 10.Jun.2019, available on http://www.diputados.gob.mx/biblioteca/bibdig/const_mex/const_1857.pdf

II. By laws or acts of the federal authority which infringe or restrict the sovereignty of the States.

III. By laws or acts of authority from those [the States] which invade the sphere of the federal authority."[107]

The first fraction makes reference to the constitutional procedure now known as the Amparo trail."[108][109] The protection granted by the Amparo sentence only benefits to the individual claiming for protection, because these opinions did not have *erga omnes* effects.[110] The federal courts were also limited to pronounce their opinions in relationship with the matter of the particular case (just like in the Act of Reforms of 1847). This is known as the "Otero formula".[111] This configuration made virtually impossible for the vulnerable groups to get access to the federal protection, as it was required to go individually through the whole legal process, and all the expenses this involves, even if the claimed law was affecting the society as a whole.

Another change in the Mexican reality brought by the promulgation of the Constitution of 1857 was the inclusion of International Treaties as part of the legal system, and along with the Constitution itself, and the laws emitted by the Congress, were crown as the "supreme law of

[107] In the original in Spanish: "I. Por leyes o actos de cualquiera autoridad que violen las garantías individuales II. Por leyes o actos de autoridad federal que vulneren o restrinjan la soberanía de los Estados. III. Por leyes o actos de las autoridades de éstos, que invadan la esfera de la autoridad federal.", Constitución Política de la República Mexicana 1857, article 101, visited on 10.Jun.2019, available on http://www.diputados.gob.mx/biblioteca/bibdig/const_mex/const_1857.pdf

[108] From the redaction of the original clause in Spanish: "…la sentencia será siempre tal, que solo se ocupe de individuos particulares, limitándose a protegerlos y ampararlos…" in Constitución Política de la República Mexicana 1857, article 102, visited on 10.Jun.2019, available on http://www.diputados.gob.mx/biblioteca/bibdig/const_mex/const_1857.pdf

[109] Also, the initial document filed in an Amparo trail, the used formula is "…demando el amparo y protección de la justicia federal…". A/N.

[110] Constitución Política de la República Mexicana 1857, article 102, visited on 10.Jun.2019, available on http://www.diputados.gob.mx/biblioteca/bibdig/const_mex/const_1857.pdf

[111] Martí Capitanachi, Luz del Carmen, *"La Formula Otero"*, Revista Letras Jurídicas No. 2, July 2000, p. 174, visited on 11.Jun.2019, available on http://letrasjuridicas.com.mx/Volumenes/2/marti2.pdf

the Union", to prevail over the local constitutions and laws promulgated by the States.[112] This set the bases for Mexico to have a monist system (regarding international law).

The Constitution of 1917 is the political agreement resulting from the Mexican revolution of 1910. The first chapter of this constitution is dedicated to the individual guarantees, and it mirrored most of the articles from the Constitution of 1857, sometimes only paraphrasing the text of the previous articles, some other times the rights were more carefully shaped by the Framers. However, there are three articles that were substantially changed, being the most relevant to the interpretation of the individual guarantees the article 1 related to the nature of these guarantees. In the version of the Constitution of 1917, the article 1 provided:

> "Art. 1. In the United Mexican States every individual will enjoy of the guarantees granted by this Constitution, which cannot be restricted nor be suspended, but in the cases and conditions which the same Constitution establishes."[113]

The main theoretical relevance of this article is in its wording. By analyzing the phrasing of this article, it is possible to identify the positivist nature of this constitution. The use of "guarantees *granted* by this Constitution" clearly suggest that the source of the individual rights is the constitution itself, and not due to the nature of the individual. Moreover, the Framers did not mention "natural rights", or "rights of man" to make reference to the individual guarantees. Furthermore, in this constitution the Framers did not included an open clause which could

[112] Constitución Política de la República Mexicana 1857, article 126, visited on 10.Jun2019, available on http://www.diputados.gob.mx/biblioteca/bibdig/const_mex/const_1857.pdf

[113] Constitución Política de los Estados unidos Mexicanos 1917, article 1, visited on 11.Jun2019, available on http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum/CPEUM_orig_05feb1917.pdf (translation by Rosendo J. Alvarez Ayala).

expand the catalog of rights to be protected at a constitutional level. The individual guarantees were going to be only those explicitly covered by the constitution.

This constitution in its article 133 gave the same treatment to the International treaties as the Constitution of 1857 gave in its article 126. This principle is now known as "constitutional supremacy". The constitutional supremacy doctrine locates the constitution on the top of the hierarchy, then the federal laws and international treaties, then the States constitutions and laws. According to the doctrine, "if a norm contrary –either in a material or in a formal way- to that superior norm [the constitution], it [the inferior norm] has no possibility to exist in that juridical order."[114] To make this supremacy clearer, the Congress passed a constitutional reform in 1934 to add to the text a condition of validity that the International Treaties must be in accordance and harmony with the Constitution.[115]

The Federal Judiciary kept the same attributions related to individual claims it had in the Constitution of 1857.[116] The Amparo trail also kept its main characteristics: 1) it must be started by the request of a legally injured party with legitimate interest, 2) the sentence will only protect the individual applicant in relation to the especial claim, and 3) the courts cannot express their opinion about the demanded law or act. [117] The rules for substantiation of the Amparo trail were

[114] Carpizo, Jorge, *"La Interpretación del Artículo 133 Constitucional"*, Boletín Mexicano de Derecho Comparado, N. 4, 1969, p. 3, visited on 11.Jun.2019, available on https://revistas.juridicas.unam.mx/index.php/derecho-comparado/article/view/605/865 (translation by Rosendo J Alvarez Ayala).
[115] Article 133 reformed in 1934, visited on 11.Jun.2019, available on http://www.diputados.gob.mx/LeyesBiblio/htm/1.htm
[116] Constitución Política de los Estados unidos Mexicanos 1917, article 103 I, visited on 11.Jun2019, available on http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum/CPEUM_orig_05feb1917.pdf
[117] Constitución Política de los Estados unidos Mexicanos 1917, article 107 , visited on 11.Jun2019, available on http://www.diputados.gob.mx/LeyesBiblio/ref/cpeum/CPEUM_orig_05feb1917.pdf

to be set by a reglamentary law enacted in 1919 (later derogated by the Reglamentary Law of 1936.).[118]

2.2 Current Constitutional Set-Up in Colombia and Mexico from a Comparative perspective.

2.2.1 Human Rights.

After a century of the promulgation of the Colombian constitution of 1886, the Colombian society was collapsing. The decade of 1980's in Colombia was plagued with political violence, and a severe institutional crisis.[119] The authoritarian model of the constitution of 1886 suffered 70 reforms [120] was finally proven as insufficient to address the requirements of the contemporary society.

The Colombian Constitution of 1991 is remembered as a response to the concerns of the civil society, in an attempt of pacifying most of the political sectors of the country, and from this interaction is from the constitution finds its legitimacy.[121] The "mythical narrative of the

[118] Fernández Fernández, Vicente, Samaniego Behar, Nitza, *"El Juicio de Amparo: Historia y Futuro de la Protección Constitucional en México"*, Revista IUS vol. 5, No 27, Puebla, México, Ene/Jun 2011, visited on 11.Jun.2019, available on http://www.scielo.org.mx/scielo.php?script=sci_arttext&pid=S1870-21472011000100009#nota

[119] Sánchez Duque, Luz María, Uprimny Yepes, Rodrigo, *Constitución de 1991, justicia constitucional y cambio democrático: un balance dos décadas después*, Cahiers des Amériques latines, 71, 2012, visited on 16.Jun.2019, available on http://journals.openedition.org/cal/2663

[120]According to the Colombian Ministry of Justice, visited on 17.Jun.2019, available on http://www.suin-juriscol.gov.co/viewDocument.asp?id=1826862

[121] Garzón Martínez, Camilo Andrés, *La Génesis de la Constitución Política de Colombia de 1991 a la Luz de la Discusión sobre el Mito Político,* Desafíos, 29(1),p. 125, visited on 15.Jun.2019, available on http://www.scielo.org.co/pdf/desa/v29n1/v29n1a05.pdf

constitution as a salvific document for the social pace had a great reception in different sectors within the Colombian society."[122]

The Colombian Constitution of 1991 is known as the "human rights constitution". In opposition to the previous constitution of 1886, the new constitution includes a detail catalog of individual rights and freedoms, more extensive than any of the past constitutions. Another difference with the replaced constitution is that in the new text it clearly specifies that "the Estate recognizes, without any discrimination, the primacy of the inalienable rights of the person"[123]

The Colombian Framers went a step further in the protection and interpretation of human rights granted by the constitution of 1991. All human rights treaties are elevated to hierarchically to be at the same level as the constitution.[124]

> "The international treaties and conventions ratified by the Congress, which recognize the human rights and that prohibit their limitations in state of exception, prevail in the internal order.
>
> The rights and duties consecrated in this Chart, will be interpret accordingly with the international treaties on human rights ratified by Colombia."[125]

[122] Garzón Martínez, Camilo Andrés, *La Génesis de la Constitución Política de Colombia de 1991 a la Luz de la Discusión sobre el Mito Político,* Desafíos, 29(1),p. 128, visited on 15.Jun.2019, available on http://www.scielo.org.co/pdf/desa/v29n1/v29n1a05.pdf

[123] From the original in Spanish: "El Estado reconoce, sin discriminación alguna, la primacía de los derechos inalienables de la persona", extract of Constitución Política de Colombia 1991, article 5, visited on 17.Jun.2019, available on https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=4125 (translation by Rosendo J. Alvarez Ayala)

[124] Constitución Política de Colombia 1991, article 93, visited on 17.Jun.2019, available on https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=4125

[125] From the original in Spanish: "Los tratados y convenios internacionales ratificados por el Congreso, que reconocen los derechos humanos y que prohíben su limitación en los estados de excepción, prevalecen en el orden interno.
Los derechos y deberes consagrados en esta Carta, se interpretarán de conformidad con los tratados internacionales sobre derechos humanos ratificados por Colombia." Constitución Política de Colombia 1991, article 93, visited on 17.Jun.2019, available on

One of the most relevant additions to the human rights catalog in this constitution is, without a doubt, the right to free development of the personality.[126] Article 16 establishes:

> "All persons have the right to free development of their personality without limitations beyond those imposed to the rights of others and to the juridical order."[127]

The Colombian vision of the right to free development of the personality departs from previous doctrines,[128] where the free development of the personality is only applicable when "there is no specific liberty basic right to consider the scope of protection afforded by this subsidiary freedom."[129]

In the Colombian reality, the interpretation given to the right to the free development of the personality is as the source of all other individual rights.[130] The right to the free development of the personality is, as perceived by the Constitutional Court:

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https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=4125 (translation by Rosendo J. Alvarez Ayala)

[126] Constitución Política de Colombia 1991, article 16, visited on 17.Jun.2019, available on https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=4125

[127] From the original in Spanish: "Todas las personas tienen derecho al libre desarrollo de su personalidad sin más limitaciones que las que imponen los derechos de los demás y el orden jurídico. Constitución Política de Colombia 1991, article 16, visited on 17.Jun.2019, available on https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=4125 (translation by Rosendo J. Alvarez Ayala)

[128] One example of this is the German jurisprudence. The German approach to the right to the free development of the personality is as general freedom of action, and as subsidiary right "with regard to activities which are protected by specific freedom-guaranteeing rights, the general freedom of action found in Art. 2 para 1 GG is displaced by these more specific guarantees." Bumke, Chirstian, Vosskuhle, Andreas, *German Constitutional Law: Introduction, Cases, and Principles"*, Oxford University Press, 2019, p. 106.

[129] Cremer, Wolfram, *The Basic Right to 'Free Development of the Personality' - Mere Protection of Personality Development versus General Right of Freedom of Action,* in Debates in German Public Law, Pünder, Hermann, Waldhoff, Christian, eds. Hart Publishing, UK, 2014, p. 59.

[130] In the Sentence No. T-014/92 issued by the Constitutional Court, the Court found from a systematic interpretation that the freedom of works derives from the right to the free development of the personality. visited on 14.Jun.2019, available on http://jurisprudencia.ramajudicial.gov.co/WebRelatoria/FileReferenceServlet?corp=cc&ext=&file=32781

> "…not a simple right, it is a generic principle and all-encompassing which goal is to cover those aspects of the individual self-determination, not guaranteed in especial form by other rights, in such a way that the person enjoys a constitutional protection to make, without intromissions nor pressures, the decisions that considers important on her/his own life."[131]

This approach makes resonance with the idea exposed by Cremer:

> "From a substantive law perspective, almost every act of state intervention needs to be justified. The determination that an act of state intervention has occurred results in only prima facie protection and should not be confused with a determination that there has been a violation of a basic right. Nevertheless, the prima facie protection requires the state to provide justification in the form of legitimate reason each time it intervenes in the freedom of a person. Furthermore the state intervention must be proportionate (suitable, necessary and adequate) in light of the weight of the legitimate reason."[132]

[131] From the original in Spanish: "El derecho al libre desarrollo de la personalidad no es un simple derecho, es un principio genérico y omnicomprensivo cuya finalidad es cobijar aquellos aspectos de la autodeterminación del individuo, no garantizados en forma especial por otros derechos, de tal manera que la persona goce de una protección constitucional para tomar, sin intromisiones ni presiones las decisiones que estime importantes en su propia vida."In the Sentence No. C-355/06 issued by the Constitutional Court, visited on 14.Jun.2019 http://jurisprudencia.ramajudicial.gov.co/WebRelatoria/FileReferenceServlet?corp=cc&ext=&file=57462 (translation by Rosendo J. Alvarez Ayala)

[132] Cremer, Wolfram, *The Basic Right to 'Free Development of the Personality' - Mere Protection of Personality Development versus General Right of Freedom of Action,* in Debates in German Public Law, Pünder, Hermann, Waldhoff, Christian, eds. Hart Publishing, UK, 2014, p. 61.

