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**PARAMETER OF CONTROL OF CONSTITUTIONAL REGULARITY  
(PARÁMETRO DE CONTROL DE REGULARIDAD CONSTITUCIONAL)**

**CASE:** *Contradicción de Tesis 293/2011*

**REPORTING JUDGE:** Arturo Zaldívar Lelo de Larrea

**DECISION ISSUED BY:** Plenary of Mexico's Supreme Court of Justice

**DATE OF DECISION:** September 3, 2013

**KEY WORDS:** parameter of control of constitutional regularity, constitutional law, constitutionality control, conventionality control, hierarchy of the international human rights treaties, binding nature of the decisions of the Inter-American Court of Human Rights, court precedent, constitutional restrictions

**CITATION OF THE DECISION:** Supreme Court of Justice of the Nation, *Contradicción de Tesis 293/2011*, Plenary, Arturo Zaldívar Lelo de Larrea J., decision of September 3, 2013, Mexico.

The full text of the decision may be consulted at the following link:

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## SUMMARY OF THE *CONTRADICCIÓN DE TESIS* 293/2011

**BACKGROUND:** On June 24, 2011 the possible *contradicción de tesis* between the criteria of a collegiate court in Morelia when deciding the *Amparo Directo* 1060/2008 and the criteria of a collegiate court of the Federal District when deciding the *amparos directos* 344/2008 and 623/2008, was reported to this Supreme Court of Justice. Those *amparos* discussed: (a) the hierarchical position of the international treaties in human rights matters in relation to the Constitution; (b) the nature of court precedent in human rights issued by the Inter-American Court of Human Rights (IACHR), and (c) conventionality control.

**ISSUE PRESENTED TO THE COURT:** To determine the criteria that should prevail regarding the hierarchical position of the international treaties on human rights in relation to the Constitution and the nature of the court precedent in human rights matters issued by the IACHR.

**HOLDING:** It was determined that there is a *contradicción de tesis*, essentially for the following reasons. Based on the constitutional reforms of June 2011, article 1 of the Constitution recognizes a group of human rights whose source is both the Federal Constitution and the international treaties to which the Mexican State is party. From this, a literal, systematic and originalist interpretation of the constitutional reforms in question, leads to the conclusion that the human rights norms, regardless of their source, are not related hierarchically since, once a treaty is incorporated into the legal order, the human rights norms it contains are integrated into the catalog of rights that function as a parameter of control of constitutional regularity and, therefore, form part of the group of laws that enjoy constitutional supremacy. However, when in the Constitution there is an express restriction on the exercise of any human right, the constitutional norm should apply. Furthermore, it was established that the court precedents of the IACHR constitutes an extension of the American Convention on Human Rights and, therefore, they are binding for national judges, regardless of whether the Mexican State has been party in the lawsuit. In that regard, based on the pro person principle, when the criterion has been issued in a case in which the Mexican State has not been a party, the applicability of the precedent will be determined based on the verification of the existence of the same reasons that caused the

proceeding. In addition, the legal operators must harmonize, in all the cases where it is possible, the inter-American court precedent with the national precedent and, if the harmonization is impossible, they must apply the criterion that is most favorable to the protection of human rights. Consequently, it was established that the following criteria shall prevail as court precedent: “Human rights contained in the Constitution and in the international treaties. They constitute the parameter of control of constitutional regularity, but when in the Constitution there is an express restriction on their exercise, what the constitutional text establishes must be applied”, and “Court precedent issued by the Inter-American Court of Human Rights. It is binding for Mexican judges provided it is more favorable to the person”.

The votes may be consulted at the following link:

<http://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=129659>

## EXTRACT OF THE *CONTRADICCIÓN DE TESIS* 293/2011

- p. 1 Mexico City. The Plenary of the Mexico's Supreme Court of Justice (this Court), in session of September 3, 2013, issues the following decision.

