TEN GUIDELINES FOR THE CORRECT INTERPRETATION OF RIGHTS

RAFAEL DE ASÍS ROIG[1]

Abstract: In this brief work I will propose ten guidelines or criteria to assist in interpreting human and fundamental rights norms in a way that is correct (as much as is reasonable) and that is in line with the perspective of the constitutional court. To do so, I will work from a series of premises to help locate these guidelines within the context of a theory of interpretation. As might be expected, this theory is itself based on a theory of law. In what follows, I will provide an account of some of the characteristic dimensions of the interpretation of rights norms. Finally I will present the ten guidelines that in fact constitute what I have elsewhere termed as main criteria of interpretation.

Keywords: Human Rights, Fundamental Rights, Criteria of Interpretation, Theory of Law

Contents: I. ON LEGAL INTERPRETATION; II. ON THE INTERPRETATION OF RIGHTS; III. ON THE CORRECT INTERPRETATION OF RIGHTS BY THE JUDGE.

I. ON LEGAL INTERPRETATION

There are different concepts regarding the role of interpretation in the legal area and these are normally associated with a similarly different way of understanding the interpretative activity itself (which is based on concepts of law and regulations and, therefore, on the theory of law) (Barranco Avilés 2009: pp. 141ff; Pérez de la Fuente 2010: pp. 141ff). I will thus regard the law as being, among other things, a system made up of normative statements whose use requires a choice to be made as to their possible meaning. As such, the position I adopt is somewhat closer to the so-called skeptic concept of interpretation (in which interpretative activity consists of attributing meaning to the norm and is thus not considered a 'scientific activity') as opposed to the cognitive concept of interpretation (in which interpretative activity consists of discovering the meaning of the norm and is thus considered "scientific") (Guastini 2001: pp. 13ff). So, the position adopted in this paper might be described as an intermediate concept

According to such a perspective, all legal disagreement arising within the legal system is of an interpretative nature. The same applies to any action that purports to have legal value.

[1] Professor of Philosophy of Law (Instituto de Derechos Humanos "Bartolomé de Las Casas", Universidad Carlos III de Madrid, Spain)

Every judicial process thus expresses a conflict between at least two parties who argue over the norms to be applied and the meaning of these norms. Within a legal context, the resolution of this dispute must be based upon a norm (understood in a broad sense of the word) and is expressed via a decision that chooses the norms to be applied and the meaning of these norms. It certainly may be said that this way of describing a legal disagreement, which is manifested via a process, is insufficient because at times interpretation does not need to opt for a meaning of the norms but to create a statement that allows the dispute to be resolved. In some cases, there are no norms in existence which might directly resolve the legal problem under consideration and it is necessary to create a statement (which is justified via argumentative means) (Atienza 1991: pp. 140ff)[2]. While these cases reveal regulatory gaps, they also show that the norm which is created gains justification when it is presented as an option that does not contradict the meaning of pre-existing norms. As such, it is an action which may take place within the framework of interpretation.

The legislator's actions are also a demonstration of an interpretative option that is based upon (and justified by) statements that are part of the legal system. The same might be said with respect to the task of lawyers, doctrine or any other legal actor.

The above contains two implications. On the one hand, that interpretation (Lumia 1966: p. 309) is always present when working with norms and, on the other that interpretation is an activity whose scope goes beyond that of judicial application.

In contrast with those concepts of interpretation which hold that this activity only occurs when the norm is not clear (which brings to mind the classical aphorism "*in claris non fit interpretatio*"), I shall argue here that interpretation is always present when working with norms, given that the latter are linguistic statements which have a relative amount of indeterminacy[3]. This likewise means that in the legal field, except for highly unusual cases, there is always a certain degree of discretion involved in the activity of interpretation. It also means that the interpretation of a norm is always an act of decision.

The justification for this act of decision is made via the use of the so-called interpretative criteria. In general terms, these criteria follow along the lines of five main categories: literal, historical, teleological, systematic and sociological (De Asís 1995: pp. 186ff). Despite the fact that there is no established hierarchy which might order these criteria according to importance (except in specific areas of law), we may still emphasize the relevance of literal and systematic categories in general juridical interpretation (De Asís 1998: p. 134).

