

This summary contains the cover page, the synthesis and the extract of a decision of Mexico's Supreme Court of Justice. Changes were made to its original text to facilitate the reading of the extract. This document has informative purposes, and therefore it is not binding.

**CHERÁN CASE: RIGHT TO CONSULTATION OF THE INDIGENOUS
PEOPLES IN LEGISLATIVE PROCESSES
(CASO CHERÁN: DERECHO A LA CONSULTA DE LOS PUEBLOS
INDÍGENAS EN LOS PROCESOS LEGISLATIVOS)**

CASE: *Controversia Constitucional 32/2012*

REPORTING JUDGE: Margarita Beatriz Luna Ramos

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

DATE OF THE DECISION: May 29, 2014

KEY WORDS: right to prior, free, and informed consultation, right of indigenous peoples to free determination and autonomy, legislative process, legislative power, indigenous communities and peoples.

CITATION OF THE DECISION: Supreme Court of Justice of the Nation, *Controversia Constitucional*, Plenary, Margarita Beatriz Luna Ramos, J., decision of May 29, 2014, Mexico.

The full text of the statement can be found at the following link:

<https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emplematicas/sentencia/2020-12/CC%2032-2012.pdf>

SUGGESTED CITATION FOR THIS DOCUMENT: Human Rights Office of Mexico's Supreme Court of Justice, *Extract of Controversia Constitucional 32/2012*, Mexico.

SUMMARY OF THE *CONTROVERSIA CONSTITUCIONAL* 32/2012

BACKGROUND: On November 2, 2011, the Electoral Tribunal of the Federal Judiciary (TEPJF) issued a decision in which, among other matters, it recognized that the indigenous people living in the Municipality of Cheran, located in the state of Michoacan de Ocampo (Michoacan) have the right to choose their authorities through usage and custom. On January 22, 2012, the High Council of Communal Government (Cheran Council) was elected through usage and custom as the definitive municipal authority of Cheran, which election was validated by the Electoral Institute of the State of Michoacán. Then, on March 16, 2012, decree 391 reforming the Constitution of Michoacan was published in the Official Gazette of the State of Michoacan (POM). Thus, the Cheran Council filed a *controversia constitucional* before the Supreme Court of Justice of Mexico (this Court), on May 2, 2012, against the Legislative and Executive Branches of Michoacan, claiming the invalidity of that decree on the grounds that the Legislative Branch of Michoacán violated its right to prior, free, and informed consultation, provided for in the Federal Constitution and in various international human rights treaties.

ISSUE PRESENTED TO THE COURT: Whether the Federal Constitution or the international treaties on human rights establish the obligation indicated by the Cheran Council, and therefore the legislative process took place improperly, because the local Legislative Branch failed to undertake the appropriate intervention. And if it is established that the Municipality of Cheran has the right to prior, free, and informed consultation by the local Legislative Branch, analyze whether such a right was respected in the legislative process that preceded the reform of the local Constitution that is challenged in this dispute.

HOLDING: This *controversia constitucional* was determined to be well founded, essentially for the following reasons. On the one hand, this Court notes that article 2 of the Federal Constitution does not expressly establish the obligation to consult indigenous peoples in legislative processes, but merely orders the Federal Government, States and Municipalities to eliminate deficiencies or lags affecting indigenous peoples and communities. This is irrespective of whether the statement of purpose that preceded the last reform of that article foresaw normative

history such as Convention 169 on Indigenous and Tribal Peoples of the International Labor Organization (ILO Convention 169), which establishes the right of indigenous peoples to be consulted, and the Agreements of San Andrés Larraínzar, which arose as a result of a struggle to affirm the conditions of the indigenous peoples of the country and to recognize their autonomy. However, according to article 1 of the Federal Constitution, ILO Convention 169 forms part of the parameter of constitutional regularity, which means that there is an obligation on the part of the Congress of Michoacan to consult the Cheran Council, in its status as municipal authority. Thus, it was determined that the legislative process that preceded the challenged reform was not respected, given that, although the Cheran Council noted that some consultation forums were held, these were not carried out adequately with the municipal authority or with sufficient quorum. For its part, the Legislative Branch of Michoacán did not dispute that argument, so this Court determined that it violated the sphere of competence and the right to consultation of the Municipality of Cherán. Finally, the Court declared the challenged reform invalid with effect only for the parties.