Human Rights in Mexico were introduced in the Reform 194 of June 2011 as part of a set of the Structural Reforms promulgated during the presidential term of Felipe Calderón Hinojosa.[133]

In the Reform 194 to the Constitution of 1917, the chapter of "individual guarantees" was renamed to "of human rights and their guarantees".[134] With the structural reform of 2011, the Constitution of 1917 experienced one of its most dramatic transformations without being replaced by a new constitution.

With this reform, the conception and understanding of the rights formerly known as "individual guarantees" changed in a way which impacts the whole legal, and political systems in Mexico. The text that replaced the article 1 reads as follows:

> "In the United Mexican States all the persons shall enjoy of the human rights ***recognized*** in this Constitution and in the international treaties signed by the Mexican State, as well as the guarantees for the protection of these rights, the exercise of these rights shall not be restricted nor suspended, except in the cases, and under the conditions established by this Constitution.
>
> The norms related to the human rights shall be interpreted in conformity whit this Constitution and with the international treaties in the matter favoring the broader protection to the person at all times.
>
> All authorities, within their sphere of competencies, has the obligation to promote, to respect, to protect, and to guarantee the human rights in conformity with the principles of universality,

[133] Sánchez Yeskett, Damian, *"10 Grandes Transformaciones de México: Reformas estructurales"*, Blog de la Presidencia, 17.Nov.2011, visited on 12.Jun.2019, available on http://calderon.presidencia.gob.mx/el-blog/10-grandes-transformaciones-de-mexico-reformas-estructurales/

[134] In the original in Spanish: "De los Derechos Humanos y sus Garantías", in DECRETO por el que se modifica la denominación del Capítulo I del Título Primero y reforma diversos artículos de la Constitución Política de los Estados Unidos Mexicanos, 10.Jun.2011, visited on 12.Jun.2019, available on http://www.diputados.gob.mx/LeyesBiblio/ref/dof/CPEUM_ref_194_10jun11.pdf

interdependency, indivisibility, and progressiveness. In consequence, the State shall prevent, investigate, punish, and repair the violations to the human rights, in the terms established by the law.

(…)

It is prohibited all discrimination motivated by ethnic or national origin, gender, age, disabilities, social status, health conditions, religion, opinions, sexual preferences, civil status, or any other kind which attempts against the human dignity and has as object to nullify or undermine the rights and liberties of the persons."[135]

The way this article was structured in the reform, switches the whole perspective of the Mexican legal theory at a constitutional level. This reforms marks a new paradigm for the Mexican system, by understanding the source of rights from a humanist approach. Now, the rights previously known as "individual guarantees" do not have their origin in the constitutional text. The constitution, by recognizing these rights accepts them as existing before the political act of constituting a country. This paradigm will demand a different approach, and interpretation from the three Branches of the Government. Moreover, with the second

[135] In the original in Spanish: "Artículo 1o. En los Estados Unidos Mexicanos todas las personas gozarán de los derechos humanos reconocidos en esta Constitución y en los tratados internacionales de los que el Estado Mexicano sea parte, así como de las garantías para su protección, cuyo ejercicio no podrá restringirse ni suspenderse, salvo en los casos y bajo las condiciones que esta Constitución establece.
Las normas relativas a los derechos humanos se interpretarán de conformidad con esta Constitución y con los tratados internacionales de la materia favoreciendo en todo tiempo a las personas la protección más amplia.
Todas las autoridades, en el ámbito de sus competencias, tienen la obligación de promover, respetar, proteger y garantizar los derechos humanos de conformidad con los principios de universalidad, interdependencia, indivisibilidad y progresividad. En consecuencia, el Estado deberá prevenir, investigar, sancionar y reparar las violaciones a los derechos humanos, en los términos que establezca la ley.
(…)
Queda prohibida toda discriminación motivada por origen étnico o nacional, el género, la edad, las discapacidades, la condición social, las condiciones de salud, la religión, las opiniones, las preferencias sexuales, el estado civil o cualquier otra que atente contra la dignidad humana y tenga por objeto anular o menoscabar los derechos y libertades de las personas" Emphasis added. N./A.: In the official transalation the word "reconocidos" (translated by the author as "recognized") is translated as "granted" (which in Spanish would be "*otorgados*"). This inaccurate translation, in the opinion of the author, switches the whole meaning of the article in Spanish. The phrasing in Spanish locates the human rights as preceding the Constitution. Reform 194 to Constitución Política de los Estados unidos Mexicanos 1917, visited on 11.Jun.2019, available on http://www.diputados.gob.mx/LeyesBiblio/ref/dof/CPEUM_ref_194_10jun11.pdf

paragraph introduced by the reform, the interpretation of the rights now denominated as human rights shall be under the *pro hominem* principle.

The impact of the introduction of the *pro hominem* principle is that now the international treaties with human rights provisions will have the same level of hierarchy as the constitution, or higher if the treaty provides a wider interpretation of the human right in question, and grants a broader protection. It has been expected that with the introduction of this principle extracted from the ACHR, the development of the protection granted to fundamental rights will take better direction than the one traditional held by the Judicial Branch.[136] However, as it will be covered in Chapter 4, the Federal Judiciary has already used it to advance the political agenda of the dominant party.

The constitution does not include a right to the free development of the personality. It only mentions the expression "free development of the personality" in relation to a mandate to the judges to order preemptive prison in the cases of serious criminal offense against the free development of the personality determined by the law.[137]

One interpretation of the second paragraph of the Article 1 is that if there is an ordinary norm which can be argued as related to a human right, this norm should be interpret under the constitutional principles AND the international treaties with human rights provisions. In a case where a disputed norm that harms a human right not enlisted by the constitution, but covered by an international treaty, the authority is required by the *pro hominem* principle to apply the

[136] Pou Giménez, Francisca, "*Constitutionalism Old, New and Unbound: the Case of Mexico",* in Bonilla Maldonado, Daniel, Crawford, Colin (ed.), "*Constitutionalism in the Americas"*, Edward Elgar Publishing, 2016, p.171.
[137] Constitución Política de los Estados Unidos Mexicanos, article 19, visited on 10.Jun.2019, available on http://www.diputados.gob.mx/LeyesBiblio/htm/1.htm

treaty instead. This principle can be perceive as the only exception to the "constitutional supremacy" doctrine, or as designation of the subsidiarity nature of the international treaties with human rights provisions.[138]

Now that the constitutional landscape has been detailed, the next point will cover the interpretation of the constitutional order before and after the human rights era.

2.2.2 Constitutional Arrangements for the Judiciary

In the Colombian case, the Constitution of 1991 divides at an institutional level the Judiciary Branch in two types of Courts. The first one, the Supreme Court, is in charge of the ordinary jurisdiction. The second one is a new Constitutional Court in charge of the interpretation of the human rights, and it has the objective to protect the constitutional rights granted to the individuals,[139] and "the safekeeping of the integrity and supremacy of the constitution."[140]

The Constitution of 1991 grants to every person in Colombia a "tutelary action", to claim for constitutional protection whenever an authority infringes a human right.[141] Although the Constitution of 1991 sets the jurisprudence as an auxiliary criteria in the administration of

[138] On this debate, it is in the opinion of the author the latter case, following the opinion 293/2011 of the Supreme Court of Justice. Visited on 12.Jun.2019, available on http://www2.scjn.gob.mx/asuntosrelevantes/pagina/seguimientoasuntosrelevantespub.aspx?id=129659&seguimientoid=556

[139] Constitución Política de Colombia 1991, article 86 para. 2, visited on 17.Jun.2019, available on https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=4125

[140] From the original in Spanish: "A la Corte Constitucional se le confía la guarda de la integridad y la supremacía de la Constitución…" Constitución Política de Colombia 1991, article 241, visited on 17.Jun.2019, available on https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=4125 (translation by Rosendo J. Alvarez Ayala)

[141] Constitución Política de Colombia 1991, article 86, visited on 17.Jun.2019, available on https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=4125

justice, "through judicial interpretation a faster constitutional mutation has been produced, which has turned the constitutional jurisprudence in one of the main source of Rights."[142] According to this, the decisions of the Constitutional Court will set precedents mandatory to observe by the rest of the judges.[143]

The Mexican Judicial Branch retained a "very formalistic styles of adjudication that, until recently, have done little in terms of effective rights protection for the majority of the population."[144]This constitutional arrangement prevail until the 2011 reform.

The Mexican Federal Judiciary changed with the Reform 193, which also brought a new approach to the Amparo trail. With this Reform, the Federal Judiciary is entitled to review the laws that originated the Amparo trail (with the exception of the tax laws).[145] This new attribution of the Federal Judiciary can lead to a General Declaration of Unconstitutionality from the Supreme Court of Justice.[146]

In order to start with this process, the Supreme Court has to notify to the issuing organ about a Jurisprudence by reiteration regarding a law infringing a human right.[147] After the notification

[142] Lancheros-Gámez, Juan Carlos, "*El precedente constitucional en Colombia y su estructura argumentativa Síntesis de las experiencias de un sistema de control mixto de constitucionalidad a la luz de la sentencia T-292 de 2006 de la Corte Constitucional*", Dikaion, Año 26 – N. 21, Vol. 1, p.168, visited on 13.Jun.2019, available on http://www.scielo.org.co/pdf/dika/v21n1/v21n1a06.pdf

[143] Sentence C – 104/93, visited on 16.Jun.2019, available on http://www.corteconstitucional.gov.co/relatoria/1993/C-104-93.htm

[144] Pou Giménez, Francisca, "*Constitutionalism Old, New and Unbound: the Case of Mexico",* in Bonilla Maldonado, Daniel, Crawford, Colin (ed.), "*Constitutionalism in the Americas"*, Edward Elgar Publishing, 2016, p.167.

[145] Reforma 193, Article 107 II, visited on 12.Jun.2019, available on http://www.diputados.gob.mx/LeyesBiblio/ref/dof/CPEUM_ref_193_06jun11.pdf

[146] Reforma 193, Article 107 II, visited on 12.Jun.2019, available on http://www.diputados.gob.mx/LeyesBiblio/ref/dof/CPEUM_ref_193_06jun11.pdf

[147] Ley de Amparo, Regalmentaria de los artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos, articles 222-224, visited on 13.Jun.2019, available on http://www.diputados.gob.mx/LeyesBiblio/pdf/LAmp_150618.pdf

has been issued, the responsible organ has 90 calendar days to overcome the problem of unconstitutionality of the law. If the responsible organ does not overcome the problem of unconstitutionality of the law, the Supreme Court of Justice will proceed with the General Declaratory of Unconstitutionality of the law in question.[148]

The scope of protection of the Amparo trail broadened to protect beyond the rights expressed in the constitution. The person can now file a request for Amparo under any claim related to human rights.[149] However, the Amparo sentence kept it previous principle of relativity, granting protection only to the plaintiff.[150]

To summarize, the Colombian Constitution of 1991:

- Sets the human rights as the most important rights in the constitutional order.
- Locates the international treaties on human rights at a constitutional level.
- The right to the free development of the personality is an all-encompassing principle.
- Creates a Constitutional Court as the organism ultimately in charge of the interpretation of the constitution.
- The right given to every citizen to present a public action of unconstitutionality.[151]
- Includes an "open ending" clause which allow the inclusion of more individual rights that not expressed in the constitution or in international treaties.[152]

[148] Constitución Política de los Estados Unidos Mexicanos, article 107 II, visited on 10.Jun.2019, available on http://www.diputados.gob.mx/LeyesBiblio/htm/1.htm
[149] Ley de Amparo, Regalmentaria de los artículos 103 y 107 de la Constitución Política de los Estados Unidos Mexicanos, article 1, visited on 13.Jun.2019, available on http://www.diputados.gob.mx/LeyesBiblio/pdf/LAmp_150618.pdf
[150] Constitución Política de los Estados Unidos Mexicanos, article 107 I, visited on 10.Jun.2019, available on http://www.diputados.gob.mx/LeyesBiblio/htm/1.htm
[151] Constitución Política de Colombia 1991, article 40 (6), visited on 17.Jun.2019, available on https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=4125
[152] Article 94 states that "the rights and guarantees contained in the Constitution and in international pacts in force, should not be understood as neglecting other [rights] that, being inherent to the human person, do not appear expressly in them." Constitución Política de Colombia 1991, article 40 (6), visited on 17.Jun.2019,

In the Mexican Case after the reforms of 2011:

- Turned the constitutional theory of individual rights to human rights.
- Set the international treaties containing provisions on human rights at a constitutional level.
- Amparo trails will now cover claims regarding human rights (either expressed in the constitution or in international treaties).
- Granted the power to review the laws that originate Amparo trails regarding human rights.
- The Supreme Court of Justice can pronounce a General Declaratory of Unconstitutionality of a law, in parts or in its totality.
- The constitution does not include a right to the free development of the personality.
- The new version of the Amparo trail also provides protection against acts performed by individuals (persons or corporations).[153]

With the new constitutional setting in both countries, the Judicial Branch has attributions equivalent to law-making powers. The members of the head of each Judicial Branch are not elected directly, but through a mechanism activated by the Executive and approved by the Legislative, for which the citizens vote and "more often than not, we as citizens 'vote' for our representatives on the basis of the broad package represented by a party (or individual) platform, and the actual voting on the specific proposals is done by the representatives,"[154] which, in a sense, also include the Judicial Branch.

available on https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=4125 (translation by Rosendo J. Alvarez Ayala)

[153] Ley de Amparo Reglamentaria de los Artículos 103 y 107, article 1 III par. 2, visited on 13.Jun.2019, available on http://www.diputados.gob.mx/LeyesBiblio/pdf/LAmp_150618.pdf

[154] Sadurski, Wojciech, *Equality and Letitimacy,* Oxford University Press, p. 49.