### BACKGROUND

- p. 1-2 On June 24, 2011 the possible *contradicción de tesis* was reported between the criteria held by a collegiate court of Morelia when deciding the *Amparo Directo* 1060/2008 and those held by a collegiate court of the Federal District when deciding the *amparos directos* 344/2008 and 623/2008.
- p. 2 The *Amparo Directo* 1060/2008 resulted in the isolated decision with the headings "International treaties. When the conflicts arise in relation to human rights, they must be located at the level of the Constitution" and "Conventionality control in internal location. The Mexican courts are obligated to exercise it".
- p. 2-3 For its part, the criterion held in the *Amparo Directo* 344/2008 resulted in the isolated decision titled "Human rights, the international treaties signed by Mexico on them. It is possible to invoke them in the *amparo* proceeding when analyzing the violations of individual rights that imply the violation of those human rights"; while the *Amparo Directo* 623/2008 resulted in the isolated decision "International court precedent. Its useful guidance in human rights matters".

### STUDY OF THE MERITS

- p. 14 To be able to determine if there are contradictory decisions the following must be verified: (a) that the contending bodies hold contradictory decisions, a decision being understood as the criterion adopted with judicial judgment and through legal reasoning to justify a particular resolution; and (b) that the criteria are discrepant on a same point of law, even though the factual questions that originate them are not the same.

In this respect, the disputing collegiate courts analyzed in the different *amparos directos* submitted to their consideration, the following legal points: (1) the hierarchical position of the international treaties in matters of human rights in relation to the Constitution; (2) the

nature of the court precedent in matters of human rights issued by the Inter-American Court of Human Rights (IACHR); and (3) conventionality control.

- p. 14,15 In relation to point (1), both courts decided with respect to the hierarchical position of the international treaties in matters of human rights in relation to the Constitution, where the collegiate court of the Federal District held that they are located below the Constitution while the collegiate court of Morelia considered that they are at the same level.
- p. 16, 17 In relation to point (2), the collegiate court of the Federal District considered the court precedent of the IACHR as guiding criterion, while the collegiate court of Morelia considered the precedents of such court and those of any other international human rights body to be binding. Nevertheless, the contradiction of criteria must be limited to establishing the nature of court precedent issued by the IACHR, since the collegiate court of the Federal District did not decide with respect to the value of the court precedent issued by other international bodies.
- p. 17, 18 Finally, on the topic of conventionality control identified in point (3), both courts held the relevance of the conventionality control in internal location, and therefore there is no point of impact between the arguments made by the two courts.
- p. 18 According to the above, the conclusion can be reached that the contradictory decision reported does exist and that the dispute consists of determining two questions: (i) the hierarchical position of the international treaties in matters of human rights in relation to the Constitution; and (ii) the nature of court precedent in matters of human rights issued by the IACHR.
- p. 19 This Court does not overlook the fact that the cases that motivated this contradictory decision were decided applying the constitutional framework that was in force before the constitutional reforms in human rights and *amparo* proceedings of June 2011 were passed (the constitutional reforms of 2011). In this regard, since the material of this contradiction affects a topic directly linked to the protection of human rights recognized by the Constitution, this Court considers it relevant to resolve it parting from the current

constitutional framework, thereby contributing to generating a criterion that contributes to legal security in a matter of special importance for all persons.

### **I. The hierarchical position of the international treaties in matters of human rights in relation to the Constitution**

- p. 21 Under both doctrine and court precedent there is an agreement with respect to which, among other questions, article 133 of the Constitution recognizes the principle of constitutional supremacy. Additionally, this Court has held historically that the first part of this article also determines the place that the international treaties occupy within the system of sources of Mexican legal order. However, the interpretation of such article has not been stable.
- p. 22 A first determination took place in 1992, as a result of the decision issued in the *Amparo en Revisión* 2069/91, in which this Court put the international treaties on the same level as the federal laws, indicating that both bodies of law occupy a rank immediately below the Constitution and that, therefore, one cannot be used as a parameter of validity or regularity of the other. Based on these reasons, the isolated decision titled “Federal laws and international treaties. They have the same normative hierarchy” was approved.
- p. 22-23 The second decision occurred as a result of the study of the *Amparo en Revisión* 1475/98, in which this Court established that the international treaties that are in agreement with the Constitution, by complying with the formal and material requisites for that purpose, are located hierarchically above the federal and local laws. This decision gave rise to the issuance of the isolated decision titled “International treaties. They are located hierarchically above the federal laws and in a second plane with respect to the Federal Constitution”, which implied the overturning of the above mentioned precedent.
- p. 23 Finally, a third decision was issued as a result of the resolution of the *Amparo en Revisión* 120/2002, in which this Court held the following in summary: (i) the existence of a superior legal order, of a national nature, formed by the Constitution, the international treaties and the general laws; (ii) the supremacy of the international treaties over the general, federal and local laws; and (iii) the existence of an internationalist vision of the Constitution, and

