

Gli strumenti esecutivo-sistemici per la modellizzazione delle politiche e la legiferazione

Les outils exécutifs et systémiques pour la modélisation des politiques et le processus législatif

The Execution Systemic Toolkit for Policy Modelling and Lawmaking

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Riassunto

Il presente articolo ha come scopo quello di presentare gli elementi che un insieme di strumenti sistemico, volto all'elaborazione delle politiche e delle leggi, dovrebbe possedere. Il presente studio è focalizzato sull'America, sul cui territorio esercita la propria giurisdizione il Sistema Inter-americano dei Diritti dell'Uomo, dato che le norme sui diritti umani (promosse dall'ONU e dai sistemi regionali dei diritti umani) prevalgono nell'ambito dell'agenda legislativa e di politiche pubbliche. In modo più specifico, si considera che la dottrina, le idee e i principi stabiliti dalla giurisprudenza della Corte Inter-americana dei Diritti dell'Uomo (IAHCR) siano attualmente i modelli validi volti a spiegare i concetti e le tesi che guidano l'attività legislativa e delle politiche pubbliche in America. Inoltre il *"control de Convencionalidad"*, sviluppato nella regione, incoraggia le sentenze costituzionali emesse negli stati a riprodurre tali concetti e tali principi, i quali hanno l'effetto di disapplicare o espellere le norme legali e, tramite le sentenze normative o strutturali, i tribunali proiettano su specifiche politiche pubbliche; tutto ciò può essere considerato un sistema morfogenetico. In tal modo, le linee giurisprudenziali principali dell'IACHR e della Corte Suprema del Messico verranno analizzate in modo da estrapolare gli elementi e le loro qualità, le quali costituiscono l'insieme di strumenti sistemici per l'elaborazione delle politiche, per la legiferazione e per l'identificazione di quei modelli comportamentali utilizzati nell'ambiente in grado di influenzare il sistema.

Résumé

Ce chapitre a l'objectif de présenter les éléments que l'ensemble d'instruments systémiques d'exécution pour la modélisation de politique et de législation devrait contenir. Cette section est centrée sur l'Amérique, sur laquelle le Système Interaméricain des Droits de l'Homme exerce sa juridiction, étant donné que le normativisme des droits de l'homme (promus par l'ONU et les systèmes régionaux des Droits de l'Homme) a la priorité dans l'agenda législatif et des politiques publiques des États. En particulier, on considère que la doctrine, les concepts et les principes établis par la jurisprudence de la Cour Interaméricaine des Droits de l'Homme (IAHCR) sont de nos jours des modèles valables pour expliquer les conceptions et les schémas de raisonnement guidant les activités inhérentes à la législation et aux politiques publiques en Amérique. De plus, le « *control de Convencionalidad* » développé dans la région encourage les décisions constitutionnelles prises aux sein des États à reproduire ces concepts et principes, qui ont pour effet la non-application ou le rejet des normes juridiques, et à travers des décisions normatives ou structurelles, les Cours conçoivent des politiques publiques spécifiques, donnant lieu à ce qui pourrait être considéré comme un système morphogénétique. C'est la raison pour laquelle il a été choisi d'analyser les grandes lignes jurisprudentielles de la IACHR et de la Cour Suprême du Mexique, ce qui permet d'en extraire les éléments et caractéristiques qui en font un outil de travail systémique pour la modélisation des politiques, le processus législatif et l'identification des modèles de comportement qui ont été rejetés dans le milieu qui influence le système.

Abstract

This chapter aims to present the elements that the execution systemic toolkit for policy modelling and lawmaking should contain. The study focuses on America over which the Inter-American System of Human Rights exercises its jurisdiction, given that Human Rights normativism (promoted by the UN and the Human Rights regional systems) prevails at the legislative and public policy agenda of the States. Specifically, it is considered that the doctrine, concepts and principles established by the jurisprudence of the Inter-American Court of Human Rights (IACHR), are nowadays the valid patterns to explain the conceptions and reasoning schemes that lead the legislative and public policy activity in America. Additionally, the *"control de Convencionalidad"* developed in the region, encourages the constitutional judgments issued within the States to reproduce these concepts and principles, which have the effect of the non-application or expulsion of legal rules and, through normative or structural judgements, the courts projects specific public policy, all of which could be considered a morphogenetic system. Thus, the main jurisprudential lines of the IACHR and the México's Supreme Court will be analyzed

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in order to extract the elements and their attributes that make up the systemic toolkit for policy modelling and lawmaking and identify which behavioral patterns have been displaced to the environment that affects the system.