3. Jurisprudence on Human Rights in Colombia and Mexico.

3.1 Colombia.

3.1.1 Before the Constitution of 1991.

To better understand the performance of The Supreme Court, it is important to look into its composition. The Court was integrated by 7 Magistrates,[155] which were proposed by the President of the Republic,[156] and the power to approve or disapprove the proposed candidates was left to the Senate.[157] The Senators where not voted directly by the citizens, instead the Departmental Assemblies were in charge to elect the Senators.[158] As a mechanism to protect the independency of the Supreme Court (at least at some degree), the term length was life tenure, and could be removed from office under misbehavior charges.[159]

To this point, it is possible to understand that the Judiciary of the constitution of 1886 did not come with many checks and balances, not even to mention the absence of clause to protect the compensation paid to the Magistrates. This would normally result in a weak court, in relation with the Legislative, and the Executive Branches. The strongest power held by the Supreme

[155] Constitución Política de Colombia 1886, article 146, visited on 17.Jun2019., available on https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=7153
[156] Constitución Política de Colombia 1886, article 119, visited on 17.Jun2019., available on https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=7153
[157] Constitución Política de Colombia 1886, article 98 (4), visited on 17.Jun2019., available on https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=7153
[158] Constitución Política de Colombia 1886, article 98 (4), visited on 17.Jun2019., available on https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=7153
[159] Constitución Política de Colombia 1886, article 175, visited on 17.Jun2019., available on https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=7153

Court was to decide about the unconstitutionality of legislative acts, but only when the Government has objected those acts as unconstitutional.[160]

The constitutional review was so limited and weak that the Law 153 of 1887 article 6 established that "a law disposition expressed after posterior to the Constitution is considered constitutional, and it will be applied even if it seems contrary to the Constitution…"[161] The Supreme Court only gained some independency when the legislative act 3 of 1910 derogated the article 6.

Retaking the assumption pending in the last paragraph of the section 2.1.1, the Supreme Court in the Constitution of 1886 was not in the position to make such interpretations of the constitutional text, as it was indeed very weak. There is a decision issued by the Supreme Court in 1889 that shows the Court's "little commitment with the defense of the 'supremacy of the Constitution'."[162] The issue was a purchase between spouses. A couple got married under the catholic law in 1883, when the religious rite was not recognized as legally binding. Three years later, in 1886 they performed a purchase of real state among themselves. The Court declared the nullity of the purchasing contract on the grounds that the Laws 57 and 153 of 1887 were already valid at the time of the purchase, and that those Laws granted the Catholic rites of marriage celebrated before of the validity of those laws would have full civil effects from the moment of the celebration, leaving without effects the contract celebrated by the couple in

[160] Constitución Política de Colombia 1886, article 151(4), visited on 17.Jun2019., available on https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=7153

[161] In the original in Spanish: "Una disposición expresa de ley posterior a la Constitución se reputa constitucional, y se aplicará aun cuando parezca contraria a la Constitución." Visited on 17.Jun.2019, avilable on https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=15805 (translation by Rosendo J. Alvarez Ayala)

[162] Cajas Sarria, Mario Alberto, *La Corte Suprema de Justicia de Colombia, 1886-1910: De Juez de la Regeneración a Juez Constitucional,* Historia Constitucional, n. 14, 2013, p. 439, foot note 29, paraphrasing Manuel José Cepeda. Visited on 15.Jun.2019.

1886. One of the spouses expressed to the Court that the retroactive application of the 1887 Laws violated their acquired rights recognized by the article 31 of the constitution of 1886, but the Court did not accept the argument. With this reasoning, the Court reminded its mission, which was not to defend the supremacy of the constitutional text, but the rule of law:

> "To the Judicial Power it is not attributed the general and authentic interpretation of the Constitution or the substantive laws, nor is it allowed to stop observing these because the Court judge them contrary to the Constitution. By only observing the article 90 from the very Constitution it is possible that the Supreme Court decides if a project of law is or not constitutional, for being or not, in conformity with the Constitution. It is not established in the Republic any Tribunal or authority that has the power of declaring that a law ceases to be mandatory for being contrary to a constitutional precept."[163]

From that 1889 sentence, the Supreme Court had a long way interacting with the constitution of 1886. Reform after reform, the Supreme Court changed its approach to the constitutional interpretation. For example in 1985, almost a century later from the aforementioned decision, the Supreme Court had a very different vision of the same constitutional text. The case in question was related to freedom of press, where the plaintiff was complaining about the import tax set for paper used for printing the newspapers. The plaintiff argued that taxing the paper was against the freedom of press by making the production more expensive. The Public Ministry argued that the taxation will not affect the newspapers, as they will be able to translate the taxation to the buyers. To resolve this case, the Supreme Court built an argument based on the texts regarding freedom of press AND freedom of expression and opinion included in the previous constitutions. However, the Court resolved that the taxation did not interfere with the

[163] Cajas Sarria, Mario Alberto, *La Corte Suprema de Justicia de Colombia, 1886-1910: De Juez de la Regeneración a Juez Constitucional,* Historia Constitucional, n. 14, 2013, p.440, quoting the Supreme Court, sentence of 14.Sep.1889, Gaceta Judicial (G.J.) No. 155, Año III, 28 de septiembre de 1889.p. 403.

freedom of press, but not before studying the merits of the case (situation imaginable for the Magistrates of the late 19th century).[164]

Later the same year, an armed group took violently the Palace of Justice in Bogotá, resulting in the immolation of 26 members of the Supreme Court.[165] Confirming that being part of the Supreme Court under the constitution of 1886 was never an easy or a safe task, either by institutional structure, or by the social reality.

3.1.2 After the Constitution of 1991.

After studying the constitutional development, the evolution of the role of the Supreme Court, and getting some historical and social context, it is now time to focus in the latest age of Colombian constitutionalism. As mentioned before, since 1991 the organism in charge of the constitutional order is the Constitutional Court. At the beginning of this new order, the precedents did not have a mandatory character in relation with other cases.[166] Eventually, the Court itself that determined in 1993 the obligatory character of the precedents.[167] Nevertheless, the statutory law of justice administration,[168] "established the reach of the sentences related to constitutional control, providing that these sentences should be understood as auxiliary criteria

[164] Sentencia 42, Radicación 1284, Gaceta Judicial CLXXXIII N. 2422, pp. 432-438, visited on 15.Jun.2019, available on http://www.cortesuprema.gov.co/corte/wp-content/uploads/subpage/GJ/Gaceta%20Judicial/GJ%20CLXXXIII%20n.%202422%20(1985)%20Primer%20Semestre.pdf

[165] Source: http://www.cortesuprema.gov.co/corte/index.php/historia/

[166] Constitución Política de Colombia, article 230: "The judges, in their ruling, will only be subject to the rule of law. The equality, the jurisprudence, the general principles of law, and the doctrine are auxiliary criteria to the judicial activity." Visited on Constitución Política de Colombia 1991, article 241, visited on 17.Jun.2019, available on https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=4125 (translation by Rosendo J. Alvarez Ayala)

[167] Sentence C – 104/93, visited on 16.Jun.2019, available on http://www.corteconstitucional.gov.co/relatoria/1993/C-104-93.htm

[168] Law 270 of 1996, visited on 16.Jun.2019, available on http://www.secretariasenado.gov.co/senado/basedoc/ley_0270_1996_pr001.html

for the application of the norms."[169] Later on, the Court declared the statutory law of justice administration as partially unconstitutional, making the precedents mandatory and with *erga omnes* effects.[170]

The Court continued the positioning of the Judiciary as the authentic interpreter of the constitutional text in the sentence C-532/92, one of its very first resolutions regarding human rights.[171] With this energetic stance, the Constitutional Court started to interpret what could be the vaguest right granted by the constitution of 1991: the right to free personality development. Some of these cases are not too controversial, as the Court is clearly shaping rights. However, in other cases the Court is going to such an extent in which it is possible to consider that the opinion goes beyond shaping, and more into creating rights out of the principle of freedom.

The Constitutional Court has now a large number of decisions related to the right to the free development of the personality.[172] As mentioned in the section 3.2 of this thesis, one of the earliest opinions of the Constitutional Court (3.Jun.1992) set the freedom to work as consequence of the right to the free development of the personality.[173] To argue in favor of this decision, the Court reasoned that the freedom of work was a manifestation of the liberty (in opposition to slavery) of the person, therefore the freedom of work has its ultimate foundation

[169] Poveda Rodríguez, Alberto, *El Precedente en el Derecho Colombiano, Un Estudio Comparado con la Jurisprudencia."*, p. 8, visited on 15.Jun.2019, available on https://repository.ucatolica.edu.co/jspui/bitstream/10983/2587/1/EL%20PRECEDENTE%20EN%20EL%20DERECHO%20COLOMBIANO.pdf (translation by Rosendo J. Alvarez Ayala)

[170] Sentence C – 037/96 visited on 16.Jun.2019, available on http://www.corteconstitucional.gov.co/relatoria/1996/C-037-96.htm

[171] Sentencia C-532/92, visited on 10.Jun.2019, available on http://jurisprudencia.ramajudicial.gov.co/WebRelatoria/FileReferenceServlet?corp=cc&ext=&file=32928

[172] Since the Constitutional Court was established in 1991, the Court has resolved 169 cases related to the right of free development of the personality, according to the records of the Judicial Branch, visited on 14.Jun.2019, available on http://jurisprudencia.ramajudicial.gov.co/WebRelatoria/consulta/index.xhtml

[173] In the Sentence No. T-014/92, visited on 14.Jun.2019, available on http://jurisprudencia.ramajudicial.gov.co/WebRelatoria/FileReferenceServlet?corp=cc&ext=&file=32781

in the human dignity.[174] Following this statement, the Court imposed a limit to this right. The Court established that the freedom to work "entails the right to get a job, but this does not mean that this right implies the existence of job offers for all the citizens that find themselves in the conditions of performing a job."[175]

In this same line there are a series of decisions, such as Sentence T – 420/92.[176] In this occasion, the Court had to decide if the act of denying a single mother to be reincorporated to a high school program she had to abandon due to her pregnancy was or not a violation to her right to education, and to her right to free development of personality. To solve this issue, the Court first clarified the character of the right to education as a fundamental right protected by the constitutional text, according to the article 67.[177] The Court continued reasoning, getting to the point of formulating an interpretation of right to education under international law. For this purpose, the Court cited the International Covenant on Economic, Social and Cultural Rights

[174] From the original in Spanish: "El derecho al trabajo es una manifestación de la libertad del hombre y por tanto en último término tiene su fundamento en la dignidad de la persona humana." In the Sentence No. T – 014/92 issued by the Constitutional Court, visited on 14.Jun.2019, available on http://jurisprudencia.ramajudicial.gov.co/WebRelatoria/FileReferenceServlet?corp=cc&ext=&file=32781 (translation by Rosendo J. Alvarez Ayala)

[175] From the original in Spanish: "Este conlleva el derecho a obtener un empleo, pero ello no quiere decir, que este derecho implica que exista una prestación u ofrecimiento necesario de trabajo a todo ciudadano que se halle en condiciones de realizarlo." In the Sentence No. T – 014/92issued by the Constitutional Court, visited on 14.Jun.2019 available on http://jurisprudencia.ramajudicial.gov.co/WebRelatoria/FileReferenceServlet?corp=cc&ext=&file=32781 (translation by Rosendo J. Alvarez Ayala)

[176] Sentencia T – 420/92 visited on 14.Jun.2019, available on http://jurisprudencia.ramajudicial.gov.co/WebRelatoria/FileReferenceServlet?corp=cc&ext=&file=32804

[177] Article 67 dictates that the education is a right of the person and a public service. Constitución Política de Colombia 1991, article 86 para. 2, visited on 17.Jun.2019, available on https://www.funcionpublica.gov.co/eva/gestornormativo/norma.php?i=4125

article 13 (1),[178] and the UDHR article 26 (2),[179] although the UDHR is not legally binding. Once the nature of the right to education was settled, the Court produced a reasoning connecting the condition of motherhood to the right to the free development of the personality, related with the right to self-determination. The Court concluded that denying a single mother to be reincorporated to the high school program amounted to a

"…disobedience against the constitutional mandate to the right of autonomy, established in the article 16 as a fundamental right, as it restricts the free decision of the student to choose as new way of life the motherhood condition, limiting her capacity to self-determination regarding her own judgment within the limits allowed."[180]

In another decision in the same period, the Constitutional Court had to balance between the freedom of mobility and the freedom of association.[181] The plaintiff, Mrs. Sandoval Santamaría, was the niece of a priest of the Dominican order. Mrs. Sandoval Santamaría wanted to visit her uncle, worried about his health. The Father Prior did not allow her in the monastery. In response, Mrs. Sandoval Santamaría filed a complaint alleging that the conduct of the Father

[178] Article 13 (1) "The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace." Visited on 14.Jun.2019, available on https://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx

[179] Article 26 (2) "Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace."