On the other hand, interpretation is not only present in the application of norms and (as previously indicated) its effects thus go beyond the scope of the judicial

[2]The controversy may thus be resolved either via the use of a norm whose meaning is specified or either through the creation of a norm, which is justified via the meaning of other norms.
[3] The existence of clarity requires an interpretation of the norm.

process. Just as interpretation is present in the creation of norms, it is also present in scientific analysis or in the field of normative-juridical philosophy. As I also emphasized beforehand, the activity of legal actors (when this term is understood in its broadest sense and which includes law users) might be therefore described as an interpretative activity. Legal interpretation is thus going to be conditioned, among many other factors, by the nature of the interpreter and the type of statement used.

In relation to the first of these factors, general reference might be made to two main categories of interpreters of the law. On the one hand, there are those whose defence of an interest at stake determines their interpretative activity; and on the other there are those who are characterized by the lack of an interest at stake and who we usually identify through the idea of impartiality. Although not exhaustive in theoretical terms, the first of these categories would include citizens, legislators or philosophical-juridical doctrines, while among the second would include judges or scientific doctrines. Admittedly this second group of actors might also be described in terms of an interest at stake, even though such interest does have an objective dimension which is represented by a supposedly objective idea of law.

With respect to the second category, legal interpretation is conditioned by the determinate or indeterminate character of the statement that is interpreted (Del Real Alcalá 2011: pp. 52ff). Traditionally we represent this difference in terms of the distinction between laws of principle and regulatory laws; a distinction that has consequences with respect to the discretionary nature of legal interpretation (there is less discretion in the interpretation of a regulatory law than there is in that of a law of principle) (Barranco Avilés 2009: pp. 31ff). Yet following along these same lines, interpretation is also conditioned by the hierarchical situation of the law within the legislation. It may thus be said that the interpretation of every statement is conditioned by the meaning of superior legal norms.

II. ON THE INTERPRETATION OF RIGHTS

Thus, if we refer to the interpretation of rights norms (human and fundamental) and we examine the type of statements in which these are normally recognized, it may be asserted that these are norms of principle that sit at the highest point in the hierarchy of the legal system. The interpretation of rights is thus considered to be a special interpretative activity[4].

In part, the particular nature of the interpretation of rights resides in its relatively indeterminate character and the fact that there are no superior norms that may act as reference for meaning (other causes of this particular nature include the clause of essential content or that which stipulates openness to international law) (Cuenca Gómez 2012). Thus, on the one hand, there is a greater degree of interpretative discretion related to these types of norms than there is with other norms in the legal system. On the

[4]For further clarification of this point see Barranco Avilés (2004) pp. 19ff.

other hand, the decision regarding their meaning implies the adoption of a stance that can only be understood as the expression of a particular position on the theory of rights (it is impossible to conceive of a strictly legal theory unless a theory of law is used that incorporates the moral and/or the political within the concept of law) (Dorado Porras 2004: pp. 21ff).

The above requires two explanations that may be understood in two different contexts. The first of these consists of accepting the possibility that there are different ways of thinking about rights and that there are thus different theories on rights. The second defends the idea that there cannot be total indeterminacy, despite the fact that norms concerning rights are characterized by a high level of indeterminacy (Cuenca Gómez 2008-2009: pp. 208ff).

I do not believe that the first of these explanations requires a great amount of argumentative effort. It should be enough to remember how accustomed we are to seeing how, when appealing to rights, the same fact may be rejected by some and accepted by others (in fact all constitutional control of the norm based on rights might be described thus).

The second of these explanations derives from the concept of law itself based on the idea of system, one that requires that there be some minimum content which acts to establish its own recognition and so at least functions to limit interpretative options (and as such, as a minimum, as a negative content in the sense that it establishes what the right cannot mean) (Ansuátegui Roig 2006: pp. 601ff). A defence of this thesis might also point to the fact that language is not completely indeterminate (Cuenca Gómez 2008); a defence of total indetermination would mean that the particular rights norm itself would have no reason to exist (it being open to any interpretation so desired) **(**Ruiz Ruiz 2011: pp. 187ff).

It may be possible to object to the aforementioned on the grounds that law is not governed by norms of rights but by norms of competence (yet this position needs to show, at the risk of being misunderstood, that these types of norms have been in fact determined). Similarly, it might also be claimed that law is based solely and exclusively on power and force (a claim which is not likely to provide an account of how to act within the law).