Key words: execution systemic toolkit; policy modelling; lawmaking; Inter-American Court of Human Rights.

1. Introduction.

In the Americas, where the Inter-American System of Human Rights exercises its jurisdiction, the Human Rights normativism (promoted by the UN and the Human Rights regional systems) prevails at the legislative and public policy agenda of the States. Nowadays, it is considered that the doctrine, concepts and principles established by the jurisprudence of the Inter-American Court of Human Rights, are the valid patterns to explain the conceptions and reasoning schemes that lead the legislative and public policy activity in America.

Additionally, the “*control de Convencionalidad*” developed in the region, encourages and in some cases, like Mexico, compels to reproduce these concepts and principles, which have the effect of the non-application or expulsion of legal rules and, through normative or structural judgements, the courts projects specific public policy, all of which could be considered a morphogenetic system.

Thus, this article aims at presenting the elements that constitutes the systemic toolkit for Policy Modeling and Law Making in order to identify the behavioral patterns that have been displaced to the *environment* that affects the legislative Mexican *system*.

In first place, is offered a brief description of the Interamerican System not only from a historic or organic perspective but about the main criteria held by the Interamerican Court of Human Rights; later, the second section presents the “Control de Convencionalidad” which is a mechanism for reviewing the adjustment of authority acts to the American Convention of Human Rights and the way México has adopted it.

Finally, the third section is about constitutional judgments issued by Mexican Supreme Court to reveal the adoption of the interamerican criteria and how this issuing impacts directly to the legislative and police maker activities.

2. The development of the Interamerican System of Human Rights.

The Interamerican System of Human Rights protection, established by the Organization of American States (OAS), is constituted by two organisms: the Interamerican Commission of Human Rights and the Interamerican Court of Human Rights (ICHR).

Broadly speaking, the Commission of Human Rights (the Commission) is a principal and autonomous body of the Organization of American States (OAS) responsible for promoting the observance and defense of human rights and serving as an advisory agency to the OAS on the matter; its creation is foreseen in the American Declaration of the Rights and Duties of Man, which was the pioneer document of international character in the matter of Human Rights, approved in Bogotá, Colombia in 1948.

Years later, in the decade of the 60's, the Commission began to develop monitoring activities that possesses until today, such as on-site visits to observe the situation that human rights keep in specific places or as part of the investigation of a particular situation. Later on, its attributions allowed it to receive and process complaints or petitions raised individually, complaints that once it examines

them, can be adjudicate as cases to the Interamerican Court of Human Rights, if they meet the requirements. Thus, on the one hand, it has powers with political dimensions and on the other, it carries out functions with a quasi-judicial dimension.

The American Convention on Human Rights or “Pacto de San José” was approved in 1969 and entered into force in 1978. It has been ratified by 24 countries on the continent: Argentina, Barbados, Brazil, Bolivia, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela. And twenty out of these, have accepted the contentious jurisdiction of the Court: Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Dominican Republic, Suriname and Uruguay. As can be seen, the insular states of the Anglo-Saxon Caribbean are those who, despite being part of the Convention, have not accepted the contentious jurisdiction of the Court and Venezuela, who denounced the Convention with effect from September 10, 2010.

The “*Pacto de San José*” is composed of two sections: 1) Defines the human rights that member states are internationally committed to respect and guarantee; and 2) the organization and powers of both the Commission and the Court.

The Inter-American Court is one of the three regional courts for the protection of human rights, together with the European Court of Human Rights and the African Court of Human and Peoples' Rights. It is an autonomous judicial institution whose objective is to apply and interpret the American Convention.

The Inter-American Court (IACHR) exercises a contentious function, within which is the resolution of litigious cases and the mechanism of its decisions fulfilment; and also exercises a consultative function; and the function of issuing provisional measures (<http://www.corteidh.or.cr/>).

Within the contentious function, the Court determines whether a State is internationally responsible for the violation of any of the rights enshrined in the American Convention or in other human rights treaties applicable to the inter-American system.

Within its advisory function, it is dedicated to issue pronouncements at the request of a member state on the conventionality of certain acts or standards, to date has issued twenty-five advisory opinions.