[180] In the original in Spanish: "…desobedecido también el mandato constitucional del Derecho a la Autonomía establecido en el artículo 16 como derecho fundamental, por cuanto coarta la libre decisión de la estudiante de escoger como nueva forma de vida su condición de madre, limitándole la facultad de autodeterminarse conforme a su propio arbitrio dentro de los límites permitidos." Sentencia T – 420/92 visited on 14.Jun.2019, available on http://jurisprudencia.ramajudicial.gov.co/WebRelatoria/FileReferenceServlet?corp=cc&ext=&file=32804 (translation by Rosendo J. Alvarez Ayala)

[181] Sentencia T – 542/92 visited on 14.Jun.2019, available on http://jurisprudencia.ramajudicial.gov.co/WebRelatoria/FileReferenceServlet?corp=cc&ext=&file=32927

Prior violated her right to free development of the personality, and her right of mobility. This time, the Court was more eloquent in its reasoning defining the right of free development of the personality:

> "The concept of the autonomy of the personality comprehends every decision that affects the evolution of the persons in the stages of life in which she or he has the enough elements of judgment to take such decisions. Its goal is to comprehend those aspects of the self-determination of the individual not guaranteed in a especial way by other rights, in such a way that the person enjoys of a constitutional protection to take, without intromissions nor pressures, the decisions that she or he estimates important in her or his own life. Here is where the right of opinion manifest itself and it is a duty of the persons to respect the rights of others and not to abuse of their own rights. One of these manifestations of this right is the right of association as every person can choose to associate or not to associate and in that measurement to achieve the goals of her or his development in society"

The Court also made reference to the report produced by the National Constituent Assembly regarding the debate on the personal autonomy. In this report, the Assembly noted that

> "In the current epoch, the development of the personality does not only has the barriers and obstacles known in other times, but the individual pretends to be conditioned through sophisticated technological means which have allowed to some sociologist to identify the alienation phenomena.
>
> Such circumstance took the members of the First Commission to consecrate the right to the personal autonomy, without any other limitations imposed by the others rights and the legal order. The risk of cultural manipulation, does not stop from being one of the grave threats to

the individual to fully develop her or his intellectual potentiality, and such is the sense of the article proposed to be introduced in the National Constitution."[182]

In this case, the plaintiff failed to prove that the visits were denied. On the contrary, the Father Prior proved that he only requested a previous authorization to access an area marked as restricted for the priests. The Court resolved in favor of the right of association of Mrs. Sandoval Santamaría's uncle, linking that right with the right to choose a profession. According to the Court, the plaintiff's uncle decided freely to join to the Dominican order, therefore he was subject of the regulations imposed by the order. The Court finalized the decisions clarifying that if Mrs. Sandoval Santamaría's uncle was in use of reason, only he could decide on who he will accept as visitor.

So far, examples where the Constitutional Court has interpreted rights protected by previous constitutions (right to work, and right to education) have been presented. However, the Constitutional Court is giving a new understanding to these rights. The Court is arguing that these rights are expressions of the right to free development of the personality, and not just rights granted by the constitution. The following decisions to be studied are related to other sort of rights. Those rights are not traditionally identified as fundamental rights, nevertheless the Court has reached to the conclusion that those rights are also expressions of the right to free

[182] From the original in Spanish: "En la época actual, el desarrollo de la personalidad no sólo tiene trabas y obstáculos que se conocieron en otros tiempos, sino que el individuo pretende ser condicionado a través de sofisticados medios tecnológicos que han permitido a algunos sociólogos identificar el fenómeno como de alienación.
Tal circunstancia llevó a los miembros de la Comisión Primera a consagrar el derecho a la autonomía personal, sin otras limitaciones que las que imponen el respeto a los derechos de los demás y al orden jurídico. El riesgo de manipulación cultural, no deja de ser una de las graves amenazas para que el individuo desenvuelva cabalmente sus potencialidades intelectivas, y tal es el sentido del artículo que se propone introducir en la Constitución nacional" in the Sentence T – 542/92, quoting the Gaceta Constitucional Nº 82, Santa Fe de Bogotá, 25 de mayo de 1.991, pág. 12, informe-ponencia del Delegatario Diego Uribe Vargas, visited on 19.Jun.2019, available on http://jurisprudencia.ramajudicial.gov.co/WebRelatoria/FileReferenceServlet?corp=cc&ext=&file=32927

development of the personality, therefore these rights are deserving of constitutional protection at the same level as the other rights previously accepted as fundamental.

One of those decisions is found in the Sentence T – 493/93, where the Court had to analyze a more delicate matter under a claim for constitutional protection of the right of free development of the personality. The issue was a female patient who was diagnosed with a breast tumor. The patient had to go from the countryside of Colombia to Medellin in multiple occasions to follow her treatment. At some point, the patient decided not to continue with her treatment. One of the patient's brother requested the intervention of an office of the State to force the husband of the patient to facilitate her and encourage her to continue with the treatment. The Court resolve in this decision that it is within the scope of the right of the free development of the personality the decision of undergoing or suspending a treatment, even if choosing the latter would result in her own death.[183]

[183] Sentence 493/93, visited on 14.Jun.2019, available on http://jurisprudencia.ramajudicial.gov.co/WebRelatoria/FileReferenceServlet?corp=cc&ext=&file=33490

Afterwards, the Constitutional Court also took the task to judge whether the conduct typified as "drug addiction"[184] in the Law 30 of 1986 was constitutional or not.[185] For this particular case the Court followed its previous stance regarding the right to decide to take a health treatment or not, in connection to the right to the free development of the personality. According to the decision of the Court:

> "Drug addiction – Personal behavior
>
> Within a liberal and democratic penal system, as the one that has to come off from a Constitution with the same seal, it must be outlaw the danger, so expensive to the penal positivism, today due to the absent venture of all the civilized peoples. Because one person

[184] Law 30 of 1986 articles 2 j): ""article 2. For the effects of the present law the following definitions will be adopted:.....
j) Dosage for personal use: It is the amount of a drug that a person carries or keeps for self-consumption.
It is a dosage for personal use the amount of marihuana that does not exceed twenty (20) grams; the one of marihuana hashish that does not exceed five (5) grams; of cocaine or any substance based on cocaine that does not exceed one (1) gram, and the one of methaqualone that does not exceed of two (2) grams.
It is not a dosage for personal use, the drug that a person carries with her or himself, when the aim is to the distribution or sale of the drug, regardless of the quantity ". ,
article 51: "The one who carries with oneself, for her or his usage or consumes cocaine, marihuana, or any other drug that produces dependency, in a quantity considered as dosage for personal use, in conformity with this law, will incur in the following sanctions: a) For the first time, prison for up to thirty (30) days and a fine of one half (1/2) of the monthly minimum wage. b) For the second time, prison from one (1) month up to one(1) year and a fine from half (1/2) to one (1) of the monthly minimum wage, if the new act is committed within the next twelve (12) months following the first offense. c) The user or consumer that, according to a legal medical certificate, finds her or himself in the state of drug addiction even if she or he has been caught for the first time, will be hospitalized in a psychiatric establishment or similar of official or private character, for the necessary time for her or his recovery. In this case there will not be prison punishment nor fine. The appropriate authority will entrust the drug addict to the care of the family or will refer her or him, under the responsibility of the family, to a clinic, hospital, or health home, for the corresponding treatment, which will prolong for as long as necessary for her or his recovery, which must be certified by the treating medic and by the appropriate Legal Medicine Section. The family of the drug addict shall respond of the fulfilment of her or his obligations, through caution which will be set by the official competent, keeping into account the economic capacity of the family. The treating medic will inform periodically to the authority which has known the case about the health condition and rehabilitation of the drug addict. If the family misses the respective obligations, the caution will be executed and the internalization of the drug addict will have to be fulfill by force.",
article 87: "The persons that, without having committed any of the infractions described in this statute, are being affected by the consumption of drugs which produce dependency, will be sent to the establishments indicated in the articles 4 and 5 of the Decree 1136 of 1970 in agreement with the indicated procedure."
visited on 14.Jun.2019, available on
http://jurisprudencia.ramajudicial.gov.co/WebRelatoria/FileReferenceServlet?corp=cc&ext=&file=33826
(translation by Rosendo J. Alvarez Ayala)

[185] Sentence C – 221/94, visited on 14.Jun.2019, available on
http://jurisprudencia.ramajudicial.gov.co/WebRelatoria/FileReferenceServlet?corp=cc&ext=&file=33826

> cannot be punished on the grounds of what she or he will possibly do, but for what she or he effectively does. Unless being a drug addict is considered by itself as punishable, even if that behavior does not transcend from the most intimate orbit of the consumer subject, what without a doubt is abusive, as it deals with an orbit extracted precisely from the right [law] and *a fortiori*, fenced for a code which is found in the free determination and in the dignity of the person (autonomous to choose her or his own destiny) the basic pillars of all legal superstructure. Only the conducts that interfere with the orbit of freedom and interests of others, can be legally demandable. It does not fall with our basic legal order the characterization, as criminal, a conduct that, in itself, only plays a role to whom observes it and, in consequence, is subtracted from the normative control which we call right [law] and even more to a legal system respectful towards freedom and human dignity as, without a doubt, is ours."[186]

It is in the opinion of the Court that the way to face the problematic of drug addiction is through education, instead of penalizing the mere fact of being drug dependent. At the same time, the Court created the right to be a drug addict, and located in the same level of protection as other human rights, instead of treating it as another ordinary allowed activity. In this respect, "deliberative democracy recognizes that constitutional rights should be more insulated than ordinary laws, but it does not assume that simply because a claim is a constitutional right it should be completely insulated from deliberation."[187]

[186] Sentence C – 221/94, visited on 14.Jun.2019, available on http://jurisprudencia.ramajudicial.gov.co/WebRelatoria/FileReferenceServlet?corp=cc&ext=&file=33826 (translation by Rosendo J. Alvarez Ayala)

[187] Gutmann, Amy, Thompson, Deniss,, *Why Deliberative Democracy?*, Princeton University Press, 2004, p. 54.

In this decision, the Court extended its interpretations to philosophical arguments to justify the current and future judgments regarding fundamental rights. The Court stated that "the philosophy that informs the Political Chart of 91 is libertarian and democratic and not authoritarian and even less totalitarian."[188] Then the Court continued with "therefore, if from the text of a norm it could break off a conclusion in tune with an ideology of such nature, it would be necessary, in a syntactic harmonizing task that it is up to the interpreter, to extract from the norm a sense in which it will not abruptly break the system but will preserve it."[189]

To conclude this case, the Court declared as constitutional the article 2 (j) under the consideration that the norm was fixing the limits between a lawful activity (personal use) with an unlawful activity (illegal drug trade). On the other hand, following the reasoning commented in previous paragraphs, the Court found unconstitutional the articles 51 and 87 of the Law 30 of 1986. The impact of this decision is on one hand the shaping of the right of the Legislative Branch to limit the notion of personal dosage, and on the other hand the incorporation of the "drug addict" conduct within the scope of the right to the free development of the personality and deserving of constitutional protection.