therefore the Mexican State cannot invoke its internal law as an excuse for the violation of the obligations contracted with other international actors. This resulted in the decision titled “International treaties. They are part of the Supreme Law of the Union and are located hierarchically above the general, federal and local laws. Interpretation of article 133 of the Constitution”.

p. 24 The above shows that, for this Court, article 133 of the Constitution reveals a notion of formal hierarchy of the rules that make up the system of sources, according to which the international treaties are hierarchically below the Constitution and above the rest of the legal norms that form part of the Mexican legal framework.

#### **a) Limitations of the hierarchical criterion**

For this Court, the caselaw developed regarding the hierarchy of the international treaties is unsatisfactory for two questions: one related to the scope of the precedents that support such doctrine; and another linked to the need to adopt a new focus to respond to the problem put forward, taking into account the new content of article 1 of the Constitution.

p. 25 Regarding the scope of the precedents, the two decisions that constitute the basis of the current hierarchy of the international treaties qualified the criteria held in them, since both decisions contemplated the possibility of the human rights of international origin becoming an extension of the Constitution itself.

p. 26-27 The criterion of hierarchy is unsatisfactory for taking into account what occurs with the human rights norms established in international treaties, and therefore it is necessary to note that this problem has acquired a new dimension as a result of the constitutional reforms of 2011, which amended the first paragraph of article 1 of the Constitution.

p. 27 From a simple reading of that provision it is clearly seen that the Mexican legal system recognizes human rights as coming from two sources: the Constitution and the international treaties to which the Mexican State is a party. In this point it is necessary to make two conceptual specifications.

- p. 27, 28 The first is in order to emphasize that, in light of the new constitutional text, the distinction between “international human rights treaties” and “international treaties” is not decisive for resolving this contradiction, since the first paragraph of article 1 of the Constitution starts with the recognition of the human rights established in both the Constitution and international treaties to which Mexico is a party, without reference to the matter or object of the respective international instruments.
- p. 28 This implies that even the human rights specified in international treaties that are not considered “human rights” treaties could be incorporated into the catalog of human rights established in the Constitution.
- p. 29 That is why this Court interprets the content of article 1 of the Constitution to mean that the normative set established in that article is composed of “human rights norms”, whose source of recognition may be the Constitution or an international treaty ratified by Mexico regardless of its subject matter.

This gives rise to a second question, since it cannot be ignored that the reform of article 1 of the Constitution was not accompanied by an amendment of article 133, which leads this Court to conclude that the reason for such omission is because it would be unsatisfactory to address, based on a criterion of formal hierarchy, the problem arising from the existence of two primary sources for recognition of human rights.

- p. 30 According to this consideration, the new formation of the catalog of human rights cannot be studied in terms of hierarchy, since the constitutional reform modified article 1 precisely to integrate a catalog of rights and not to distinguish or hierarchize those norms based on their source. This conclusion is reinforced if it is considered that article 1 of the Constitution, in addition to determining the sources of recognition of human rights, incorporates hermeneutic criteria for the resolution of possible antinomies from the possible duplicity in the regulation of a human right.

The above leads this Court to note that the human rights recognized in the international treaties and in the Constitution are not related in hierarchical terms. Consequently, the traditional focus of the hierarchy of the international treaties does not constitute a

satisfactory tool to determine the place the human rights recognized in such normative instruments occupy in the Mexican legal system.

## **b) The principle of constitutional supremacy in light of the new constitutional framework**

p. 31 The above stated problem leads this Court to rethink the concept of constitutional supremacy to recognize its operativity in light of the constitutional reforms, and especially the new article 1, as a result of the emergence of a new parameter of control of constitutional regularity.

