
# Papeles el tiempo de los derechos

**“On the Interpretation of the Constitution in a Multicultural Society”**

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# On the Interpretation of the Constitution in a Multicultural Society [1]

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## 1. - Some Assumptions

The question that I will deal with here is whether the interpretation of the constitution in a multicultural society has special characteristics. Put another way, the issue is whether being in a multicultural society is relevant when it comes to interpreting the Constitution.

This is a question conditioned not only by the importance that may be given to cultural pluralism but also by three problems. First, there is the concept of interpretation, second, the concept of the constitution and third, the position taken as regards the specificity or not of constitutional interpretation as opposed to legal interpretation in general.

Various theories of interpretation exist. Here I would like to focus on two of them; that which sees interpretation as an act of knowledge (the cognitive concept) and that which sees it as an act of decision (the skeptical concept). The cognitive conception of interpretation holds that to interpret means to discover the meaning of a precept, that is, verify its meaning. The skeptical view, by contrast, holds that to interpret is to decide the meaning, that is, attribute meaning to a text.

With regard to the constitution, a number of positions also exist. Once more, I would like to focus on two of them; that which sees the constitution as representing a commitment to identity and that which sees it as a commitment to plurality. For the first of these positions, the constitution is a normative instrument which establishes and guarantees a substantive ethical and political model and with it a social conception which represents an idea of the good life. For the second of these positions, the

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constitution is a normative instrument which establishes a procedural ethical and political model and with it a social view open to different forms of life.

Finally and with regard to the specificity of constitutional interpretation I would also like to draw attention to two distinct positions; that which sees no difference between constitutional interpretation and legal interpretation in general and that which does see a difference. For those in the first group, the interpretation of the constitution can be carried out and described on the same basis as that of any other norm. For those in the second group the constitution cannot be interpreted in the same way as other norms.

Apart from that of its political importance, two arguments are frequently offered in defense of the specific nature of constitutional interpretation. I will refer to them as the indeterminacy argument and the situational or leap in the dark argument.

The situational argument refers to the superior position of constitutions with regard to the legislative order. Constitutions are the basic norms of legal systems, a fact which, no doubt, influences their interpretation given that, unlike other norms, they do not have a limiting normative framework of possible meanings. To put it another way, while in the case of the legal interpretation of norms in general the interpreter always has a normative frame of reference represented by the constitution, the interpretation of constitutional norms lacks such a framework.

The indeterminacy argument is based on the vagueness or plurality of meanings present in constitutional norms and highlights the difficulties involved in using the two basic tools available for legal interpretation in general; the literal and systematic criteria. This being the case, other criteria such as history, social reality, spirit and final objective come to the fore.

The arguments which support the specificity of constitutional interpretation have at least three important, closely connected consequences. The first has to do with interpretative techniques, the second with argumentative references and the third with interpretative authorities.

With regard to interpretative techniques, criteria which are difficult to describe as being purely legal become relevant in the interpretation of the constitution because of its position with regard to legislation in general. Some examples are spirit, final objective, proportionality and attention to consequences. Each of these techniques utilizes ethical and political arguments.

With regard to augmentative references, all interpretative decisions involve adopting a point of view or theory on the constitution and rights as these are the material contents of this norm.

Finally, the question of who ought to be the interpreter is a fundamental question for the interpretation of constitutions. The discussion related to this issue is currently being developed on the basis of the adoption of criteria utilized in area of norm production. I will call these criteria that of impartiality and that of interest.

In general terms what the criteria of impartiality demands is that the interpreting organ be characterized precisely by its "impartiality". This approach naturally reduces the extent of the indeterminacy problem and denies the existence of discretionality in the interpretation of the constitution. All of this tends to favor the selection of a judicial organ to be the authorized interpreter of the Constitution. The criteria of interest, for its part, demands that the authorized interpreter be an "interested" body. This approach naturally emphasizes the indeterminate character of the norms and affirms the existence of interpretative discretionality. It also holds that in constitutional questions there is no possibility of impartiality (some even claim that it is undesirable) and that as what are in play are ethical and social questions the matter ought to be left in the hands of organs that have some sort of democratic legitimacy. This leads to a view that what is required is an organ with some relationship with parliament (or even, in its most radical version, the result of an election).