The work of the IACHR has generated a process of gradual change in the political and legal agenda of the entire continent. This dynamic, in accordance with the characteristics and historical and social context of the region, has brought together two major jurisprudential lines: one, which could be identified as “criminal” and which refers to the international responsibility of states in matters such as torture, extrajudicial executions, enforced disappearances, military jurisdiction and amnesty laws; and another one of “judicial protection of the social rights” and that has solved denunciations on the problems and the violations generated by the inequality and the social exclusion.

It has been even recognized the Court's ability, through its jurisprudence, to guide with standards and principles the actions of democratic States and the jurisprudence of national courts (Von Bogdandy, 2011), derived from the obligation to incorporate them into the actions of national authorities.

The Pact of San José is considered the main instrument in the matter of Human Rights in the region, whose first two articles allude, to the commitment of the States to respect the rights and freedoms recognized in it, and to guarantee the free and full exercise thereof to all persons' subject to its jurisdiction; and second; to the commitment to adopt legislative or other measures to enforce such rights and freedoms.

Accordingly, many constitutions attribute constitutional status to human rights treaties, and together with the profusion of jurisprudence of the IACHR and the way in which the highest national courts take it up again, it is possible to affirm that we are facing without doubts a situation of great practice transcendence, but also theoretical or doctrinal that can even generate the idea of being building a common constitution or at least common rules.

In fact, the judge himself Sergio García Ramírez, former president of the IACHR, recognized before the General Assembly of the OAS, that "If the protection of the human being is the fundamental decision in national Constitutions and in international texts, the dilemmas among them diluted and the coincidence arises naturally" (Von Bogdandy, 2011).

In the case of Mexico, it is necessary to refer to Article 1 of the Political Constitution of the United States of Mexico in force; This article contains fundamental rules regarding the obligations that Mexico must fulfill as a State. In effect, the first paragraph affirms categorically that the persons present in the national territory will enjoy the human rights recognized both in the Constitution itself and in the international treaties in which the State is party.

The third paragraph of the first constitutional article establishes the obligation for all authorities to promote, respect, protect and guarantee the human rights of all persons. That is to say, the State is undoubtedly obliged to the promotion, respect, protection and guarantee of human rights relative to all persons who are in the country or are under its jurisdiction, whether those recognized by domestic or international law.

However, the article itself refers expressly to the international treaties on Human Rights of which Mexico is a party, among which, and principally, is the American Convention on Human Rights (hereinafter the Convention), known as Pact of San José. Remission, incidentally, somewhat superfluous, because according to the Law of Treaties, all States Parties to an international treaty are constrained to comply and comply, regardless of national legal provisions.

These coincidences do not arise from chance, but are possible thanks to the Control of Conventionality that, as will be seen in the next section, introduces the criteria of the court to the States, thereby generating a monopoly on the criteria to be followed not only in the resolution of disputes, but in all state action, which is considered a displacement of the criteria and traditions that previously governed public decisions, at least in the jurisprudential lines, which as an example have been pointed out.

3. The "Control de Convencionalidad" doctrine.

In principle, it is necessary to establish that the "Control de Convencionalidad" doctrine, or conventionality control was named by the IACHR in the ruling that solved the case *Almonacid Arellano vs. Chile*. Previously, Judge Sergio García

Ramírez, in his votes of the cases *Myrna Mack* and *Tibi*, had made a conceptual approach to the control of conventionality that is carried out in the inter-American headquarters and in the internal sphere of the States (IACHR, 2012).

It is an effective tool to apply the International Law of Human Rights to the internal scope of the countries. This application promotes an interactive dynamic and a constant dialogue between the local courts and the IACHR, in this way, the conventionality control is linked to the establishment of general hermeneutical standards issued by the Court that must be observed by the courts and other State authorities with three fundamental purposes (Bazán, 2012):

1. Abide the international commitments assumed by the States;
2. Prevent the State from incurring on international responsibility;
3. Preserve the Inter-American system of protection of DH.

The evolution of jurisprudence has identified five elements (IACHR, 2012) of conventionality control as a hermeneutic tool:

- a) Consists in verifying the compatibility of the norms and other internal practices with the ACHR, the jurisprudence of the Inter-American Court and the other inter-American treaties of which the State is a party;
- b) It is an obligation that corresponds to every public authority within the scope of its competences;
- c) For purposes of determining compatibility with the ACHR, not only the treaty must be taken into consideration, but also the jurisprudence of the Inter-American Court and the other inter-American treaties of which the State is a party;

d) It is a control that must be carried out *ex officio* by all public authorities;

e) Its execution may involve the suppression of norms contrary to the ACHR or its interpretation according to the ACHR, depending on the powers of each public authority.