[188] In the original in Spanish: "La filosofía que informa la Carta Política del 91 es libertaria y democrática y no autoritaria y mucho menos totalitaria." Sentence C – 221/94 visited on 14.Jun.2019, available on http://jurisprudencia.ramajudicial.gov.co/WebRelatoria/FileReferenceServlet?corp=cc&ext=&file=33826 (translation by Rosendo J. Alvarez Ayala)

[189] In the original in Spanish: "Por tanto, si del texto de una norma pudiera desprenderse una conclusión a tono con una ideología de esa naturaleza, sería necesario, en una tarea de armonización sintáctica que incumbe al intérprete, extraer de ella un sentido que no rompa abruptamente el sistema sino que lo preserve. Porque la tarea del juez de constitucionalidad no consiste, ni puede consistir, en resignarse a que la norma básica es un tejido de retazos incongruentes, entre sí inconciliables, sino en eliminar contradicciones y hacerlo de modo razonable." Sentence C – 221/94 visited on 14.Jun.2019, available on http://jurisprudencia.ramajudicial.gov.co/WebRelatoria/FileReferenceServlet?corp=cc&ext=&file=33826 (translation by Rosendo J. Alvarez Ayala)

Another set of examples of the Constitutional Court's power of creating rights are the so called "innominate rights". These rights are the consequence of the Court's interpretation and development of the constitution of 1991, article 94, and other legal concepts that have not been developed before in the legal system, to grant protection at the same level as the fundamental rights.[190]

In this tenure, the Court has defined a "vital minimum", a concept referring to the minimum necessities required to be fulfilled so that the individual can have a "dignifying existence".[191] Under this concept, the Constitutional Court has resolved issues regarding the suspension of medical services,[192] the removal from welfare program,[193] and pension rights[194] among other issues. In each of these decisions, the Court has linked the problematic in question to the principle of human dignity, to expand the constitutional protection to the individuals.

With each of these decisions, the Court has acknowledged its own power to create rights to solve legislative, political, and social questions. As reviewed in the cases included in this Chapter, the Court is prone to pronounce opinions that can very well go beyond the constitutional text, developing the rights expressed in the constitution (as the right to free development of the personality), as well as applying principles such as the human dignity in order to bring new rights to the constitutional order.

[190] Ferreira Causil, Adriana Cristina, *Los Derechos Innominados en Colombia, Reflexiones Sobre su Origen",* p. 104, visited on 18.Jun.2019, available on https://www.academia.edu/8829494/Los_derechos_innominados_en_coLombia_refLexiones_sobre_su_origen

[191] Sentence T – 426/92, visited on 20.Jun.2019, available on http://www.corteconstitucional.gov.co/relatoria/1992/t-426-92.htm

[192] Sentence SU – 111/97 visited on 20.Jun.2019, available on http://www.corteconstitucional.gov.co/relatoria/1997/SU111-97.htm

[193] Sentence T – 716/17, visited on 20.Jun.2019, available on http://www.corteconstitucional.gov.co/relatoria/2017/t-716-17.htm

[194] Sentence T – 581A/11 visited on 20.Jun.2019, available on http://www.corteconstitucional.gov.co/relatoria/2011/t-581a-11.htm

3.2 Mexico.

3.2.1 Before the Structural Reform of 2011.

With the original set-up framed in the Constitution of 1917, the Mexican Federal Judiciary served more like a 3rd instance, or Court of Appeals for general legal issues.[195] In the practice, this was translated into a huge workload of cases fighting the acts of lower courts in the original process, where the courts would only pay attention to any irregularities in the process. An example of this is the sentence of Amparo 3330/23, where the Third Court pronounced a "grammatical and juridical interpretation" clarifying the Civil Procedures Code regarding the notifications made to any strangers of the trail.[196]

In the early times of the Constitution of 1917, the Federal Judiciary only reviewed the authority acts, looking for misinterpretations of laws in the resolutions of ordinary courts. Basically, the only type of guarantees protected by the Federal Judiciary were procedural rights. In an Isolated Amparo resolution, the Supreme Court in plenary resolved about a penal sentences on adultery that, since the lower court sentenced based on indirect evidence where it should have resolved

[195] This is related with the general requirements to file an Amparo claim. According to the Constitution of 1917, article 107 II, the Amparo will only proceed against final sentences. This means that the plaintiff was required to file a claim first to the ordinary court, then fight the resolution in a second instance, to finally take the claim to the Federal Judiciary.

[196] Amparo 3330/23, visited on 09.Jun.2019, available on https://sjf.scjn.gob.mx/sjfsist/Paginas/DetalleGeneralV2.aspx?Epoca=1e3e1fdfdf8fcfd&Apendice=1000000000000&Expresion=%2522notificaci%25C3%25B3n%2522&Dominio=Rubro,Texto&TA_TJ=2&Orden=2&Clase=DetalleTesisBL&NumTE=7026&Epp=20&Desde=-100&Hasta=-100&Index=0&InstanciasSeleccionadas=6,1,2,3,4,5,50,7&ID=817669&Hit=1&IDs=817669,817666,817416,816879,816873,817358,817315,817221,816629,816591,814860,816646,817749,817521,817226,816383,816135,813593,813590,813504&tipoTesis=&Semanario=0&tabla=&Referencia=&Tema=

on direct evidence (according to the applicable penal code) the sentence from the lower court infringed the individual guarantee of the plaintiff.[197]

The previously describe legal issues were the ones resolved by the Federal Judiciary in the early times of the Constitution of 1917. These issues could be easily have been resolve in lower courts, as it was not necessary to interpret the constitution, or the compliance of the law with the constitution. The role played by the Federal Judiciary was only as a supervisor of the lower ranked judges from the States.

In one of the earliest decisions of the Supreme Court in plenary regarding the unconstitutionality of a law, the opinion of the Court was that "the unconstitutionality of a law cannot be invoke, if the plaintiff has tried to support her or his rights in that law."[198] This kind of approach held by the Supreme Court gives the impression that their task was merely to oversee the formalities of the laws, and acts of authorities, without reaching any substantial reasoning of the disputed law, or act.

Similar to the previous case, the Supreme Court decided on the unconstitutionality of the application of the Sanitary Code (and not the law itself). This Code regulated medications in

[197] Informe 1928, p. 95, visited on 09.Jun.2019, available on https://sjf.scjn.gob.mx/sjfsist/Paginas/DetalleGeneralV2.aspx?Epoca=1e3e1fdfdf8fcfd&Apendice=1000000000000&Expresion=%2522garant%25C3%25ADas%2520individuales%2522&Dominio=Rubro,Texto&TA_TJ=2&Orden=2&Clase=DetalleTesisBL&NumTE=4246&Epp=20&Desde=-100&Hasta=-100&Index=0&InstanciasSeleccionadas=6,1,2,3,4,5,50,7&ID=815986&Hit=1&IDs=815986,815902,814922,814901,814883,817452,817272,817022,817723,817514,817508,817442,817409,817406,817400,817278,817148,817131,817034,817361&tipoTesis=&Semanario=0&tabla=&Referencia=&Tema=

[198] Amparo 3728/23, and 3873/23, visited on 09.Jun.2019, available on https://sjf.scjn.gob.mx/sjfsist/Paginas/DetalleGeneralV2.aspx?Epoca=1e3e1fdfdf8fcfd&Apendice=1000000000000&Expresion=%2522inconstitucionalidad%2522&Dominio=Rubro,Texto&TA_TJ=2&Orden=2&Clase=DetalleTesisBL&NumTE=4539&Epp=20&Desde=-100&Hasta=-100&Index=7&InstanciasSeleccionadas=6,1,2,3,4,5,50,7&ID=284492&Hit=151&IDs=288733,288731,288291,287363,287196,810642,285736,285586,285561,285266,284492,279891,283496,283254,283243,810526,282688,281314,810091,280175&tipoTesis=&Semanario=0&tabla=&Referencia=&Tema=

the Federal District, as well as in Federal Territories and States. However, the nature of the Code should only have covered the Federal District, and Federal Territories, as the States have the prerogative to legislate the local health topics. When this Code was applied by the authority to an individual outside of the competence of the Code, the Supreme Court reasoned that since the plaintiff had his address outside of the competence of the Code, it was unconstitutional to apply the rules of the Code to him under the territoriality principle of the law. Again in this case the reasoning only covered the act of application of the law, and only protected the plaintiff.[199]

Under the perspective of protector of individuals guarantees adopted by the Supreme Court during the Constitution of 1917, its role was extremely limited. When the Law on Divorce from the State of Yucatan was challenged on the grounds of infringing a due process right because the law only required the will of one of the spouses to dissolve the matrimony, the Court decided it was unconstitutional because the disputed law did not request the will of the other spouse. In its reasoning, the Court found that this omission infringed one of the spouses' contractual rights, and therefore a due process right.[200] Again, this opinion only protected the plaintiff. If anybody else in the State of Yucatan wanted to receive the same protection, it was

[199] Amparo 846/28, visited on 09.Jun.2019, available on https://sjf.scjn.gob.mx/sjfsist/Paginas/DetalleGeneralV2.aspx?Epoca=1e3e1fdfdf8fcfd&Apendice=1000000000000&Expresion=%2522inconstitucionalidad%2522&Dominio=Rubro,Texto&TA_TJ=2&Orden=2&Clase=DetalleTesisBL&NumTE=4539&Epp=20&Desde=-100&Hasta=-100&Index=10&InstanciasSeleccionadas=6,1,2,3,4,5,50,7&ID=336901&Hit=204&IDs=337058,383826,362521,336901,336798,313490,362195,809445,383773,362111,313427,362032,336699,313296,361766,336586,313261,336529,336519,361550&tipoTesis=&Semanario=0&tabla=&Referencia=&Tema=

[200] Amparo 2601/33, visited on 09.Jun.2019, available on https://sjf.scjn.gob.mx/sjfsist/Paginas/DetalleGeneralV2.aspx?Epoca=1e3e1fdfdf8fcfd&Apendice=1000000000000&Expresion=%2522inconstitucionalidad%2522&Dominio=Rubro,Texto&TA_TJ=2&Orden=2&Clase=DetalleTesisBL&NumTE=4539&Epp=20&Desde=-100&Hasta=-100&Index=13&InstanciasSeleccionadas=6,1,2,3,4,5,50,7&ID=359119&Hit=277&IDs=335249,312204,382451,382431,312139,382372,335081,335004,312077,312075,359344,312070,382197,312041,334905,334866,359119,381978,381972,381898&tipoTesis=&Semanario=0&tabla=&Referencia=&Tema=

necessary to start the legal battle from the first instance. This requirement was an over excessive burden, especially for the members of vulnerable groups.

In the topic of human rights, the Supreme Court started to make reference to this concept only until 1977 using it as a synonym of individual rights.[201] At this point, the Court did not provide any kind of argument nor reasoning expanding the concept or the rights involved in the sentence (liberty, and due process). From the text of the sentence it is clear that the Court only use it as interchangeable term for "individual guarantees", more in the sense of aesthetic writing and not doctrine developing as the Court did not even mention any international treaty on human rights.

From that vague precedent, the jurisprudence of the Supreme Court had virtually zero development in the subject. The Court kept using the term "human rights" as synonym of "individual guarantees", which only appeared in three other sentences. These sentences had the same reach as the one describe in the previous paragraph, making more noticeable that the use of "human rights" functioned as a style of writing more than a legal concept for jurisprudence development.[202]

[201] Amparo 70/77, visited on 09.Jun.2019, available on https://sjf.scjn.gob.mx/sjfsist/Paginas/DetalleGeneralV2.aspx?Epoca=1e3e1fdfdf8fcfd&Apendice=1000000000000&Expresion=%2522derechos%2520humanos%2522&Dominio=Rubro,Texto&TA_TJ=2&Orden=2&Clase=DetalleTesisBL&NumTE=2338&Epp=20&Desde=-100&Hasta=-100&Index=0&InstanciasSeleccionadas=6,1,2,3,4,5,50,7&ID=236081&Hit=1&IDs=236081,252992,239695,205046,204050,202375,202374,200040,200039,200038,199809,195234,195104,194983,194951,194175,191980,191978,188600,188020&tipoTesis=&Semanario=0&tabla=&Referencia=&Tema=

[202] Registries 239695, 205046, and 204050, visited on 09.Jun.2019, available on https://sjf.scjn.gob.mx/sjfsist/Paginas/ResultadosV2.aspx?Epoca=1e3e1fdfdf8fcfd&Apendice=1000000000000&Expresion=%22derechos%20humanos%22&Dominio=Rubro,Texto&TATJ=2&Orden=2&Clase=TesisBL&bc=Jurisprudencia.Resultados&TesisPrincipal=TesisPrincipal&InstanciasSeleccionadas=6,1,2,3,4,5,50,7&Hits=20&Index=1&LND=204050

From 1990, when the Comisión Nacional de Derechos Humanos (National Commission on Human Rights, from now on CNDH) was funded, the Federal Judiciary dedicated its resolutions on human rights to limit the sphere of action of the CNDH. For example, in the Amparo 590/98, a Circuit Court resolved that "the recommendations of the National Commission on Human Rights do not hold the character of authority for the effects of the Amparo trail."[203] With this, the Circuit Court established that the recommendations of the CNDH are not enforceable, and do not nullify or modify any authority act.

In the same line, another Circuit Court also resolved that "the recommendations of any commission on human rights, may it be national or international, produce the causal link of rejection"[204] for the Amparo trail. With resolutions like these, the Federal Judiciary diminished the role of the CNDH (and any other commission on human rights), either by interpreting the normative of the CNDH in such a way that the result would only limit the reach of the CNDH, or by interpreting the constitution in a way where the CNDH had no place to assist, even in a subsidiary form, to the protection of individual guarantees or "human rights".