Certainly the second explanation is based on theoretical arguments and on how arguments are conducted within the law. Despite this, it runs into serious problems when we consider the question of the validity of the interpretative decision. Indeed, the issue of the actual validity of the interpretation of a norm of rights can only be concretely resolved by referring to the competence of the body adopting that decision (Jiménez Cano 2008: pp. 232ff). Thus, any questions as to the validity of a Constitutional Court´s interpretative decision on rights are ultimately answered in terms of competence. This means that the Court would be able to express any decision (except for when we speak of constitutional decisions which are unconstitutional, which again means applying a theory, in this case a theory regarding rights whose potential would

have to be demonstrated without recourse to arguments based on competence).Why it is that constitutional courts normally satisfy the range of community expectations, though they sometimes adopt decisions that might be considered to be unsatisfactory, is something that has to do with the ethics of the constitutional judge.

In any case, the aforesaid assumes that there is a need to differentiate between valid and correct interpretative decisions (De Asís 1999). As I pointed out previously, the issue of the validity of interpretation may be resolved from the perspective of competence; in an interpretative conflict, the option defended by the competent body will prevail. However, as I have also previously pointed out, it is necessary to set some limits –even if they are regulative– upon the performance of the competent body (this is because it is possible that when this body acts as the last recourse, it may contradict commonly accepted meaning). The problem is how to guarantee that these minimum contents will be respected or how to guarantee these limits. And regarding this particular issue it is not possible to use legal techniques but rather it is necessary to resort to ethical types of considerations (in order to function correctly, all legislation requires a moral perspective be adopted).

Valid interpretation does not thus have to coincide with the correct interpretation. In this last instance, interpretation is based on criteria of correction that are not necessarily of a legal nature. To put it another way, legal correction of a decision has to do with its validity but the idea of correction has other references, such as ethics, politics or even rationality. Indeed, as is also the case when we speak of general legal interpretation, these criteria may differ according to the interpreter. So, we may think that a lawyer´s defence of a correction of an interpretative option will be different from a correction defended by a judge or by scientific doctrine. This would be the case whenever the lawyer's interpretation is subordinate to the defence of the client's interest, while the judge's interpretation is, of necessity, impartial.

It is worth examining this point in two ways. Firstly, it is very clear that, although we might be able to speak of different interpretative criteria, all legal actors seek to persuade. This reduces the distance that separates the correct interpretations issued by different legal operators and allows us to consider the possibility of there being a correction criteria in common (which is not necessarily exhaustive of all aspects of the idea of correction). The second consideration has to do with the ethical and political nature of interpretation of rights norms and how this nature makes it difficult to conceive of complete impartiality, even when discussing judges. The interpretative decision regarding rights that these legal actors take is also an adopted position (although perhaps this position is, or should be, much more disinterested than that of the other actors).

I will conclude this point on the interpretation of norms concerning rights by pointing out that in the field of law there are some traditional criteria of interpretation which, given their special nature, have very limited influence while there are others that, on the contrary, are even more relevant (De Asís 2005: pp. 141ff). Among those of limited influence are literal criteria (in light of the indetermination of these rulings) and

systematic criteria (given the hierarchical situation of rights norms); these are the same criteria, it will be recalled, that I emphasized when referring to general legal interpretation. Among those of greater relevance are historical, theological and sociological criteria, to which we must add what are surely examples *par excellence* of criteria concerning rights; that of proportionality (Bernal Pulido 2003) (which implies a deliberation) and the consequentialist (Ezquiaga 1987: p. 276).

III. ON THE CORRECT INTERPRETATION OF RIGHTS BY THE JUDGE

In the following, I will point out certain criteria of interpretative correction by making reference to the judge as a legal actor. Notwithstanding, many of these criteria may be extrapolated to other actors.

As we have indicated in the previous points, there is no unique meaning in human or fundamental rights norms and it is extremely difficult to demonstrate the existence of absolute impartiality. That being the case, if the approach toward the interpretative correction of these rules is to have general effect, it cannot refer to questions of content. Such questions may only form part of a theory of interpretative correction which is grounded in a theory of rights that allows its contents to be identified. The criteria of correction that I am going to examine are abstract and general and, what is more, of a more procedural nature and do not thus help us to define any possible specific meaning..

That said, I will now propose ten criteria of correction that should act as a reference for judges to follow when interpreting norms concerning rights.

The first main criterion, which I describe as that of impartiality and which has to do with the guarantee of this principle, acts to protect judges' interpretative decisions from any contamination that their own ideology promotes and which might influence the resolution of a case. Basically, this criterion is manifested via use of the mechanism of abstention. An adequate use of this instrument would resolve truly curious situations in the legal legislation, protecting both the judge and the citizens. It is certainly the case that we are not dealing with an ethical instrument but rather a legal instrument. Indeed, this means to affirm that all judges who consider themselves influenced by any type of circumstance during the interpretation of a norm have the moral obligation to consider abstention and to thus protect the law, citizens and lastly, their own conscience (De Asís 1993: pp. 57ff).