However, in the case of Mexico, as was anticipated, conventionality control is foreseen in the Constitution itself, Article 1. Constitutional refers that:

In the United Mexican States, all individuals shall be entitled to the human rights granted by this Constitution and the international treaties signed by the Mexican State, as well as to the guarantees for the protection of these rights. Such human rights shall not be restricted or suspended, except for the cases and under the conditions established by this Constitution itself.

The provisions relating to human rights shall be interpreted according to this Constitution and the international treaties on the subject, working in favor of the broader protection of people at all times.

All authorities, in their areas of competence, are obliged to promote, respect, protect and guarantee Human Rights, in accordance with the principles of universality, interdependence, indivisibility and progressiveness. As a consequence, the State must prevent, investigate, penalize and rectify violations to Human Rights, according to the law.

Slavery shall be forbidden in Mexico. Every individual who is considered as a slave at a foreign country shall be freed and protected under the law by just entering the country.

Any form of discrimination, based on ethnic or national origin, gender, age, disabilities, social status, medical conditions, religion, opinions, sexual orientation, marital status, or any other form, which violates the human dignity or seeks to annul or diminish the rights and freedoms of the people, is prohibited (1).

Now, in correlation with Article 1, Article 133 establishes:

This Constitution, the laws derived from and enacted by the Congress of the Union, and all the treaties made and execute by the President of the Republic, with the approval of the Senate, shall be the supreme law of the country. The judges of each state shall observe the Constitution, the laws derived from it and the treaties, despite any contradictory provision that may appear in the constitutions or laws of the states.

There is consensus in considering that the transcribed text of article 1, along with other provisions reformed in June 2011, meant the introduction of a new constitutional paradigm in Mexico that imposes on all legal operators and specifically on the National Supreme Court of Justice (SCJN) to determine the scope and aims that the said reform had.

One of the main contributions of the 2011 reform was the creation of a set of rules that may emanate from the constitution or international treaties and that make up what was called the *regularity or validity control parameter of Mexican legal regulations*.

This parameter is not constituted only with the constitutional, conventional or legal provisions; but also with the provisions contained in the jurisprudence issued by the SCJN which is mandatory and the jurisprudence of the IACHR, which undoubtedly is binding when Mexico is part of the matter resolved without the need to be reiterated (2).

Furthermore, it has been accepted that the jurisprudence of the IACHR is an extension of the American Convention on Human Rights, since it is considered that the Convention establishes provisions in the matter, understanding by disposition to the text of a specific order; while inter-American jurisprudence establishes norms, which are understood as the meaning attributed to the provisions (Cossío et al., 2015). What added to the idea of the constitutional regularity parameter

conformed by the catalog of rights recognized in the constitution and international treaties, the criteria emanating from all the jurisprudence issued by the IACHR are binding for the judges of the country

In this case, national judges are obliged to analyze whether the precedent (jurisprudence/sentence) of the IACHR is applicable to the Mexican legal system; that is, as a preliminary study it should be noted that the conditions that served as the basis for the resolution are analogous to the national reality and not that Mexico is obliged to carry out the actions ordered by the Court, as is the country that was party in the litigation (Cossío et al., 2015).

This complex mechanism gives rise to a growing influence that can be perceived even as the construction of a common normativity in the whole region from which public policy is also created within the States, so that in this incorporation of criteria to national legal systems, from the international sphere, we can identify a priori the elements that are currently forming the strategic toolkit of law and policy makers.

It is important to express clearly that the control of conventionality can be enhanced in international venue, which is properly the IACHR, since is attributed to it the quality of natural interpreter of the Convention and in national venue, that is, each judicial system of the different states is forced to verify the conformity of public acts of any nature with the Convention.

Now, in general, the control in national headquarters can be concentrated or diffuse. The concentrated control “contrary to the method of diffuse control, is characterized by the fact that the constitutional order expressly confers to a single state body, the power to annul laws sanctioned by the Parliament that are considered unconstitutional”

(Brewer, 2014). While *a contrario sensu*, diffuse control can be performed by any court but does not necessarily imply the expulsion of the rules, but its non-application. In the next section will be presented specific IACHR decisions addressed to Mexico; and Mexican Supreme Court decisions that illustrate the indicated influence.