The use of an international treaty on human rights had no place in the jurisprudence of the Federal Judiciary, until mid-2000, when a Circuit Court used the ACHR as a point of

[203] Amparo 590/98, visited on 09.Jun.2019, available on https://sjf.scjn.gob.mx/sjfsist/Paginas/DetalleGeneralV2.aspx?Epoca=1e3e1fdfdf8fcfd&Apendice=1000000000000&Expresion=%2522derechos%2520humanos%2522&Dominio=Rubro,Texto&TA_TJ=2&Orden=2&Clase=DetalleTesisBL&NumTE=2338&Epp=20&Desde=-100&Hasta=-100&Index=0&InstanciasSeleccionadas=6,1,2,3,4,5,50,7&ID=194175&Hit=16&IDs=236081,252992,239695,205046,204050,202375,202374,200040,200039,200038,199809,195234,195104,194983,194951,194175,191980,191978,188600,188020&tipoTesis=&Semanario=0&tabla=&Referencia=&Tema=

[204] Amparo 136/2002, visited on 09.Jun.2019, available on https://sjf.scjn.gob.mx/sjfsist/Paginas/DetalleGeneralV2.aspx?Epoca=1e3e1fdfdf8fcfd&Apendice=1000000000000&Expresion=%2522derechos%2520humanos%2522&Dominio=Rubro,Texto&TA_TJ=2&Orden=2&Clase=DetalleTesisBL&NumTE=2338&Epp=20&Desde=-100&Hasta=-100&Index=1&InstanciasSeleccionadas=6,1,2,3,4,5,50,7&ID=183815&Hit=26&IDs=187298,186441,186307,185617,185619,183815,183848,183875,183897,183899,183900,183901,183557,183597,182919,182764,182538,182460,180995,181020&tipoTesis=&Semanario=0&tabla=&Referencia=&Tema=

comparison to decide if the Federal Penal Code infringed a due process right.[205] According to the decision by the Court, the Federal Penal Code provided insufficient mechanisms of defense in relation with those granted by the ACHR article 8.2. Whoever, the emphasis to the human rights in general, and to the international treaties on human rights was still very weak.

The weakness which the Federal Judiciary was approaching the ACHR is noticeable in the Amparo 282/2007, where the articles 14 and 17 of the Constitution of 1917 were challenged against the article 8 (1) of the ACHR.[206] The opinion of the Second Court argued that the rights in the article 8 (1) were in harmony with the articles 14 and 17 of the constitution, and the Court determined that the article 8(1) did not get "to the extreme to broaden the prerogatives of audience, and access to the justice".[207] In this decision, the Court was reluctant to explore in depth the provision of the ACHR, in its judgment the Court limit itself to upkeep the text of the constitution.

From the analysis of the different cases from the Federal Judiciary it is possible to understand the line that the courts were following: a strict interpretation of the black letter law, without much room for historical, philosophical, or international interpretations. Even when the courts started to use the term "human rights", and introduced the ACHR as part of their decisions, this

[205] Amparo 402/2004, visited on 09.Jun.2019, available on https://sjf.scjn.gob.mx/sjfsist/Paginas/DetalleGeneralV2.aspx?Epoca=1e3e1fdfdf8fcfd&Apendice=1000000000000&Expresion=%2522derechos%2520humanos%2522&Dominio=Rubro,Texto&TA_TJ=2&Orden=2&Clase=DetalleTesisBL&NumTE=2338&Epp=20&Desde=-100&Hasta=-100&Index=2&InstanciasSeleccionadas=6,1,2,3,4,5,50,7&ID=178269&Hit=49&IDs=181191,225253,180582,180735,180294,180321,179533,179233,178269,177815,176961,177020,176764,176527,176086,175379,173819,173251,173368,172814&tipoTesis=&Semanario=0&tabla=&Referencia=&Tema=

[206] Amparo 282/2007, visited on 09.Jun.2019, available on https://sjf.scjn.gob.mx/sjfsist/Paginas/DetalleGeneralV2.aspx?Epoca=1e3e1fdfdf8fcfd&Apendice=1000000000000&Expresion=%2522derechos%2520humanos%2522&Dominio=Rubro,Texto&TA_TJ=2&Orden=2&Clase=DetalleTesisBL&NumTE=2338&Epp=20&Desde=-100&Hasta=-100&Index=3&InstanciasSeleccionadas=6,1,2,3,4,5,50,7&ID=171789&Hit=65&IDs=172641,171911,172050,171601,171789,171515,170900,170941,170717,170750,170751,170470,170180,170067,170126,169584,169585,169541,169426,169499&tipoTesis=&Semanario=0&tabla=&Referencia=&Tema=

[207] Idem.

was only at a shallow level. In only one case, one of the courts that integrates the Federal Judiciary resolved that a disposition of a federal law was contrary to the ACHR. However, the Federal Judiciary did not issue any opinion were they found that the ACHR, or any other international treaty on human rights, provided a broader protection to the individual guarantees.

3.2.2 After the Structural Reform of 2011.

With the constitutional reform, not only the prism used to interpret the individual guarantees changed into an international human rights system approach. The behavior of the Federal Judiciary also changed. Some of these changes are based on the interpretation of the reformed text of the article 1. However, other important changes are based on the principle of free development of the personality, without this principle being a right included in the constitution, or in any binding treaty.

The first occasion in which the Supreme Court in plenary session took the opportunity to elaborate its discourse regarding the constitutional reforms is the Amparo 315/2010, related to the nature of the right to health resolved in March 2011 (months before the publication of the reforms).[208] In this decision, the Supreme Court established:

> "Our country is going through a stage of an immense transformation in which the way of identifying the normative substance of the Political Constitution of the United Mexican States and its consequences for the mechanic of the functioning of the Amparo trail. One of the

[208] P. XV/2011, Amparo 315/2010, visited on 08.Jun.2019, available on https://sjf.scjn.gob.mx/sjfsist/Paginas/DetalleGeneralV2.aspx?Epoca=1e3e1fdfd000000&Apendice=1000000000000&Expresion=%2522derechos%2520humanos%2522&Dominio=Rubro,Texto&TA_TJ=2&Orden=2&Clase=DetalleTesisBL&NumTE=2342&Epp=20&Desde=-100&Hasta=-100&Index=7&InstanciasSeleccionadas=6,1,2,3,4,5,50,7&ID=161331&Hit=154&IDs=162527,162555,162487,162598,162597,162472,162163,162211,161812,161822,161494,161167,161410,161331,161368,160870,160636,160694,160697,160545&tipoTesis=&Semanario=0&tabla=&Referencia=&Tema=

specific manifestations of this phenomena is the alteration of the comprehension, until now traditional, of the rights as those related to the health or to the education. This is, in spite of the text consecrated in the Constitution, these rights have been traditionally understood as mere declarations of intentions, without much real binding power on the actions of the citizens or the public powers. It has been understood that its effective consecutiveness was subordinated to specific legislative actions and administrations, in which absence the Constitutional Judges could not do much. Now, instead, the departure point is from the premise that, even in a constitutional democratic State the ordinary legislator and the governmental and administrative authorities have a very broad margin to embody their vision of the Constitution and, in particular, to display in one direction or another the public policies and regulations that they must give to body to the effective guarantee of the rights, the Constitutional Judge must contrast her or his labor with the standards contained in the very Supreme Law and in the treaties on human rights which are part of the normativity and bind all state authorities."[209]

With this reasoning, the Supreme Court made clear that the nature of the human rights if it is not specified in the constitution, it should be look upon the international treaties on human

[209] In the origitnal in Spanish: "Nuestro país atraviesa una etapa de intensa transformación en la manera de identificar la sustancia normativa de la Constitución Política de los Estados Unidos Mexicanos y sus consecuencias para la mecánica del funcionamiento del juicio de amparo. Una de las manifestaciones específicas de este fenómeno es la alteración de la comprensión, hasta ahora tradicional, de derechos como el relativo a la salud o a la educación. Esto es, a pesar de su consagración textual en la Carta Magna, estos derechos han sido tradicionalmente entendidos como meras declaraciones de intenciones, sin mucho poder vinculante real sobre la acción de ciudadanos y poderes públicos. Se ha entendido que su efectiva consecución estaba subordinada a actuaciones legislativas y administraciones específicas, en cuya ausencia los Jueces Constitucionales no podían hacer mucho. Ahora, en cambio, se parte de la premisa de que, aunque en un Estado constitucional democrático el legislador ordinario y las autoridades gubernamentales y administrativas tienen un margen muy amplio para plasmar su visión de la Constitución y, en particular, para desplegar en una dirección u otra las políticas públicas y regulaciones que deben dar cuerpo a la garantía efectiva de los derechos, el Juez Constitucional puede contrastar su labor con los estándares contenidos en la propia Ley Suprema y en los tratados de derechos humanos que forman parte de la normativa y vinculan a todas las autoridades estatales.", visited on 08.Jun.2019, available on https://sjf.scjn.gob.mx/sjfsist/Paginas/DetalleGeneralV2.aspx?Epoca=1e3e1fdfd000000&Apendice=1000000000000&Expresion=%2522derechos%2520humanos%2522&Dominio=Rubro,Texto&TA_TJ=2&Orden=2&Clase=DetalleTesisBL&NumTE=2342&Epp=20&Desde=-100&Hasta=-100&Index=7&InstanciasSeleccionadas=6,1,2,3,4,5,50,7&ID=161331&Hit=154&IDs=162527,162555,162487,162598,162597,162472,162163,162211,161812,161822,161494,161167,161410,161331,161368,160870,160636,160694,160697,160545&tipoTesis=&Semanario=0&tabla=&Referencia=&Tema=

rights. The Court also made clear that previous to the reform the Federal Judiciary could only interpret the rights according to the black letter of the law. This means that if an individual right (like the ones exemplified in the own Court's resolution) were not developed by the legislator, then there was nothing the Federal Judiciary could do to protect the plaintiff of the Amparo trail. On an underlying interpretation of the aforementioned decision, the Supreme Court is taking the role of shaping the human rights in the cases in which the Legislative Branch has not acted (or is in the middle of a long process of debate and has not come to an agreement in the form of a law). However, "to presume that we know what the right resolution is before we hear from others who will also be affected by our decisions is no only arrogant but also unjustified in light of the complexity of the issues and interests that are so often at stake."[210]

After the enforcement of the constitutional reforms of 2011, and following the opinion where the Supreme Court established the international treaties as a source for interpretation of the human rights, the Federal Judiciary defined "human dignity" in its jurisprudence.[211] The Federal Judiciary defined "human dignity" as the origin, the essence, and the goal of all the human rights.[212] With this extremely broad definition, the Federal Judiciary will resolve all the subsequent cases in which the human dignity can be used as an argument. One of the implications of having such a broad definition are that the Courts will have *carte blanche* to reason in whatever direction they might want, to favor political advances in sensitive, or controversial topics. Whenever an issue arises that can be related or linked to a human right,

[210] Gutmann, Amy, Thompson, Deniss,, *Why Deliverative Democracy?*, Princeton University Press, 2004. p. 12
[211] I.5o.C. J/30 (9a.), Amparo 309/2010, 657/2010, 286/2010, 371/2011, 504/2011, visited on 11.Jun.2019, available on https://sjf.scjn.gob.mx/sjfsist/Paginas/DetalleGeneralV2.aspx?Epoca=1e3e1fdfd000000&Apendice=1000000000000&Expresion=%2522derechos%2520humanos%2522&Dominio=Rubro,Texto&TA_TJ=2&Orden=2&Clase=DetalleTesisBL&NumTE=2342&Epp=20&Desde=-100&Hasta=-100&Index=7&InstanciasSeleccionadas=6,1,2,3,4,5,50,7&ID=160870&Hit=156&IDs=162527,162555,162487,162598,162597,162472,162163,162211,161812,161822,161494,161167,161410,161331,161368,160870,160636,160694,160697,160545&tipoTesis=&Semanario=0&tabla=&Referencia=&Tema=
[212] Ibid.

the Federal Judiciary can use this concept crystalized in the jurisprudence to impulse a political agenda, avoiding the legislative process by positioning the human activity as a human right.

In the decision 1a. CCXV/2014 (10a.), the Supreme Court resolved an issue related to the definition of marriage, in the context of same-sex couples. The challenged law, the Civil Code for the State of Oaxaca, established "to perpetuate the specie" as the aim of the contract of matrimony.[213] The Supreme Court found that the challenged article infringed the right to the free development of the personality as "in the topic, join different aspects from genetics, biological, and others inherent to the human nature which might impede the procreation and, on one hand, implicitly generates a violation to the principle of equality, because from the starting point of that purpose a different treatment is given to homosexual couples in relation to heterosexual couples, by excluding them from the possibility to contract marriage…"[214]

With this decision, the Supreme Court enlarged the equality rights to the LGBTI community, by updating the definition of the marriage figure into the current social context. By itself, this decision is not creating a human right, but extending the understanding of the equality rights. The obscure part of this resolution is the use of the free development of the personality, as a right and as a vehicle to justify the change in the perception of a traditional legal figure.