The second criterion might be described as one of coherence and consistency. Under this criterion, the correct interpretation of a norm concerning rights must be able to occupy a coherent position within the framework of a theory of rights (which implies that its effect upon other rights must also be analysed). As I have already repeatedly indicated, the content of the interpretative decision on norms regarding rights expresses an adopted position that, as such, must be coherent with the theory of rights that it defends.

A third criterion, which I shall call 'explicitation', has to do with the compliance of the constitutional requirement to motivate decisions. In the interpretative field, this criterion also means that the interpretative criteria used should be shown or should act to explain the decision. As pointed out when referring to interpretation of rights, these will be conducted along the lines of one of the following criteria: historical, theological, sociological, proportionality and consequentialist.

A fourth criterion, that of respecting language has to do with the existence of limits in interpretative discretion and which derive from the limits of language. According to this criterion, the judge must respect the natural meaning of the statement, by this it being understood whatever corresponds to the meaning of the terms in the language that law is expressed. This demand might be considered useless if, as I have indicated, rights norms are characterized by their indetermination and if, within this interpretation, the literal criteria (which is directly related to what I have described as natural language) lacks force. Be that as it may, this criterion of correction obliges the judge to very carefully analyse the degree of indeterminacy in the norm concerning rights given that this degree is not identical in every norm (thus, for example, the degree of indeterminacy in norms that express individual rights is greater than in other norms that recognize economic, social and cultural rights) (De Asís 2010: pp. 63ff).

A fifth criterion, of saturation (Alexy 1989: p. 236), implies that the greatest possible number of criterion and technical arguments should be used upon reaching an interpretative decision. As such, the decision to be taken should be that which is based on the greatest number of interpretative criteria.

The sixth of these criteria, that of deliberation and consequences, derives from the relevance of the two criteria that I indicated when referring to interpretation of rights norms. The first of these requires that the interpretation deliberate over the allocation of other goods and rights without this implying any loss to the right in question; the second requires that the consequences of this interpretative choice be tended to in all areas that they may occur. This means that there are two criteria that must always be taken into account when conducting a correct interpretation of rights norms. More specifically, these criteria require that the interpretative decision: (i) pursue a goal which is coherent with the theory of rights; (ii) is the most appropriate decision to achieve the said goal (which means considering other options); (iii) acts to reduce as little as possible the maximum content that may be attributed to the right; (iv) acts to produce more advantages than disadvantages within a framework of a theory of rights.

The seventh of the criteria is one of non-refutation[5] which clearly and simply requires that the propriety and solvency of the interpretative criteria used be justified. In this sense, the criterion is respected when used correctly and when its strength is examined in each case. Thus for example, as we have already indicated, it is possible

[5] See in the context of fact-based sentencing Gascón Abellán (1999) p. 220.

that not all criteria have the same force in all legal contexts or with respect to all types of norm.

The eighth criterion is that of universalization (Alexy 1989: p. 187), which requires that decisions reached are able to be universalized or, to put it another way, which establishes the need for the interpreter to adopt decisions that he or she would always be prepared to adopt given the same circumstances. This criterion has to do with the idea of precedent in the sense of that it requires the interpreter to always act as if he or she were setting a precedent

The ninth criterion is related more directly to the idea of the precedent and is based upon what is known as a criterion to consider the interpretative precedent. This criterion requires that the interpreter justify the reason for excusing him or herself from an interpretative decision prior to the norm of rights that he or she is using (De Asís 1995: pp. 263ff).

The tenth and last of the criteria to which I will refer is that of acceptability (Aarnio 1978: pp. 103ff). Under this criterion, an interpretative decision is largely justified if it can be presented as that which is most accepted by society. The criterion has to do with the need for reasonable community expectations to be satisfied. The interpreter must thus reach decisions which are foreseeably acceptable to the community or, from another point of view, the interpretative decision must develop within the bounds of what is expected by its end-users and, once inside these bounds, it must be the decision which presumably enjoys the highest level of acceptance.