In any case, the discussion on the normative authority and the adoption of one of the aforementioned criteria will be conditioned, once more, by the view taken on the concept of the constitution and the theory of rights used.

With regard to the view taken of the constitution, both the commitment to plurality and the commitment to identity will have influence not so much on the decision about who should interpret the constitution but rather on the criteria that should be used in its interpretation.

The adoption of a view about rights, on the other hand, does produce a view on who should interpret the constitution. And here it is possible to identify two different conceptions of rights, one predominantly substantial and the other predominantly formal.

The activity which consists of the development of the meaning of rights in the ambit of predominantly substantive theories is not discretional or perhaps better put, has a very low level of discretionality. There is a specific determinate content to a right

which excludes (or which should exclude) discretionality to any significant degree. This means that the problem of the guarantee or better put, of assuring that the development of the content of the right is correct, acquires great importance.

With regard to predominantly procedural theories, the activity of the development of the meaning of rights has a high degree of discretionality. The criteria of morality (the rights) basically express procedures rather than information or better but, express no precise information on the content of decisions. There is a significant degree of discretionality and what is required is a development that sticks closely to the appropriate procedure for understanding the rights (in which there is no discretionality or at least in which it is very low).

In relation to this problem these two types of theory of rights may arrive at identical conclusions but by different routes and with different meanings. More specifically, the problem of the guaranteeing of rights in both theories will be centered on a judicial organ, though they will differ in their way of understanding it and the extent of its actions.

The predominantly substantial accounts of rights, in view of the fact that they believe that decisions have a correct content, or at least that there is content that can be directly excluded from them, hold that the guaranteeing of rights (of criteria of moral correctness) should be placed in the hands of an impartial organ, a disinterested organ which will not seek to falsify these criteria. The idea of impartiality is, thus, projected onto both the development of rights and their guarantee.

This way of understanding impartiality and the highly determined content of morality that goes with it usually leads to the eulogizing of judicial organs as the true guarantors of moral correctness.

Predominantly procedural accounts of rights may also assume this idea of impartiality though with different results. These sorts of conceptions, as has already been mentioned, deny the existence of a correct content for decisions or better but, they make the correctness of the decision dependent on the adherence to a series of procedures and the maintenance of a procedural vision of those rights which allows them to have a variety of substantial contents. Regarding, then, the question of the guarantee, the idea of an impartial organ may make sense as long as it is directed towards an analysis of the adherence to procedural demands. The idea of impartiality thus extends itself not into the development of rights but rather into their guarantee within solely procedural limits.

The importance given to procedure and the scant information about contents in predominantly procedural accounts usually leads to the eulogizing of a connection with parliaments, a view that does not have to lead to the undervaluing of a judicial branch of government which respects democratic procedures and which controls how the connection works in a way shaped by the procedural criteria which characterize this approach.

The procedural vision of rights involves the defense of a series of limits on the basis of which an evaluation of decisions may be made. However, this does not constitute a barrier to the examination of the discretional development of rights in terms of their content. Given that this examination must be based on a minimal set of reference points regarding content then the question of the organ that is to carry out becomes of vital importance. This position is characterized by a defense of a democratic composition of the judicial organ that guarantees those rights.

**2. - The Interpretation of the Constitution in a Multicultural Society.**

I have tried to emphasize how, when we examine questions which affect the interpretation of constitutions, we have to answer two big questions; how to interpret and who interprets?