4. Constitutional decisions and their impact over the policy modelling and Law Making activities.

In the previous section, legal support was established for the influence that inter-American jurisprudence has on the Mexican legal system and which is part of it since its introduction by constitutional means (Article 1).

The treaties and other binding international regulations for Mexico on Human Rights, formulated and promoted by the UN and the OAS, whose provisions are subject to control by the IACHR amount to more than two hundred (3) and they are related to human rights in general, asylum, international humanitarian law, enforced disappearance, persons with disabilities, racial discrimination, education and culture, slavery, extradition, genocide, environment, childhood, migration and nationality, minorities and indigenous peoples, women, intellectual property, refugees, health, torture and work.

That is to say, the matters to which they are addressed, imply an important accumulation of provisions that necessarily impact the state's work towards the interior and that, being the foundations of the IACHR resolutions, are mandatory for all authorities.

This regional tendency is somewhat novel, because although it is true that States were always bound by

the international treaties to which they belong, this obligation was perceived as an obligation of the State *per se*, as a subject of International Law but not necessarily of direct and obligatory application for all its authorities at all levels of government.

Traditionally on many occasions, international regulations to be effective inside the State, they had to be received through legislation, which safeguarded the classic activity of the legislator who executed his mandate based on the regulatory needs he autonomously perceived.

The dialogue between the IACHR and the national courts has imposed a different dynamic: sentences affect (if not oblige) the legislator and those responsible for public policy to perform certain acts. This necessarily implies a different systemic composition, since the toolkit used has been added with the resolution issued by the courts, which, incidentally, may even be indicated as contrary to the principle of separation of powers.

In that sense, there are two types of resolutions that can have these effects:

1. Those properly dictated by the IACHR where the Mexican State was a defendant and was found responsible, and
2. Those issued by the SCJN in the exercise of the conventionality control that in national headquarters is authorized to perform.

As for the first type, the IACHR had issued condemnatory decisions against Mexico in seven cases until now. In the following chart are presented some penalties imposed to the State, that refers to the legislators and policy makers, which by its nature transcends the victims (4).

| Case | Penalties and/or safeguards of non-repetition |
|--|--|
| Cotton field (5) | <p>A. The State continues the standardization of all its protocols, manuals, ministerial criteria for investigation, expert services and the administration of justice used to investigate all crimes related to disappearances, sexual violence and homicides of women. Specifically, State should stick to:</p> <ul style="list-style-type: none"> I. Protocol of Istanbul II. Manual on the prevention and effective investigation of extrajudicial, arbitrary and summary executions of the United Nations III. International standards for the search for missing persons, based on a gender perspective, and report on the measures adopted <p>B. It must make adjustments to the “Alba Protocol” (urgent search mechanism designed by Mexico):</p> <ul style="list-style-type: none"> I. Searches of trade II. Coordinated work III. Eliminate obstacles that are effective IV. Assign human, economic, logistic, scientific resources V. Confront report and database VI. Prioritize searches <p>C. Mexico must create a database that contains:</p> <ul style="list-style-type: none"> I. Personal information on missing girls and women II. Genetic personal information and family cell samples to locate and identify III. Genetic information and cell samples from the bodies of girls or women <p>D. Permanent education and training programs and courses</p> <p>E. Generate and impart an education program aimed at the population of Chihuahua to overcome the situation</p> |
| Rosendo Radilla’s Case (6) | <p>A. That the federal judges adopt the criteria of the IACHR regarding the jurisdiction of military courts, and</p> <p>B. That the SCJN concentrate jurisdictional conflicts between military and civilian judges pending sentencing in collegiate courts of the country.</p> |
| Inés Fernández’s case (7) | <p>A. The State must carry out legislative reforms with international standards on Human Rights</p> <p>B. Resources for the <i>me’phaa</i> community of <i>Barranca Tecoani</i> (the indigenous village where the rape took place)</p> <p>C. Establish a community center. Center of the woman</p> <p>D. Ensure the permanence of girls enrolled in secondary school in Ayutla (the county where <i>Barranca Tecoani</i> is)</p> <p>E. Count on services for women victims of violence, provided by the institutions</p> |
| Valentina Rosendo’s case | <p>A. The State must carry out legislative reforms with international standards on Human Rights</p> <p>B. Limit the jurisdiction of the military jurisdiction to crimes that have a strict connection with the military discipline or with legal rights specific to that area and allow the persons affected by the intervention of that jurisdiction to have an effective remedy to challenge the performance of this jurisdiction</p> <p>C. Awareness and sensitivity campaigns on discrimination and violence against women</p> |
| Cabrera García y Montiel Flores case (8) | The State must carry out legislative reforms with international standards on Human Rights |