In sum, the correct interpretation of the norms concerning rights is that which (i) is reached without self-interest; (ii) is coherent with a theory of rights which is willingly defended; (iii) explains the criteria which justify it;(iv) respects the limits of language; (v)utilizes non-refutable criteria; (vi) is proportional and has taken its consequences into account; (viii) may be made universal; (ix) respects interpretative precedents; (x)is acceptable to the community and which satisfies its expectations. In any case, it deals with criteria of correction so that their dissatisfaction does not necessarily imply the invalidity of the interpretative decision.

BIBLIOGRAPHY

Aarnio, A. (1978) *Lo racional como razonable.* Madrid: Centro de Estudios Constitucionales.

Alexy, R. (1989) *Teoría de la argumentación jurídica.* Madrid: Centro de Estudios Constitucionales.

Ansuátegui Roig, F.J. (2006) “Positivismo jurídico y sistemas mixtos”. In: Ramos Pascua, J.A. and Rodilla González, M.A. (eds.) *El positivismo jurídico a examen. Estudios en homenaje a José Delgado Pinto.* Salamanca: Ediciones de la Universidad de Salamanca.

Atienza, M. (1991) *Las razones de Derecho.* Madrid: Centro de Estudios Constitucionales.

Barranco, M.C. (2004) *Derechos y decisiones interpretativas*. Madrid: Marcial Pons.

Barranco Avilés, M.C. (2009) *Teoría del Derecho y derechos fundamentales.* Lima: Palestra

Bernal Pulido, C. (2003) *El principio de proporcionalidad y los derechos fundamentales.* Madrid: Centro de Estudios Políticos y Constitucionales.

Cuenca Gómez, P. (2001) "En defensa de una concepción alternativa de la interpretación jurídica". *Cuadernos Electrónicos de Filosofía del Derecho*, 23.

Cuenca Gómez, P. (2008) *El sistema jurídico como un sistema normativo mixto.* Madrid: Dykinson.

Cuenca Gómez, P. (2012) "La incidencia del Derecho Internacional de los derechos humanos en el Derecho interno: la interpretación del artículo 10,2 de la Constitución española". *Revista de Estudios Jurídicos*, 2.

Cuenca Gómez, P. 2008-2009) "Sobre el iuspositivismo y los criterios de validez jurídica". *Anuario de Filosofía del Derecho*, 25.

De Asís, R. (1993) "Juez y objeción de conciencia". *Sistema,* 113.

De Asís, R. (1995) *Jueces y normas.* Madrid: Marcial Pons.

De Asis, R. (1998) *Sobre el razonamiento judicial.* Madrid: McGraw-Hill.

De Asís, R. (1999) "Argumentación judicial y derechos". *Revista de Estudios Jurídicos,* 2.

De Asís, R. (2005) *El juez y la motivación en el Derecho.* Madrid: Dykinson, Madrid.

De Asís, R. (2010) "Sobre la interpretación de los derechos sociales". In: Ribotta, S. and Rossetti, A. (eds.) *Derechos sociales en el siglo XXI. Un desafío clave para el Derecho y la Justicia.* Madrid: Dykinson.

Del Real Alcalá, A. (2011) *Interpretación jurídica y neoconstitucionalismo*. Cali: Universidad Autónoma de Occidente.

Dorado Porras, J. (2004) *Iusnaturalismo y positivismo jurídico: una revisión de los argumentos en defensa del iuspositivism* . Cuadernos Bartolomé de las Casas, 33. Madrid: Dykinson.

Ezquiaga, F.J., (1987) *La argumentación en la justicia constitucional española*, Oñati: IVAP.

Gascón Abellán, M. (1999) *Los hechos en el Derecho,* Madrid: Marcial Pons.

Guastini, R. (2001) *Estudios sobre la interpretación jurídica.* Mexico: UNAM.

Jiménez Cano, R. (2008) *Una metateoría del positivismo jurídico*. Madrid: Marcial Pons.

Lumia, G. (1966). "In tema di interpretazone e di applicazione del Diritto". *Rivista Internazionale di Filosofia del Diritto*.

MacCormick, N. (1978) *Legal Reasoning and Legal Theory.* Oxford: Clarendon Press

Pérez de la Fuente, O. (201) "¿Es necesario la teoría para decidir casos judiciales? Sobre la crítica del pragmatismo jurídico al Derecho como integridad". *Revista Telemática de Filosofía del Derecho,* 13.

Ruiz Ruiz, R. (2011) "El desplazamiento de la discrecionalidad del legislador al juzgador: causas y recelos". *Anuario de Filosofía del Derecho,* XXVII.