### **1. The constitutional reform in human rights**

p. 32 It is very important that the new concepts incorporated into the Constitution be studied with a focus on human rights and with interpretations of the new constitutional paradigm, thereby seeking the useful effect of the reform, in order to optimize and strengthen the constitutional reforms without losing sight of their principal objective: the effective protection of people's human rights.

In this regard, one of the principal contributions of the constitutional reform is the creation of a group of human rights norms, whose source may be, without distinction, the Constitution or an international treaty. Thus, this group integrates the new regularity or validity control parameter of the Mexican legal system.

p. 32, 36 To justify this assertion, a literal interpretation of the first three paragraphs of article 1 of the Constitution shows the following: (i) the human rights recognized in the Constitution and in the treaties Mexico is party to integrate the same group or catalog of rights; (ii) the existence of such catalog has its origin in the Constitution itself; (iii) this catalog should be used for the interpretation of any norm relative to human rights; and (iv) the relationships between the human rights that integrate this group should be resolved presuming the interdependence and indivisibility of human rights—which excludes the hierarchy among them—, as well as the pro person principle, understood as a harmonizing and dynamic tool that permits the functionality of the constitutional catalog of human rights.

- p. 36-37 In view of the fact that each of the concepts contained in the Constitution forms part of a constitutional system, this Court considers that the text of article 1 of the Constitution cannot be interpreted in an isolated manner and without considering the other constitutional articles related to the expansion of the catalog of human rights recognized in the Constitution and their inclusion in the material scope of protection of the *amparo* proceeding.
- p. 37 In this regard, the human rights recognized in international treaties have been expressly integrated into our internal legal system, to expand the constitutional catalog of human rights, in the understanding that, as a result of the final part of the first paragraph of article 1 of the Constitution, when there is an express restriction on the exercise of human rights in the Constitution, the indication in the constitutional norm should be followed.
- p. 40 In this regard, assuming that the constitutional reforms did not alter the constitutional regime of the international treaties in general —regardless of their subject matter—, it is right to conclude that the only thing that was changed was the constitutional regime of the international human rights norms, which were integrated under the parameter of control of regularity whose source is the Constitution itself. Only thus can it be explained that both article 15 and article 105, section II, subsection g), permit the possibility of carrying out a control of the validity of international treaties adopting as parameter for that study the human rights recognized in other international treaties.
- p. 40-41 In effect, the two articles in question permit the validity of the international treaties to be determined by their conformity with or non-violation of certain norms that make up a parameter of control of their normative regularity. Therefore, it is clear that a systematic interpretation of the reformed articles leads to the unavoidable conclusion that there are international norms that, by recognizing human rights, acquire a preponderant role in our legal system, by becoming part of the parameter of control of regularity according to which the validity is studied of the rest of the legal norms that make up the Mexican legal system.
- p. 41 In addition to the grammatical and systematic interpretation, this Court considers that if the intention and purpose of the Reforming Branch in approving the reform in question is

analyzed, the conclusion is also reached that the human rights norms, regardless of their source, constitute a parameter of control of constitutional regularity that serves to give coherence and unity to the legal system in cases of antinomies or normative gaps.

- p. 45 Thus, from an analysis of the legislative proceeding the following conclusions can be reached: (i) it was sought for human rights, regardless of whether their source is the Constitution or the international treaties, to form a single catalog of constitutional rank; (ii) it was intended for the group of human rights to bind the judicial bodies to interpret not only the norms on the matter themselves, but every norm or act of authority in the Mexican legal system, being erected as a parameter of control of constitutional regularity; and (iii) it was held that not only the norms contained in the international human rights treaties constitute that parameter of constitutional regularity, but every human rights norm, regardless of whether its source is the Constitution, an international human rights treaty or an international treaty that, although not considered on human rights, protects a right of that kind.