Rights in constitutional systems function as criteria of validity for judicial decisions, which means that the creation, interpretation and application of law can only be valid if it does not contradict their meaning. I have already made reference to the problems that appear when an attempt is made to give meaning to a norm of rights. As I have also indicated, such norms, in spite of their high degree of indetermination and the various theories that exist regarding their range, cannot be considered to be empty statements. They contain a nucleus of certainty that cannot be exceeded by the interpreter and which must form part of any conception of rights, including predominantly procedural ones. This nucleus of certainty is based on values and principles like autonomy, Independence, liberty and equality which, in spite of the broadness of their content also establish minimum demands for it. Rights, thus, as ethical and political theory, bring with them models of conduct which logically leads to a restriction on other models based on other theories. The question now is whether these restrictions may affect cultural practices.

The term “cultural practices” refers to a set of actions that form a significant way of life for individuals and groups. The objectification of culture in the social ambit, something that always happens when there is talk of pluralism or multiculturalism, as has already been pointed out, plays a similar role to a theory of justice, ethics or politics, just as theories of rights do. They even allow one to talk of a culture of rights and to situate a model of cultural identity in this ambit (represented by human dignity understood in terms of rights). Reference to different cultural practices, in effect leads to admitting the existence of a variety of normative repertoires and ways of understanding the world and social relations which differ among themselves. To the extent that these repertoires possess a normative dimension they also possess the features possessed by various ethical and political theories involved in this area. The special feature of these repertoires lies in the way that they are justified, normally with reference to tradition.

The valuation of any culture (the same as any ethical or political theory) will arise as a consequence of our judgment of its practices with reference to human beings, a judgment which will be based on a number of reference points and which must take into account the fact that the existence of that culture is a result of the acceptance of those practices which define it by a set of human beings.

The theory of rights, understood as a nucleus of certainty present in the different conceptions of those rights, may be utilized as a point of reference in such a valuation and based on its assumptions, conscious of the importance of independence and autonomy, must open itself other models and integrate dimensions of other theories and cultures. Attention to the cultural dimension is, thus, a demand on all theories of rights that rise from the idea of the defense of the moral subject and wish to be coherent with it.

Presented with a situation of multiculturalism the theory of rights must maintain a normative position, a position which implies respect for different cultures, for different theories of justice and the equal autonomy of all human beings (respect for the Other). This means that between the two models of the constitution set out here it is the pluralist one which best matches this theory of rights. None of this involves abandoning the right to reject practices, theories or cultures which conflict with the basic elements of the theory of rights nor positive discrimination in favor of subjects or groups deriving from their being considered as moral subjects (and not so much because of their belonging to a nation or culture).

The theory of rights cannot be monolithic in nature and must be open, to the largest degree possible to different theories and points of view while examining both their content and justification. This open character of rights is consequence of the rational discussion of the content of various theories. In that discussion the argument of tradition or any other that tries to justify a practice by appealing solely and only to culture would appear to be out of place, at least in the first instance (that is, when we discuss the "goodness" of the practice). This does not mean that the social dimension lacks relevance in the context of the theory of rights but rather that all normative propositions must be justified by reasons.

All of this necessarily implies a minimum theory of rights. A theory of rights that is open to other cultures, a culture of rights that is open to other cultures. This will be achieved by incorporating the idea of dissent in the discourse of rights so that in general terms respect for cultural difference is nothing more than the logical outcome of the respect for difference that is an integral part of the correct manner of understanding rights.

The interpretation of the constitution in a multicultural society should thus make possible, to the largest possible degree, the living together of different forms of life justified with arguments compatible with the postulates of autonomy, independence, liberty and equality (which goes hand in hand with respect for difference) as a mechanism for the development of a dignified human life. These are the indispensable reference points for this interpretation and serve to answer the first of the questions put at the beginning of this section.

With regard to the second question about who should be the interpreter, the theory of rights based on the previous postulates and the defense of a model of the constitution based on commitment to pluralism must necessarily be receptive to the fact of multiculturality. And this is an even more determining factor if one predominantly adheres to a procedural view of rights. Based on this position and in consonance with the defense of the criteria of interest in the legitimacy of the deciding organ, the presence of this pluralism in the deciding organs, or at least the organs that select them, must be advocated.