

The Reception of the Inter-American Case Law into Mexican System: The Ambiguous Position of the Supreme Court of Justice of the Nation¹

1. Introduction. 2. Constitutional interpretation of the “Human Rights clauses” of the Mexican Constitution. 3. The IACHR’s decision in the *Radilla Pacheco* case (2009). 4. The Supreme Court’s approach after *Radilla Pacheco*. 5. Conclusions.

1. The reception of the Inter-American Court of Human Rights (hereinafter IACHR) case law into Mexican law is a relatively recent topic of interest, for academy as well as for judiciary and legal practice. Traditionally, the conceptualization of rights in the national legal arena was rather “closed”: rights established in regional and international human rights instruments were given little consideration in national legal adjudication and legislation, and their adoption was virtually halted until recently.

In order to move from the above-mentioned “closed” conception of rights to an almost “unlimited” national adoption of international law of human rights, several changes have been necessary. Within few years, a constitutional reform (adopted in 2011), an IACHR judgment (the *Radilla Pacheco* decision), and two decisions issued by the Mexican Supreme Court of Justice of the Nation (hereinafter SCJN) took place establishing a new constitutional paradigm and conceptual framework that define the relationship between national and Inter-American case law.

The aim of this article is to analyse the main features of these important changes.

2. The judicial interpretation of two provisions of the 1917 Mexican Constitution - the “human rights clause” (Art. 1) and the “supremacy clause” (Art. 133) - has defined the understanding of the content and scope of human rights in Mexico for nearly a century. On the one hand, the former pointed out that the persons would enjoy the guarantees “granted by the Constitution”, which may not be restricted or suspended, “but in the cases and under the conditions established by it”. On the other hand, the latter established the hierarchy of national sources of law: the Constitution, laws approved by the Congress and international treaties are part of the “Supreme Law of the Union”.

It was precisely the interpretation given to the list contained in the supremacy clause, in conjunction with the “human rights clause” that led to the “closed” conception of the sources of human rights. Actually, international treaties occupied the same hierarchical position as the laws issued by the Federal Congress and the Constitution was considered as a higher level norm with respect to both international treaties and federal laws. This interpretation implied that in any contradiction between the Constitution and an international treaty, the former would have prevailed over the latter. According to this approach the jurisprudence of the IACHR could be considered only as a “guiding” criterion in the interpretation and compliance with the provisions protecting human rights.

It is noteworthy to mention that this was not always the case. Shortly before the 2011 constitutional reform that would change this parameter, some federal court in an almost

isolated approach considered that, in case of contradictions on human rights contained in international treaties, these instruments should be considered at the same hierarchical level as the Constitution.

However, the 2011 Constitutional reform changed the paradigm of human rights in the country. This revision, one of the biggest of the Mexican constitutional history, modified the “human rights clause” as well as the “supremacy clause”, thereby intervening on the relationship between national law and Inter-American jurisprudence. More specifically, as far as the “human rights clause” is concerned, the “new” article 1 introduces several important changes. First of all, it expanded the range of human rights available in the country, stating that the persons would enjoy the human rights granted by the Constitution and international treaties in which Mexico is part. Second, it introduced what was later called the “consistent interpretation”, an interpretation method that will be developed by the Supreme Court. Third, an interpretation parameter called “*pro personae*” was introduced, according to which the widest possible protection should be guaranteed. Fourth, it introduced the obligation for the Mexican State to promote, respect, protect and ensure human rights. Fifth, it settled the principles that the aforementioned obligations should follow: universality, interdependence, indivisibility and progressiveness. And finally, it introduced the obligations to prevent, investigate, sanction and redress human rights violations.

3. On November 23, 2009, the IACHR issued the *Radilla Pacheco vs. Mexico* decision, in which declared the Mexican State responsible for the violation of several articles of the American Convention of Human Rights in a case of forced disappearance. In that decision the IACHR stated that even if domestic judges and tribunals are subject to the rule of law and therefore they are compelled to apply the regulations in force within the national legal system, once a State has ratified an international treaty such as the American Convention, its judges, as part of the State’s apparatus, are also submitted to it. This obligation means that judges must ensure that the provisions of the American Convention are not affected by the application of national laws contrary to its object and purpose, and that they do not lack legal effects from their creation. In other words, the Judiciary shall exercise a “control of conventionality” *ex officio* between domestic regulations and the American Convention, evidently within the framework of its respective competences and the corresponding procedural regulations. Within this task, the Judiciary shall take into consideration not only the treaty but also the interpretation the IACHR, as the final interpreter of the American Convention, has made of it.

4. The SCJN reacted to the *Radilla Pacheco* judgement with two decisions. With the first one (*Varios* 912/2010), the SCJN pointed out that according to the IACHR judgment federal judges shall carry out an *ex officio* control of conventionality between domestic regulations and the American Convention according to a diffuse model of judicial review of legislation. It means that domestic regulation and national judicial interpretation must respect the

American Convention and its interpretation - as all other human rights enshrined in international treaties signed by México. More specifically, the Mexican Court distinguishes between IACHR's "binding criteria" (those arising from IACHR decisions issued against Mexico due to the fact that resolutions issued by the IACHR against Mexico are mandatory for all authorities of the country in their respective sphere of competence) and IACHR's "guiding criteria" (those deriving from the IACHR's decisions issued against another State, but only in the case in which the criteria elaborated by the IACHR is more favorable to the victim). Furthermore, it settles a three steps "method of consistent interpretation" for the judicial review of legislation: (i) Consistent interpretation in a broad sense; (ii) Consistent interpretation in the strict sense; (iii) and, non-implementation of the law when the previous alternatives were impossible.

With its second decision (*Contradicción de Tesis* 293/2011), the SCJN focuses mainly on two issues: the hierarchical position of human rights contained in international treaties with respect to those contained in the Constitution, and the legal nature of the case law on human rights issued by the IACHR. As far as the first point is concerned, the SCJN stated that an "harmonic" criterion must guide the relationship between human rights recognized in the constitution and those recognized in international treaties and that both categories of human rights - constitutional and conventional - integrate the same parameter of validity.

Regarding the second point, the Court settled a contradiction between two previous SCJN's decisions: according to the first one (*Amparo Directo* 623/2008) it was possible to invoke the IACHR's case law as a *guiding* criterion when it comes to the interpretation and enforcement of protective human rights provisions; on the contrary, according to the second one (*Amparo Directo* 1060/2008), international human rights case law is a *compulsory* criterion, which must be applied by all judicial authorities, because "the criteria emanating from the jurisprudence issued by the Inter-American Court of Human Rights are binding on national judges regardless of whether the Mexican State has been a party to the dispute, since they endow human rights established in the American Convention on Human Rights with its substance". However, the SCJN stated that the application of the IACHR' case law "(...) must be done in terms of collaboration and not in contradiction with national precedents, taking into account at all times the *pro persona principle*" due to the fact that "the binding force of the case law from the IACHR arises from the very constitutional mandate established in Article 1 of the Constitution, since the principle of *pro-persona* obliges national judges to decide on the basis of the interpretation that is most favorable to the individual".

5. Despite the important changes briefly analysed in the present contribution, the Inter-American Convention and the interpretation given to its provisions by the IACHR as well as the other international human rights instruments still face serious difficult to be applied by state and federal judges. The Constitutional reform and the SCJN's case law have not been able to change the traditional mexican legal culture and the

“closed” conception of human rights yet, as it results evident in many judicial decisions. The journey to a more complete integration between international and national system as far as human rights are concerned is still quite long.

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