The resolutions transcend the victims; that is, they do not only deal with compensation or individual reparation measures applicable to specific cases, but they also establish authentic lines of action for legislators, since we observe the reiteration of “making legislative reforms with international standards on Human Rights” and the order of “Limit the jurisdiction of the military jurisdiction to crimes that have a strict connection with the military discipline or with legal rights of that area and allow the persons affected by the intervention of that jurisdiction to have an effective remedy to challenge the action of the latter”. Obviously, it can only be corrected through legislation.

In the case of policy making, the variety is broader, as it refers to the standardization of protocols, manuals, criteria, research methods that can be included under the guidelines of the prosecutors' offices, which in a very specific way must adhere to international methodologies such as those contained in the Istanbul Protocol or in UN manuals.

In the same way, the IACHR ordered the reform of the “Alba Protocol”, which is a mechanism that allows the coordination of efforts of the three levels of government committed to the promotion and execution of activities leading to the location of women with a report of loss and that, in fact, it was modified in 2016 in behalf of Campo Algodonero's ruling in order to include the need to conduct official searches, in a coordinated manner at the three levels of government, carry out coordinated work by the authorities, eliminate obstacles that remain ineffective, which implied reform the Penal Code, assign human, economic, logistic and scientific resources as well as confront the reports received with the databases that exist. In this same sentence, Mexico was forced to create a reliable database on women and girls reported missing,

genetic personal information and cell samples of relatives to locate and identify missing women.

On the allocation of economic resources, which traditionally belongs to the legislative branch and the executive responsible for public budgets. There are also specific executive measures such as the establishment of community centers, ensuring the school stay of girls in secondary education in the municipality where the affectations were made, the development of awareness programs on violence against women, as well as generating attention services to women victims of violence.

Regarding the second type of decisions, those issued since the judicial activity carried out within the States under the control of conventionality and constitutionality, we refer specifically to a kind of sentences that illustrate more clearly the introduction of the elements that are currently shaping the execution Law Making and Policy Modelling toolkit in Mexico.

These sentences are called *structural* or *normative* because they are concerned with identifying structural state conditions that impede or hinder the exercise of rights. More concretely, they have been defined as judicial decisions that, in order to ensure the effective protection of the rights of large groups of people, order the design and implementation of public policies by the State (Gutiérrez, 2016).

For its part, Néstor Osuna identifies them as sentences through which the judges make an important effort to give effect to the constitutional statements, when they verify the existence of generalized, recurrent and serious ignorance of human rights (Osuna, 2016).

To formulate the transcribed definition, the author appeals to the experience of judges in the exercise of their functions, through which they perceive causes that systematically produce this deficit of

human rights, and that the cases that arrive at their offices, if they are resolved only as individual remedies, they cannot solve the general problem whose record is found in the files (Osuna, 2016).

The current relevance of these judgments derives from the possibility that the state conditions that prevent the effective protection of rights derive from the legislative omission or legislation contrary to the constitution or away from conventionality. What definitely involves introducing various and different elements to the toolkit.

This type of sentence is in wide development in countries such as Chile, Colombia and Argentina, both in jurisprudence and in doctrine. While in Mexico we are witnessing an incipient stage of their formulation but that have been glimpsed since the resolutions of the Federal Judicial Branch. Specifically, the Supreme Court of Justice of the Nation (hereinafter SCJN) in Mexico is the judicial instance that has pronounced sentences of a structural nature

The issuance of structural judgments by the Supreme Court of Justice of the Nation when resolving the *Amparo* Trial (2), expands the powers and faculties traditionally reserved to the judges, that at the most, were considered negative legislators in the sense of invalidating norms, but never of issue new ones.

This type of sentence encourages the exercise of an integral control of constitutionality and conventionality. For a better understanding, the following are concrete examples issued by the Federal Judicial Power and specifically by the SCJN, with the purpose of determining the position that the Mexican constitutional court has in this regard.