## **2. The case *Varios* 912/2010**

- p. 46-47 When deciding the case *Varios* 912/2010, this Court concluded that the national judges must initially observe the human rights established in the Constitution and in the international treaties of which the Mexican State is a party, as well as the criteria issued by the Federal Judicial Branch (FJB) when interpreting them and look to the interpretive criteria of the IACHR to evaluate if there is one that is more favorable and ensures a broader protection of the right to be protected.
- p. 47 In this regard, this precedent, after the reform of June 2011, is in line with the grammatical, systematic and originalist interpretation developed above.

## **3. Scope of the principle of constitutional supremacy**

Traditionally it has been understood that the principle of constitutional supremacy is composed of the ascension of the Constitution as fundamental norm of the Mexican legal

system, which in turn implies, among other things, that the rest of the legal norms must be in agreement with it, both formally and materially.

p. 47-48 While this understanding has not changed, what has evolved is the configuration of the group of legal norms with respect to which such supremacy can be predicated in our legal system. This transformation is explained by the expansion of the catalog of human rights established in our Constitution, which obviously can be qualified as part of the normative group that enjoys this constitutional supremacy. In this regard, for this Court to defend human rights is to defend the Constitution itself.

p. 48 In this regard, the constitutional supremacy is predicated on all the human rights incorporated into the Mexican system, in that they form part of the same normative catalog or group. Nevertheless, the above explained assertion requires responding to the following question: how is it possible that a norm, whose existence and validity depends on the Constitution, establishes together with constitutional norms, the parameter of control of the validity of all the other norms of the legal system?

p. 48-49 The response to this question requires the disassociation of two moments: (i) the incorporation of an international treaty into the legal order that takes place beginning with the compliance with the formal requirements of validity, which refer basically to entering into the international treaty by the President of the Republic and its ratification by the Senate; and (ii) once incorporated into the legal system, the satisfaction of the material requirements of validity, which consist basically in the conformity of the treaty with the Constitution, in the general sense that the content of the international instrument would not violate the constitutional norms and specifically that it does not affect the human rights established in the Constitution itself and in other international treaties.

p. 50-51 In this regard, the conformity of the international human rights norms with the Constitution for purposes of their incorporation into the internal legal system should be analyzed under the special rule of article 15 of the Constitution, understood with the pro person principles of conforming interpretation and progressiveness established in article 1 of the Constitution, which permit the recognition of new human rights, provided this does not

mean a detriment to the content and scope of the rights previously recognized and integrated into the parameter of control of constitutional regularity.

- p. 51 Pursuant to the above, the requirement established in article 133 of the Constitution reinforces the interpretation that the international treaties are in a hierarchical position inferior to the Constitution, while the requirement established in article 15 of the Constitution guarantees that, regardless of the normative hierarchy of the instrument that recognizes them, the international human rights norms, and not the treaty as a whole, make up the parameter of regularity contained in article 1 of the Constitution, being decoupled from the international treaty that is its source and, therefore, from its normative hierarchy, to enjoy, consequently, constitutional supremacy.
- p. 51-52 Thus, all the above indicated considerations make it possible for this Court to conclude that the human rights norms contained in international treaties and in the Constitution are not related in hierarchical terms since, once a treaty is incorporated into the legal system, the human rights norms that it contains are integrated into the catalog of rights that function as a parameter of constitutional regularity, such that those norms cannot violate the principle of constitutional supremacy precisely because they form part of the normative group with respect to which the supremacy is predicated.
- p. 52 If both constitutional norms and international norms refer to the same right, they will be articulated in a manner that prefers those whose content protects their holder more favorably, following the pro person principle in that regard. Furthermore, in the scenario that a human right contained in an international treaty that Mexico is party to is not established in a constitutional norm, the Constitution itself in article 1 contemplates the possibility of its content being incorporated into the group of rights that all persons will enjoy and that all the authorities will have to respect and guarantee and, according to which, the legal acts of both authorities and private citizens must be interpreted so they may be harmonious and coherent with such fundamental contents.
- p. 53-54 Finally, this Court has been consistent in recognizing the possibility that judicial authorities engage in a control of regularity, whether concentrated or diffuse depending on the

attributes of each body and the route in which the matter is processed, for which they may use parameters of constitutionality or of conventionality, which form part of the same normative group and, therefore, integrate the mentioned parameter of control of regularity, such that speaking of constitutionality or conventionality implies referring to the same parameter of regularity or validity, although for merely didactic purposes the origin of the norm used to develop the respective validity study may be differentiated.