VOTE: The votes can be consulted at the following link:

<https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=138752>

EXTRACT OF THE *CONTROVERSIA CONSTITUCIONAL 32/2012*

p.1 Mexico City. The Plenary of Mexico's Supreme Court of Justice (this Court), in session of May 29, 2014, issues the following decision.

BACKGROUND

p.55-56 On November 2, 2011, the Superior Chamber of the Electoral Tribunal of the Federal Judiciary (TEPJF) issued a decision through case file SUP-JDC-9167/2011, where it determined, among other issues, that the members of the indigenous community of the Municipality of Cheran, located in the State of Michoacán de Ocampo (Michoacan) have the right to request the election of their own authorities, following their traditional rules, procedures and practices, with full respect for human rights.

p.57-58 On January 22, 2012, the indigenous communities of Cheran held elections to designate municipal authorities by their system of usage and custom, which were validated by the Electoral Institute of the State of Michoacán (IEEM) by issuing the Certification of Majority and Validity of the Election (Certification of Election) of the High Council of the Communal Government of the Municipality of Cheran, Michoacan (Cheran Council).

p.58 On March 16, 2012, Decree 391 was published in the Official Gazette of Michoacán (POM), reforming the Political Constitution of the Free and Sovereign State of Michoacán de Ocampo (Constitution of Michoacán).

p.1-2 Through a document filed on May 2, 2012 at this Court, the members of the Cheran Council, as municipal authority, initiated a *controversia constitucional* against the Legislative and Executive Branches, and each of the Municipalities, all of the State of Michoacan, on the grounds that they violated their right to prior, free, and informed consultation, claiming the invalidity of the reform to the Constitution of Michoacan, consisting of decree 391, which adds a third paragraph to article 2; reforms the first and second paragraphs, and adds a third, fourth, fifth, sixth and seventh paragraphs with XXI

sections, and an eighth final paragraph to Article 3; adds sections X and XI and changes the order of section X of Article 72; adds a fourth paragraph to Article 94; adds a third paragraph to Article 103; adds a third paragraph, moving the previous one to the fourth paragraph in Article 114; reforms subparagraph c) of the second paragraph, adding a subparagraph d) and reforming the third paragraph of Article 139.

- p.3 In addition, the constitutional provisions they claimed were violated are Articles 1 and 2 of the Federal Constitution, Article 6 of Convention 169 on Indigenous and Tribal Peoples of the International Labor Organization (ILO Convention 169), as well as 18 and 19 of the United Nations Declaration on the Rights of Indigenous Peoples and other related and applicable provisions.

STUDY OF THE MERITS

- p.42-43 This Court considers that the lawsuit was filed by those who have active standing to do so, because representatives of the Cheran Council attend the proceeding and prove their capacity with the verified copy of the Certification of Election, issued by the IEEM.
- p.47-48 Moreover, while this Court has established that municipalities have no legitimate interest to allege a violation of article 2 of the Federal Constitution, because *controversias constitucionales* were not instituted to defend the rights of indigenous peoples or communities that are geographically located in their territorial circumscription, this rule does not apply when the Cheran Council demonstrates that its city council was elected and legally recognized through the system of usage and custom, and further claims that the acts challenged allegedly violate that form of designation, the effectiveness of its continuity or the form of its performance. This is so because that constitutional provision preserves, among other aspects, the right of indigenous peoples to elect, in accordance with their traditional rules, procedures and practices, the authorities or representatives for the exercise of their own forms of internal government. Therefore, once such municipalities have authorities legally constituted in accordance with their community practices, those authorities have the legal capacity to sue, through a *controversia*

constitucional, to ensure that the attributions governing their functions are not affected, since this means of control is provided precisely to protect the regularity of the exercise of the powers conferred by the Federal Constitution on municipalities and other bodies of the State.