5. *Amparo* in Review 310/2013.

This trial was about the guardianship of two children procreated during the validity of the marriage of their parents, which was granted in the first instance to the mother, under the normative provision contained in the Civil Code for the Federal District where it was stated plainly that prefer to the mother to perform this work.

The sentence that resolves this *Amparo* in Review that was heard by the First Chamber of the SCJN is dated December 4, 2013 and in it the following fundamental issues were determined:

- Measures regarding the care and education of children must be adopted taking into account their interest, not that of the parents, since it is not the psychological or affective conditions of the parents that determine the measures to be adopted, but exclusively the good of the children. This criterion binds both the courts and the rest of the public authorities, including parents and citizens, so that measures must be adopted that are more appropriate to the age of minors, to progressively build control about their personal situation and future projection, avoiding always that the minor can be manipulated, looking, on the contrary, for their integral formation and their family and social integration.
- The effects and scope of the sentences issued by a Constitutional Court vary according to the process in which they are issued, and according to the constitutional violation that is noticed in the specific case.
- The claims of the claimants, the nature and purpose of the process set the pattern of the consequences of the sentence issued, either the declaration of an unconstitutionality, the

recognition of the injury to a fundamental right, and the restoration of the same.

- Not every violation of fundamental rights is the same, so the effect of a writ of *Amparo* must be characterized by a ductility that allows for the most effective protection of the rights of individuals.

This resolution establishes a clear position of the First Chamber of the SCJN in the sense that the effects and scope of the constitutional judgments will always depend on the nature of the matter to be resolved, the determining variable being the fundamental right that was violated; It also establishes that thinking differently would condemn the *Amparo* Trial to ineffectiveness in its role as guarantor of fundamental rights.

This case generated the Isolated Thesis with registration number 2005463, published in the Gazette of the Judicial Weekly of the Federation, in February 2014, under the heading “Sentences of Amparo. The effects are determined by the violation of the fundamental right of each specific case.”

Following this logic, a couple of resolutions have been issued:

- Federal Court in Criminal and Administrative Matters of the Twenty-Second Circuit. Isolated thesis with registration number 2012583, published in September 2016, under the heading: “Constitutional judgments, to determine what their effects are, it is necessary to take into account, casuistically, what type of act is claimed and what are the normative circumstances that surround it, since depending on the consequences that each act implies, the scope of those will have to vary in each concrete case”.

- Essential criterion. In this precedent specifically the Collegiate Court states that in many cases the sentences may go beyond the defendant, by constituting the only way to achieve a full reparation or restitution of the right violated.

- Precedent with registration number 2012584. Published in September 2016, under the heading “Constitutional judgments. Its typology is compatible with the purposes of the current *Amparo* trial”,

- Essential criteria: Protective judgments are not necessarily limited to a binding effect with respect to the responsible authority, but sometimes include other equally binding effects that must be complied with by the organs of the State, in order to make an integral reparation for the violation committed.
- The typology of the sentences has a logical and compatible relationship with the claim that there is a full reparation or restitution of the violated right, since the resolution must transcend the parties involved to eliminate all the direct legal consequences of the act claimed, since its origin is to restrict both the act itself, and its pre-established consequences, so the nature, types, scope and limits of the effects of the protective decision are not limited exclusively to what is determined in the *Amparo* judgment, but also the responsible authorities must understand immersed in them the

direct legal consequences they have on other organs, laws and institutions.

Thus, from a systemic approach, it can be said that legislators and policy makers of the interamerican system member states are actually being influenced more by external criteria and values than internal ones. That's because of the activity of the international courts, like the IACHR, who has become an almost lonely actor in the policy modelling in the region.

Something very interesting is that this shift has come through the judicial branch, it implies that the legislative, the administrative and the judicial authorities are linked by decisions that are consistent with the human rights legal corpuses.

Finally, local values are displaced to the environment, and the system is getting plenty of values that are considered as universal ones. The main characteristic of these values is that are considered intrinsically good and valid to all persons, shaping the global citizen.

6. Conclusions.

Under the influence of the global and regional normativism on Human Rights, national States as Mexico have incorporated elements and pieces to the systemic toolkit for policy modelling and law making activities, that have origin outside their borders.

It implies that the own and original criteria are not more taken into account to settle the principal lines of public policies and legislative issues.