[213] Código Civil para el Estado de Oaxaca, article 143 first paragraph, visited on 08.Jun.2019, available on https://sjf.scjn.gob.mx/sjfsist/Paginas/DetalleGeneralV2.aspx?Epoca=1e3e10000000000&Apendice=1000000000000&Expresion=%2522libre%2520desarrollo%2520de%2520la%2520personalidad%2522&Dominio=Rubro,Texto&TA_TJ=2&Orden=2&Clase=DetalleTesisBL&NumTE=86&Epp=20&Desde=-100&Hasta=-100&Index=0&InstanciasSeleccionadas=6,1,2,50,7&ID=2006534&Hit=16&IDs=165694,165696,165698,165813,165822,163592,162926,162645,161268,2001903,2002360,2002401,2004199,2005339,2005338,2006534,2008086,2008496,2008495,2008494&tipoTesis=&Semanario=0&tabla=&Referencia=&Tema=

[214] 1a. CCXV/2014 (10a.), Amparo 457/2012, visited on 08.Jun.2019, available on https://sjf.scjn.gob.mx/sjfsist/Paginas/DetalleGeneralV2.aspx?Epoca=1e3e10000000000&Apendice=1000000000000&Expresion=%2522libre%2520desarrollo%2520de%2520la%2520personalidad%2522&Dominio=Rubro,Texto&TA_TJ=2&Orden=2&Clase=DetalleTesisBL&NumTE=86&Epp=20&Desde=-100&Hasta=-100&Index=0&InstanciasSeleccionadas=6,1,2,50,7&ID=2006534&Hit=16&IDs=165694,165696,165698,165813,165822,163592,162926,162645,161268,2001903,2002360,2002401,2004199,2005339,2005338,2006534,2008086,2008496,2008495,2008494&tipoTesis=&Semanario=0&tabla=&Referencia=&Tema=

The Federal Judiciary has progressively develop a series of concepts into fundamental rights. Such is the case of "human dignity". Once the definition explained in the previous paragraph got into the jurisprudence system, a Circuit Court took the provision in the article 1 of the Constitution prohibiting all discriminatory acts that attempt to diminish the human dignity, and transformed it into a fundamental right to human dignity.[215] With this decision, the Federal Judiciary took a normative principle and transformed into a fundamental right itself, beyond the intentions of the reform, and beyond the UDHR, and the ACHR. With this decision by the Federal Judiciary, the Mexican constitution has a whole new right: the right to human dignity. This right cannot be found in the constitution, but only in the work of the Federal Judiciary.

Under this reformed perspective, the Supreme Court plenary also reviewed the binding character of the IACtHR decisions. In the resolution 912/2010, the Supreme Court decided that when the Mexican State has been part of a controversy or litigation under the jurisdiction of the IACtHR

> "…the decision of the body [IACtHR], along with all their considerations, constitutes *res judicata*, corresponding exclusively to that international organ to evaluate each and every one of the exceptions formulated by the Mexican State, as long as they are [the exceptions] in the competence of the same Court or with the reserves and exceptions formulated by the former [the Mexican State]…the resolutions pronounced by that international instance are obligatory for all the organs of the Mexican State, having it [the Mexican State] being part of the litigation,

[215] I.8o.C.41 K (9a.), Amparo 617/2009, visited on 11.Jun.2019, available on https://sjf.scjn.gob.mx/sjfsist/Paginas/DetalleGeneralV2.aspx?Epoca=1e3e1fdfd000000&Apendice=1000000000000&Expresion=%2522derechos%2520humanos%2522&Dominio=Rubro,Texto&TA_TJ=2&Orden=2&Clase=DetalleTesisBL&NumTE=2342&Epp=20&Desde=-100&Hasta=-100&Index=8&InstanciasSeleccionadas=6,1,2,3,4,5,50,7&ID=160554&Hit=161&IDs=160554,2000012,2000015,160480,160482,160488,160525,160526,160584,160589,160338,160344,2000170,2000157,2000129,2000085,2000084,2000074,2000073,2000072&tipoTesis=&Semanario=0&tabla=&Referencia=&Tema=

being [the resolutions] binding for the Judicial Branch not only in the operative paragraphs of the specific resolution, but in the totality of the criteria within the decision"[216]

With this decision, the Supreme Court admits the jurisprudence of the IACtHR, but limiting this jurisprudence only to those cases in which Mexico has been part of the litigation. This stance of the Supreme Court yield some of its powers of interpretation of international treaties, but only to the extent in which the Mexican State has tried to prove that the norm related to human rights was within the aim of the ACHR.

After setting these precedents and in concordance with the constitutional reforms, the Supreme Court has produced jurisprudence using this new (to the Supreme Court) approach to the fundamental rights. One of the most controversial decisions, which evolved into jurisprudence by reiteration, is the one related to the recreational use of marihuana.[217]

[216] From the original in Spanish: "… la sentencia que se dicta en esa sede, junto con todas sus consideraciones, constituye cosa juzgada, correspondiéndole exclusivamente a ese órgano internacional evaluar todas y cada una de las excepciones formuladas por el Estado Mexicano, tanto si están relacionadas con la extensión de la competencia de la misma Corte o con las reservas y salvedades formuladas por aquél.[…] las resoluciones pronunciadas por aquella instancia internacional son obligatorias para todos los órganos del Estado Mexicano, al haber figurado como parte en un litigio concreto, siendo vinculantes para el Poder Judicial no sólo los puntos de resolución concretos de la sentencia, sino la totalidad de los criterios contenidos en ella." In P. LXV/2011 (9a.), 912/2010, visited on 12.Jun.2019, available on https://sjf.scjn.gob.mx/sjfsist/Paginas/DetalleGeneralV2.aspx?Epoca=1e3e1fdfd000000&Apendice=1000000000000&Expresion=%2522derechos%2520humanos%2522&Dominio=Rubro,Texto&TA_TJ=2&Orden=2&Clase=DetalleTesisBL&NumTE=2342&Epp=20&Desde=-100&Hasta=-100&Index=8&InstanciasSeleccionadas=6,1,2,3,4,5,50,7&ID=160482&Hit=165&IDs=160554,2000012,2000015,160480,160482,160488,160525,160526,160584,160589,160338,160344,2000170,2000157,2000129,2000085,2000084,2000074,2000073,2000072&tipoTesis=&Semanario=0&tabla=&Referencia=&Tema= (translation by Rosendo J. Alvarez Ayala).

[217] 1a./J. 10/2019, visited on 08.Jun.2019, available on https://sjf.scjn.gob.mx/sjfsist/Paginas/DetalleGeneralV2.aspx?Epoca=1e3e10000000000&Apendice=1000000000000&Expresion=%2522cannabis%2522&Dominio=Rubro,Texto&TA_TJ=2&Orden=1&Clase=DetalleTesisBL&NumTE=5&Epp=20&Desde=-100&Hasta=-100&Index=0&InstanciasSeleccionadas=6,1,2,50,7&ID=2019365&Hit=1&IDs=2019365,2018503,2018502,2013142,2008839&tipoTesis=&Semanario=0&tabla=&Referencia=&Tema=

The first Amparo sentence related to the personal use of marihuana for recreational purposes was issue in 2015.[218] Afterwards, the Supreme Court resolved on the same issue in the same direction in 2016, twice in 2018, and finally in 2019 the 5th uninterrupted Amparo sentences in the same terms was issue to crystalize the opinion as a jurisprudence by reiteration.

In this jurisprudential criteria, the Supreme Court analyzed the absolute prohibition on the use of marihuana for recreational purposes, as provided by the *Ley General de Salud* (General Law on Health). The General Law on Health establishes a prohibition to the Health Secretary to issue authorizations to perform activities related to the personal use of marihuana in these terms:

> "…self-consumption with ludic or recreational ends – to plant, cultivate, harvest, preparer, posses, and transport – the stupefacient "cannabis" (sativa, indica, american or marihuana, its resin, prepared products, and seeds) and the psychotropic "THC" […] are unconstitutional, as these prohibitions cause an unnecessary and disproportionate affectation to the right to free development of the personality. In effect, this measure is not necessary because there are alternative means to the absolute prohibition to the ludic consumption of marihuana which are equally suitable to protect the public health and order, but that affect in less degree to the fundamental right in question; same wise, the law causes a very intense affectation to the right to the free development of the personality, in comparison with the minimum degree of protection to the public health and public order that such measurement reaches."[219]

[218] 1a. CCLXXIV/2016 (10a.) Amparo 237/2014,visited on 08.Jun.2019, available on https://sjf.scjn.gob.mx/sjfsist/Paginas/DetalleGeneralV2.aspx?Epoca=1e3e10000000000&Apendice=1000000000000&Expresion=%2522cannabis%2522&Dominio=Rubro,Texto&TA_TJ=2&Orden=1&Clase=DetalleTesisBL&NumTE=5&Epp=20&Desde=-100&Hasta=-100&Index=0&InstanciasSeleccionadas=6,1,2,50,7&ID=2013142&Hit=4&IDs=2019365,2018503,2018502,2013142,2008839&tipoTesis=&Semanario=0&tabla=&Referencia=&Tema=

[219] In the original in Spanish: "el autoconsumo con fines lúdicos o recreativos –sembrar, cultivar, cosechar, preparar, poseer y transportar– del estupefaciente "cannabis" (sativa, índica y americana o marihuana, su resina, preparados y semillas) y del psicotrópico "THC" […], son inconstitucionales, toda vez que provocan una afectación innecesaria y desproporcionada en el derecho al libre desarrollo de la personalidad. En efecto, la

With this reasoning, the Supreme Court created the right to self-consumption of marihuana for recreational purposes, without establishing any limits, nor guidelines regarding to the implementation of the created right. It is not clear where the raw materials (specifically the seeds) are going to be acquired from. Furthermore, there are no parameters on quantities, for cultivation and harvesting, or other health and safety considerations. This decision only produced a new form of right originated from the free development of the personality, and by being within the specter of a fundamental right it also has constitutional protection to the highest level. If the goal was to legalize the personal use of marihuana for recreational purposes, it should have been negotiated on the Legislative table as "a deliberative process should contribute to fulfilling the central political function of making good decisions and laws."[220]

The implications of the jurisprudence 1a./J. 10/2019 is the removal of a topic of relevance for the general public from the deliberative process of a constitutional democracy. With this criteria, the requirement to pronounce a General Declaratory of Unconstitutionality has been fulfilled. However, according to the Supreme Court's website it is in the middle of a bureaucratic process.[221] Once this process is completed, the Congress will have to reform the

medida no es necesaria debido a que existen medios alternativos a la prohibición absoluta del consumo lúdico de marihuana que son igualmente idóneos para proteger la salud y el orden público, pero que afectan en menor grado al derecho fundamental en cuestión; asimismo, la ley ocasiona una afectación muy intensa al derecho al libre desarrollo de la personalidad, en comparación con el grado mínimo de protección a la salud y al orden público que alcanza dicha medida.", 1a./J. 10/2019, visited on 08.Jun.2019, available on https://sjf.scjn.gob.mx/sjfsist/Paginas/DetalleGeneralV2.aspx?Epoca=1e3e10000000000&Apendice=1000000000000&Expresion=%2522cannabis%2522&Dominio=Rubro,Texto&TA_TJ=2&Orden=1&Clase=DetalleTesisBL&NumTE=5&Epp=20&Desde=-100&Hasta=-100&Index=0&InstanciasSeleccionadas=6,1,2,50,7&ID=2019365&Hit=1&IDs=2019365,2018503,2018502,2013142,2008839&tipoTesis=&Semanario=0&tabla=&Referencia=&Tema= (translation by Rosendo J. Alvarez Ayala).

[220] Gutmann, Amy, Thompson, Deniss,, *Why Deliverative Democracy?*, Princeton University Press, 2004, p. 22

[221] The last update (13.Mar.2019) indicates that the Supreme Court was required to integrate a resolution from a Minister of the Supreme Court to integrate his or her vote to complete the file. Visited on 18.Jun.2019,

General Law of Health to match the jurisprudence. The Congress will have to take into account the self-consumption of marihuana for recreational purposes as part of the fundamental rights protected by the constitution, as "it is question of judicial review, especially in tests of proportionality, to what extent fundamental rights limit regulation by the legislature."[222]

It is important to note that, in 2006 was the first time that it was brought to the Congress an initiative of reform of the General Law of Health, to decriminalize and to legalize the use of marihuana for medical purposes. This reform was discussed and approved by the Congress, but the President of Mexico at the time Vicente Fox Quezada vetoed the initiative of reform.[223] After the initiative was vetoed, the Senate retook it for discussion during the presidential mandate of Felipe Calderón Hinojosa in November 2008.[224] Afterwards, the initiative was turned to the unresolved topics, and was kept there until November 2012.[225] The initiative ended up being discussed, and approved by 98 votes against 7 and 1 abstinence, in the Senate until December 2016, during the period of Enrique Peña Nieto.[226] Finally, it was published in the Official Diary of the Federation in June 2017.[227] It took 11 years from the first time that the initiative was approved by the Legislative Branch, but due to the Executive's veto powers, and then internal bureaucracy of the Congress it was delayed even more. In contrast, with the judicial activism, the recreational use of marihuana took only four years to become a

available on
http://www2.scjn.gob.mx/denunciasincumplimiento/ConsultaGeneralesAcuerdos.aspx?asuntoID=238513

[222] Kingreen, Thorsten, "*Rule of Law versus Welfare State",* in Debates in German Public Law, Pünder, Hermann, Waldhoff, Christian, eds. Hart Publishing, UK, 2014, p. 113.