## **II. The value of the court precedent issued by the IACHR**

p. 56-57 As a result of new reflections and due to the new membership of this Court, it must be considered that the binding force of the interpretive criteria contained in inter-American decisions should be extended to those issued in cases in which the Mexican State has not been a party, as explained below.

p. 57 On the one hand, it should be considered that the court precedent of the IACHR constitutes an extension of the American Convention on Human Rights (ACHR). This idea can be clarified if we start from the conceptual difference between a “provision” and a “norm”. According to this distinction, the provision alludes to the text of a particular law (an article, a section, etc.), while the norm refers to the meaning that is attributed to that text. In this case, the “provision” would be the text of the ACHR, while the “norms” would be the different meanings that the IACHR attributes to the conventional text through its court precedent, including those issued in the cases in which the Mexican State has not been a party.

Furthermore, according to article 1 of the Constitution, all the human rights recognized in the Constitution and in the international treaties ratified by the Mexican State form part of the parameter of control of regularity of the Mexican legal system. Consequently, the criteria that the IACHR issues in its decisions, as last interpreter of the ACHR in the international sphere, are binding for all the judicial bodies of the country.

p. 57-58 It is relevant to clarify that both this Court and the rest of the supreme courts of the States of the Americas that have recognized the contentious competence of the IACHR must maintain a constant judicial dialog with the international court, since both have the same

purpose: the protection of human rights. It is in this regard that the relations between this Court and the IACHR must be understood in terms of cooperation and collaboration.

p. 58 In this regard, the court precedent of the IACHR, although understood as binding on the Mexican legal operators, does not try to nor can substitute the national court precedent nor should be applied uncritically. On the contrary, the application of the court precedent of the inter-American court must be done in collaboration and not contradiction with national court precedent, such that the decisions that may eventually imply a difference of criterion with respect to the scope that a specific right may have must be resolved based on the pro person principle.

p. 59 It is in this regard that it is clear that the inter-American court precedent is binding for national judges when it is more favorable, since this sets the basis for a minimum interpretation with respect to a particular right.

Thus, the binding nature of the inter-American criteria should not be understood as a guideline that constrains the internal judges to decide unwaiveringly applying the standard set by the IACHR, overlooking even the court precedent of the PJJF. On the contrary, this obligation should be understood as binding on the internal legal operators to observe in their decisions a minimum standard, which may be inter-American or national, depending on which is more favorable to the person.

p. 60 When the matter involves the application of a criterion issued by the IACHR in a case in which the Mexican State has not been a party, the legal operators are obligated to analyze if the precedent is applicable to the Mexican legal system. This prior step will not depend on the conduct ordered as proper by the IACHR being compatible with the conduct, legal act or norm analyzed, but with the fact that the analyzed normative framework, the factual context and the particularities of the case are analogous and, therefore, appropriate for the application of the inter-American precedent.

p. 63-64 For all of the above, it is concluded that the criteria emanating from the court precedent issued by the IACHR are binding for the national judges regardless of whether the Mexican

State has been a party in the lawsuit, since they give content to the human rights established in the ACHR.

- p. 64 Consequently, this binding nature of the inter-American court precedent requires the following from the Mexican legal operators: (i) when the criterion has been issued in a case in which the Mexican State has not been a party, the applicability of the precedent to the specific case must be determined based on the verification of the existence of the same reasons that motivated the decision; (ii) in all cases where it is possible, the inter-American court precedent should be harmonized with the national; and (iii) if the harmonization is impossible, the criterion most favorable for the protection of the human rights of people must be applied.

### **DECISION**

- p. 64-65 According to the above, the criteria established by this Court must prevail as court precedent in the following terms:

“Human rights contained in the Constitution and in the international treaties. They constitute the parameter of control of constitutional regularity, but when in the Constitution there is an express restriction on their exercise, what is established in the constitutional text shall be applied”.

“Court precedent issued by the International Court of Human Rights. Is binding for Mexican judges provided it is more favorable to the person”.