It has been demonstrated how the contained provision in the human rights treaties are incorporated to national legal systems at the highest levels, which are the Constitution and its interpretation by the Supreme Court.

This pattern refer to a trend that involve a shift in the reasoning schemes that are reflected in the currently ruling schemes. Authorities and citizens feel satisfied if international criteria is used to solve internal issues, that can be trials, legislative gaps or public policy.

This process is carried out by two principle means: the enforcement of the sentences dictated by the IACHR and all the standards it issues, and the "control de convencionalidad" performed by Mexican courts.

This way, the system is steadily ejecting elements to the environment and through that expulsion is creating a differentiated configuration of itself.

Notes.

- (1). Translation made by the Law Research Institute of the National University, available at <https://www2.juridicas.unam.mx/constitucion-reordenada-consolidada/en/vigente>
- (2). "Sentencias emitidas por la Corte Interamericana de Derechos Humanos en asuntos donde el Estado mexicano fue parte. Para que sus criterios tengan carácter vinculante no requieren ser reiterados" Décima Época, Registro: 2003156, Pleno, Semanario Judicial de la Federación y su Gaceta, 2013, Tesis: P.III/2013, p. 368.
- (3). According to the web site of the National Supreme Court of Justice, available at <http://www2.scjn.gob.mx/red/constitucion/TI.html>
- (4). It has to be said that these penalties were imposed among a lot others in each judgement, that were addressed specifically to the victims and the specific investigation procedures.
- (5). This case is known as "cotton field" or *campo algodonero*, because the bodies of three women were found in a cotton field in Ciudad Juárez, Chihuahua. It is about Mexican state international responsibility because of a clear pattern of systematic aggressions and violence against women, situation widely documented and known as *las muertas de Juárez*.
- (6). This case is about the forced disappearance of this person who was victim of an illegal detention at a military check point.
- (7). This and Valentina Rosendo cases, are about indigenous women raped by soldiers. The women were part of highly marginalized indigenous communities at Guerrero State, where military forces were stationed.
- (8). The case refers to the international responsibility of the State for the arbitrary detention and cruel and degrading treatment to which Teodoro Cabrera García

and Rodolfo Montiel Flores were subjected, as well as for the lack of investigation and punishment of those responsible.

(9). Amparo is the name of the Constitutional Judgment which purpose is to protect constitutional human rights.

References.

- Bazán V., “El control de convencionalidad: incógnitas, desafíos y perspectivas”, en Prieto Sanchís, *Justicia Constitucional y Derechos Fundamentales*, Madrid, Trotta, 2012, available at <http://www.corteidh.or.cr/tablas/r30034.pdf>
- Brewer A., “Control de constitucionalidad concentrado”, in Ferrer McGregor et al. (coords.), *Diccionario de Derecho Procesal Constitucional y Convencional*, Tomo I, Poder Judicial de la Federación, 2014.
- Cossio Díaz J. R. (04 de Noviembre de 2015), *Suprema Corte de Justicia de la Nación*, Recuperado el 28 de Enero de 2017, de Opinión del ministro José Ramón Cossío Díaz en el amparo en revisión 237/2014 (Uso recreativo de marihuana), <https://www.sitios.scjn.gob.mx/jrcossio/sites/default/files/articulos/not041115.pdf>
- Cossío J. R. et al., *La construcción de las restricciones constitucionales a los Derechos Humanos*, México, Porrúa, 2015.
- Gutiérrez A. *El amparo estructural de los derechos*, Thesis to obtain PhD, Madrid, Universidad Autónoma de Madrid, 2016, Available at <http://hdl.handle.net/10486/676669>
- IACHR, “Control de Convencionalidad”, *Cuadernillo de Jurisprudencia de la Corte Interamericana de Derechos Humanos*, no. 7, San José, 2012.
- Osuna N., “Sentencias estructurales. Tres ejemplos de Colombia”, in *Justicia Constitucional y Derechos Fundamentales. La protección de los Derechos Sociales. Las sentencias estructurales*, Bogotá, 2016, pp. 91-116. Available at http://www.kas.de/wf/doc/kas_41796-1522-4-30.pdf?150622205823
- Von Bogdandy A. et al., *Construcción y papel de los derechos sociales fundamentales*, Instituto de Investigaciones Jurídicas, UNAM, Mexico, 2011.