p.49-21 The authorities that were recognized as defendants were: the Legislative and Executive Branches of the State of Michoacan; the first for the issuance of the challenged norm and, the second for its publication. It was also decided that the other municipalities of the State of Michoacan should not be defendants, since proving the alleged lack of consultation with the Municipality of Cheran, which it essentially argues in its claim, in relation to the discussion and approval of the contested constitutional reform, does not require their participation in this *controversia constitucional*.

I. Study of the grounds for invalidity

p.51-52 The Legislative Branch, through its representative, asserted, in short, as grounds for the invalidity of the dispute: a) the tardiness of the filing of the claim; b) that from the full text of the claim there is no argument specifically intended to combat the invalidity of the contested acts, an essential requirement to be in a position to determine the existence or non-existence of the grievance which may or may not be caused to the Cheran Council, together with the fact that it does not specify the scope or area of jurisdiction which it considers to be affected or limited by the Decree; c) the lack of legal interest arising from the fact that the claim did not specify the possible impact that the challenged acts may cause; and d) the dismissal of the lawsuit due to the sovereign power of the Congress of Michoacán contained in article 164 of the Constitution of Michoacán, to reform that Constitution without the involvement of any other body or subject to any other branch.

p.52-53 With respect to the grounds for invalidity mentioned above, this Court considers that: a) it is not true that the claim was filed late, because it was filed within the time limit established by law for that purpose.

p.53 b) Nor is the reasoning that the claim is invalid well-founded based on the lack of arguments for the invalidity of the contents of the norms, since in this case the Municipality of Cherán suffers from an impact on the sphere of its competencies, which relates to its quality as indigenous and, it argues, undermines the effectiveness of the continuity of its traditional norms, procedures and practices.

Indeed, the total reasoning of the Cherán Council concerns the legislative procedure, since it considers that it should have been consulted during its development and, by failing to do so, the Legislative Branch infringed upon its rights and its sphere of powers.

This argument (regardless of whether or not it is effective) legitimizes it to initiate the *controversia constitucional*, without necessarily having to present arguments for the invalidity of the contents of the reform, since it suffices to challenge the process from which it resulted, on the grounds that the process causes it harm.

p.54 c) For these same reasons, it is clear that the Municipality of Cherán has a legal interest to file the claim, contrary to what the Legislative Branch argues.

d) Finally, the argument that the sovereign power of the Legislative Branch to reform the Constitution of Michoacán, without the involvement of any other body, cannot be addressed to qualify the validity of the claim, because it involves precisely the discussion of the substance of the *controversia constitucional* and it has been a repeated criterion of this Court that the motives for invalidity involving the in-depth study of the issue cannot be addressed, as reflected in the court precedent issued by the Plenary of this Court which resulted from the *Controversia Constitucional 59/2006*.

II. Study of the concept of invalidity

p.55.66 Since the causes of invalidity that were asserted were unfounded, it is appropriate to conduct a study on the merits. For its part, the concept of invalidity proposed by the Cherán Council is well-founded, according to the following study:

- p.71 To respond to the Cheran Council's argument that the legislative process took place improperly, because the Legislative Branch failed to provide it with the involvement to which it is entitled, first it will be determined whether the Federal Constitution or the international human rights treaties establish such an obligation, because otherwise it makes no sense to analyze whether the challenged norms are likely to directly affect it with the consequent need for the indicated consultation.
- p.66.71.76 Thus, from the statement of purpose of December 7, 2000 that preceded the last amendment to article 2 of the Federal Constitution, and from the final contents of the decree reforming that article, published in the Official Federal Gazette (DOF) on August 14, 2001, it is noted that although the ILO Convention 169 and the San Andrés Larraínzar Agreements were adopted as a normative reference, which provide for the right to consultation of indigenous peoples with regard to policies, laws, programs, and public actions relating to them, the fact remains that the Federal Legislative Branch did not expressly establish the obligation on the bodies involved in legislative processes, prior to the adoption and enactment of laws, to consult with the indigenous peoples. It is only required in two of the sections of Part B that they be given participation so that the Federation, States and Municipalities can abate the deficiencies and lags affecting indigenous peoples and communities.
- p.78 In accordance with various norms of the ILO Convention 169, and incorporated into our legal system, in terms of the provisions of the first paragraph of the first article of the Federal Constitution and the court precedent issued by the Plenary of this Court in the *Contradiccion de Tesis 293/2011*, indigenous peoples, such as the municipality initiating the *controversia constitucional*, have the human right to be consulted, through culturally appropriate, informed and good faith procedures through their representatives, whenever legislative measures are envisaged that may directly affect them, which consideration, in addition, is based on the determination of the Inter-American Court of Human Rights in the cases of the Kichwa People of Sarayaku vs. Ecuador and of the Twelve Saramaka

clans vs. Suriname; as well as the resolution of the First Chamber of this Court in the *Amparo bajo Revision* 631/2012, filed by the Yaqui Tribe.

p.79 It is true that our Federal Constitution does not contemplate the need for local legislative bodies, within their legislative processes, to open periods of consultation; however, the international standard invoked here does establish such a prerogative for indigenous peoples; therefore, in compliance with its contents and the provisions of article 1 of the Federal Constitution, the Congress of Michoacan has a duty to provide for an additional phase in the process of creating laws to consult representatives of that sector of the population, in the case of legislative measures that may directly affect them.

This is especially so when it is considered that the TEPJF ordered the Congress of Michoacan, *inter alia*, to harmonize the Constitution and domestic legislation with the Federal Constitution and international treaties on indigenous rights.

p.79-80 It is also true that the decision of the Congress of Michoacan to incorporate consultation with indigenous peoples and communities has been materialized in various secondary laws, such as the Planning Law, the General Law on Linguistic Rights of Indigenous Peoples or the Law of the National Commission for the Development of Indigenous Peoples; however, the exercise of the right of consultation should not be limited to those ordinances; communities such as Cheran must also have such a prerogative in the case of legislative procedures such as the one now disputed, the contents of which concerns, precisely, the rights of indigenous peoples and can therefore undoubtedly directly affect them.

p.80 Having established that the Municipality of Cheran has the right to prior, free, and informed consultation by the local Legislative Branch, it is appropriate to analyze whether such a right was respected in the legislative process that preceded the reform of the Constitution of Michoacan that is challenged in this dispute.

- p.84 It should be noted that the Cheran Council complained in its claim that "consultation forums" were carried out in which care was not taken to establish adequate procedures with the representatives of Cheran and that such forums were suspended and resumed without sufficient quorum and without fulfilling the authentic objective of consulting them.
- p.84-85 The defendant Legislative Branch does not contradict these assertions and directs its defense to the material content of the reform; however, such argumentation is inadequate, since what is discussed in the suit is the prior procedure through which the indigenous municipality has been given the right of prior consultation.
- p.85 Thus, since it does not appear in the suit that the Cheran Council has been consulted previously, freely, and in an informed manner through an adequate, good faith procedure, through the institutions representing it, it is clear that the conduct of the defendant Legislative Branch violated its sphere of competence and rights, and it is therefore necessary to declare the contested norms invalid, with no need to take up the other arguments of the parties.

DECISION

- p.85.87,88 This Court determines that this *controversia constitucional* is valid and well founded. It also declares the invalidity of the reform to the Constitution of Michoacan, published in the POM on March 16, 2012, with effect only between the parties in accordance with the court precedent issued by the Plenary of this Court in the *Controversia Constitucional 19/95*. And it is determined that it will take effect as of the legal notification of the decision to the defendant authorities, only with respect to the sphere of competence of the Municipality of Cheran. Finally, it is ordered to publish the decision in the Federal Judicial Weekly and in its Gazette and in the DOF.