[223]Official website of the Senate, visited on 02.Jun.2019, available on
http://www.senado.gob.mx/64/gaceta_del_senado/documento/18567

[224] Official website of the Senate, visited on 02.Jun.2019, available on
http://www.senado.gob.mx/64/gaceta_del_senado/documento/18567

[225] Official website of the Senate, visited on 02.Jun.2019, available on
http://www.senado.gob.mx/64/gaceta_del_senado/documento/38378

[226] Official website of the Senate, visited on 02.Jun.2019, available on
http://www.senado.gob.mx/64/gaceta_del_senado/documento/68065

[227]Official Diary of the Federation, visited on 02.Jun.2019, available on
http://dof.gob.mx/nota_detalle.php?codigo=5487335&fecha=19%2F06%2F2017

jurisprudential criteria. This provides a strong hint that the right to free development of the personality, although not explicitly granted by the constitution or any other binding treaty, can be used to push public policies that otherwise would take several presidential terms to be resolve by legislative means.

Removing this kind of topics diminishes the democratic debate and participation. Deliberative democracy has an instrumental value which is to allow "citizens to make the most justifiable political decisions"[228], and an expressive value of justifying decisions under the principle of mutual respect between politicians and citizens.[229]

Deliberative processes will strengthen legitimacy, as they bring closer decision-makers and the citizens, neglecting public deliberation is treating citizens in a paternalistic way, instead of members of a democratic State[230]

The Federal Judiciary has also incurred in the interpretation of right to a "vital minimum", which is not an explicit right in the constitution but it has been developed in different court houses (like Colombia) and in the theory.[231] The Federal Judiciary arrived to the conclusion that the right to the vital minimum exist as a fundamental right in the Mexican constitutional

[228] Gutmann, Amy, Thompson, Deniss,, *Why Deliverative Democracy?*, Princeton University Press, 2004. p. 21, citing Estlund, David, *Beyond Fairness and Deliberation: The Epistemic Dimension of Democratic Authority*, in Bohman, J. and Rehg, W., eds., Deliberative Democracy, MIT Press, Cambridge, 1997, pp. 173-204.
[229] Gutmann, Amy, Thompson, Deniss,, *Why Deliverative Democracy?*, Princeton University Press, 2004, pp. 21-22.
[230] Gutmann, Amy, Thompson, Deniss,, *Why Deliverative Democracy?*, Princeton University Press, 2004, p. 45.
[231] Escobar Roca, Guillerma, *"Derechos Sociales y Tutela Antidiscriminatoria"*, Thomson Reuters, 2012, p. 1579, visited on 19.Jun.2019, available on https://archivos.juridicas.unam.mx/www/bjv/libros/11/5154/25.pdf

system, as the result of the interpretation of the articles 1, 3, 4, 13, 25, 27, 31 IV, and 123.[232][233] The Federal Judiciary has stated that "these prerogatives which, as a whole or unit, form the base or departure point from which the individual counts with the minimum conditions to develop an autonomous life plan and active participation in the democratic life of the State (education, housing, health, dignified salary, social security, environment, etc.)…"[234] The Court continues, "…therefore, as with all indeterminate juridical concepts, it requires to be interpreted by the judge, taking into consideration the necessary elements for its adequate application to particular cases, consequently it must be assess that the concept is not reduced to a quantitative perspective, but on the contrary, since its content goes in function of the particular conditions of each person, in this way every governed has a different vital minimum…"[235]

In virtue of the decisions mentioned in the previous paragraph, there is a new fundamental right in ever-growing catalog of human rights which ended up being extremely vague. The Federal Judiciary decided to embrace the right to the vital minimum, but ended up in a way in which is obscure what this minimum is. From these decisions, the vital minimum seems more like a principle than a right. By stating that each person has its own vital minimum, the Court leaves

[232] 1a. XCVII/2007, Amparo 1780/2006, visited on 10.Jun.2019, available on https://sjf.scjn.gob.mx/sjfsist/Paginas/DetalleGeneralV2.aspx?Epoca=1e3e10000000000&Apendice=1000000000000&Expresion=%2522m%25C3%25ADnimo%2520vital%2522&Dominio=Rubro,Texto&TA_TJ=2&Orden=1&Clase=DetalleTesisBL&NumTE=57&Epp=20&Desde=-100&Hasta=-100&Index=2&InstanciasSeleccionadas=6,1,2,50,7&ID=172545&Hit=56&IDs=159817,2005198,2004683,2004088,2004082,2004081,2004106,2002743,2002744,2001317,2000225,161233,168160,168137,172546,172545,172348&tipoTesis=&Semanario=0&tabla=&Referencia=&Tema=

[233] The referred articles are related to the right to education, equality, equality before the law, State competence in national development, property, taxes, and right to work.

[234] .4o.A.12 K (10a.), Amparo 667/2012, visited on 10.Jun.2019, available on https://sjf.scjn.gob.mx/sjfsist/Paginas/DetalleGeneralV2.aspx?Epoca=1e3e10000000000&Apendice=1000000000000&Expresion=%2522m%25C3%25ADnimo%2520vital%2522&Dominio=Rubro,Texto&TA_TJ=2&Orden=1&Clase=DetalleTesisBL&NumTE=57&Epp=20&Desde=-100&Hasta=-100&Index=2&InstanciasSeleccionadas=6,1,2,50,7&ID=2002743&Hit=48&IDs=159817,2005198,2004683,2004088,2004082,2004081,2004106,2002743,2002744,2001317,2000225,161233,168160,168137,172546,172545,172348&tipoTesis=&Semanario=0&tabla=&Referencia=&Tema=

[235] Ibid.

the governed in uncertainty. What is this vital minimum after all? To try to figure this out it is necessary to look into other laws to see how this right to the vital minimum applies in reality. If to look on the minimum wage law for the 2019, the minimum salary per day is $102.68 MXN (which roughly translates to $5.30 USD approx.)[236]. In Mexico, by August 2018, around 50% of the working force lived with up to two minimum wages.[237] With a globalized market, this amount of daily wage is far from accomplishing the goal of providing an active participation in the democratic life of the country. These decisions look more like a way in which the Judiciary is complying with the internationally accepted rights, but only in paper as it has not transcended to real protection of the right incorporated to the constitutional order.

[236] Official website of Comisión de Salarios mínimos, visited on 01.Jun.2019, available on https://www.gob.mx/cms/uploads/attachment/file/426395/2019_Salarios_Minimos.pdf
[237] As reported by the newspaper El Universal, visited on 01.Jun.2019, available on https://www.eluniversal.com.mx/cartera/el-50-de-los-mexicanos-gana-hasta-dos-salarios-minimos

Conclusions

The path to provide and protect individual rights has been, and will be a rough one. From national perspectives to the international approach, it has been a constant negotiation on what should be protected and how.

In the Latin American context, this struggled has been marked by authoritarian regimes backed up by constitutional designs that have empowered the tyrants. Both, Mexico and Colombia have suffered the reign of overpowered Executive Branches with one excessively powerful individual at front. This is translated in constitutions in the form of either very scarce individual rights or in a limit (and most of the times inefficient) judicial protection.

As studied in Chapter One, the approach of the IACtHR can be considered more conservative at the moment of resolving a complaint (although not so much when issuing an advisory opinion). However, the constant use of soft law makes problematic the acceptance of it jurisprudence, and puts into serious questions the future of the Inter-American system due to its dubious legitimacy of its interpretative method.

After the development of the international system of human rights law, some rays of hope have shined in the region. However, this hope can easily be turned into another form of non-democratic devise that can be used by the powerful to advance their ambitions, waving the flag of human rights. The decision-making process is now in jeopardy, as the courts are adjudicating practically all social issues, and covered them under the human rights approach, without a deliberative process natural to a constitutional democracy. On the one hand, "the acceptance of the principle of respect for the human rights itself necessarily also means that there are

substantive limits to what authorities can do to individuals […] there are some opportunities that must be provided to citizens, and the language of opportunity does not translate easily into the language of limits."[238] On the other hand, once an activity is judged to be part of the catalog of human rights, it is no longer possible to freely deliberate, as the activity is now considered next to sacred with all the positive and negative implications.

The examples of the resolutions from the jurisprudential systems of Mexico, and Colombia discussed in Chapter Three, give a broad perspective of the inclination of the Judiciaries in Latin America to overtake the law-making process from the more political Branches. This tendency can be better understood from the Historical overview provided in Chapter Two, were it was made clear how the Judiciary was built to be weak in both countries, and was kept weak for many constitutional arrangements. However, this new stance (which both jurisdictions share) can be easily turn into a double-edged sword for the individuals, and the society as a whole.

As we are advancing in our way through the 21st century, the discourse of human rights is taking a way in which now all controversial topics are trying to be solved by applying a human rights-based approach as if it was a panacea. When the deliberation of the citizens is transformed into the deliberation of the judges "our disagreement on the interpretation of these constitutional rights will simply replicate the prior disagreement over the moral issues that these rights were supposed to resolved. We will not only disagree over whether a proposed law transcends a substantive limit imposed by a constitutional right but, even more fundamentally, over what interpretation of a right constitutes a *limit* on the exercise of state authority in the

[238] Sadurski, Wojciech, *Equality and Legitimacy*, Oxford University Press, USA, 2008, p 35.

first place."[239] The free development of the personality should be handle with care, and not as a *carte blanche* to solve, or workaround, social issues without a democratic approach.

We need to look at the moral issues that constitutional rights are intended to address to be able to understand the way these rights should be framed and interpreted, and to debate where the limits to these rights and to the State action should lie.[240]

Democracy promotes the legitimacy of collective decisions, public-spirited perspectives on public issues, mutually respectful processes of decision-making, and helps correct mistakes made during when citizens and representatives takes collective actions.[241] The aim of this theory is to justify laws "on the basis of principles that citizens who are trying to find fair terms of cooperation can reasonably accept."[242]

When the courts overtake the powers of creating law by the means of law interpretation, the majority rule is diluted as it "makes sense only if we believe in the fundamental political equality of citizens,"[243] regarding the law making process. The Judiciary is not representative of the political view of the society, its main task is to oversee the compliance of the other powers to the constitutional regime. But when the constitutional regime is made flexible to favor the human rights, and this flexibility is abused by the courts at the moment of interpretation, the whole democratic system is to suffer.

[239] Sadurski, Wojciech, *Equality and Legitimacy*, Oxford University Press, USA, 2008, p. 36.
[240] Sadurski, Wojciech, *Equality and Letitimacy,* Oxford University Press, p. 36.
[241] Gutmann, Amy, Thompson, Deniss,, *Why Deliverative Democracy?*, Princeton University Press, 2004. pp. 10-12.
[242] Gutmann, Amy, Thompson, Deniss,, *Why Deliverative Democracy?*, Princeton University Press, 2004, p. 40.
[243] Sadurski, Wojciech, *Equality and Letitimacy,* Oxford University Press, p. 41.

With the current development on fundamental rights as human rights, the courts (both national and international) are giving moral arguments more weight in the interpretation of black letter law, and reaching to the point of creating rights out of this all-encompassing interpretation. The moral argument disguised as human rights approach should be avoid "because moral appeals are the weapon of the weak, a deliberative playing field is more nearly level […] compared to bargaining or other purely aggregative methods of politics, deliberation can diminish the discriminatory effects of class, race, and gender inequalities."[244]

The question remaining is if democracy is part of the human rights[245], since seeing democracy as a human right encounters obstacles such as its difficulties "to fit into the traditional Hohfeldian framework with its central idea of claim rights"[246], or is part of a constitutional arrangement never intended to be enforced.

[244] Gutmann, Amy, Thompson, Deniss,, *Why Deliverative Democracy?*, Princeton University Press, 2004, p. 50.
[245] Hanisch, Christoph, *A Human Right To Democracy: For And Against*, St. Louis University Public Law Review, 35, 2, 2016 p. 234, Academic Search Complete, EBSCO*host*, viewed 20.Apr.2019.
[246] Hanisch, Christoph, *A Human Right To Democracy: For And Against*, St. Louis University Public Law Review, 35, 2, 2016 p. 234, Academic Search Complete, EBSCO*host*, viewed 20.Apr.2019., referring to Hinsch, Wilfried, Stepanians, Markus, *Human rights as moral claim rights, in rawls's law of peoples: a realistic utopia?* Rex Martin & David A. Reidy eds. 2006. pp. 117-130. The Hohfeldian framework supposes that the Constitution and its Amendments are a list of immunities as opposed to liberties or privileges. Macdonald, Stuart, *Why We Should Abandon The Balance Metaphor: A New Approach To Counterterrorism Policy,* 15 ILSA J. INT'L & COMP. L. 95, 2008 pp. 132-133.

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