

# CONSTITUTIONAL PRECEDENT IN THE MEXICAN SUPREME COURT

50 LEADING CASES



**Suprema Corte**  
de Justicia de la Nación

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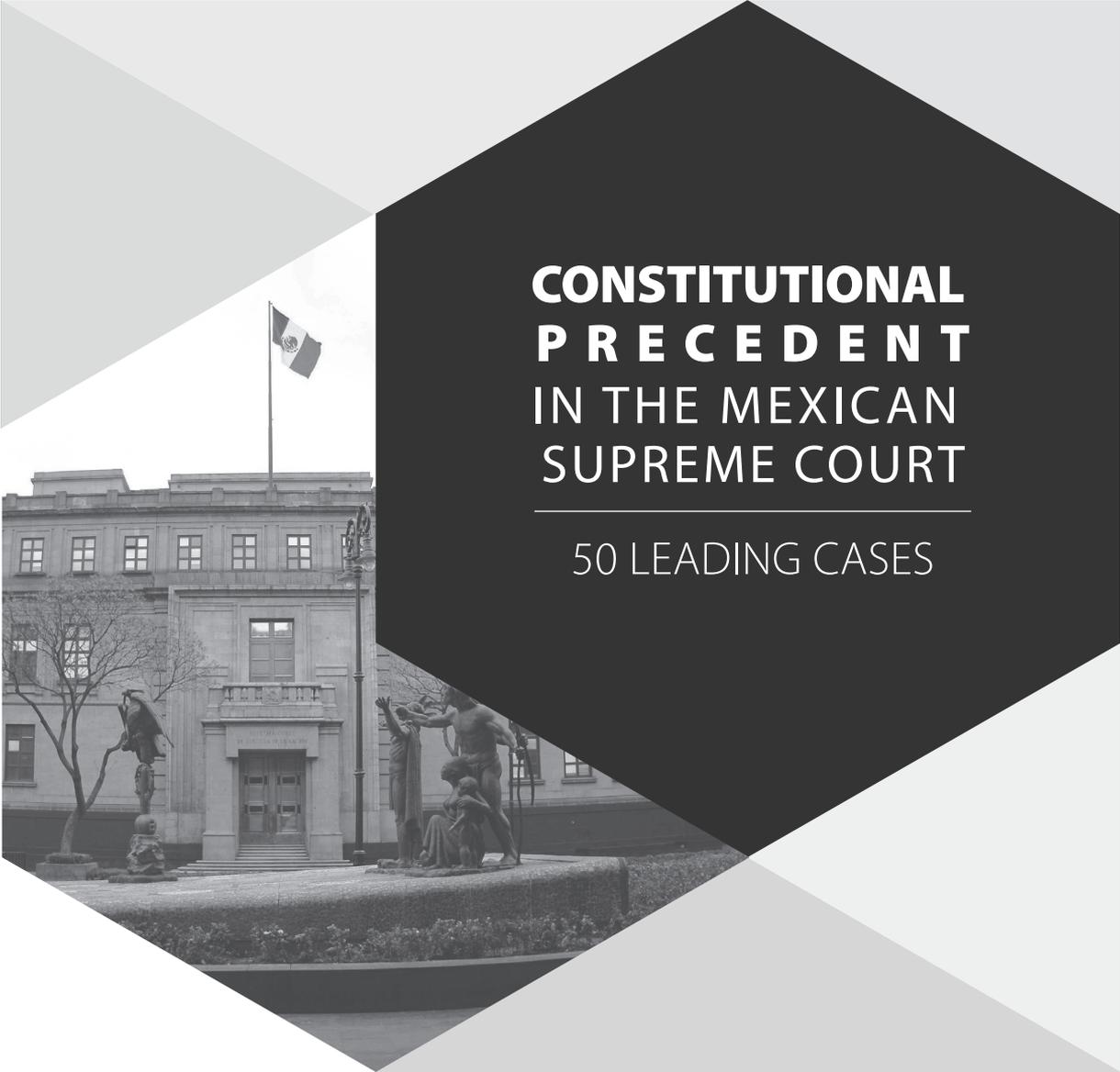
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# CONSTITUTIONAL PRECEDENT IN THE MEXICAN SUPREME COURT

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**Suprema Corte**  
de Justicia de la Nación

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## INTRODUCTORY NOTE

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This book is an example of the transformative power of the judicial system and the importance of the constitutional control of the norms and acts of any public authority in order to protect the human rights of everyone. This work systematizes some of the most emblematic decisions that Mexico's Supreme Court has issued in recent years and that have positioned this court as a main actor in the construction of a more fair and equitable society.

Despite the intense development of comparative constitutional law in the last years, the debate has focused on certain countries and the case-law of our Supreme Court has not received the attention it deserves. This book, which largely includes the constitutional doctrine of the Mexican Court, contributes to filling that gap and confirms that the developments in Mexican constitutionalism have global importance. The decisions that have been selected stand out for their resolution of complex problems, their argumentative

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solidity and their contributions to democratic constitutionalism. That is why it is an indispensable work for comparative law and for the defense of human rights in Mexico and in other latitudes.

The following pages explain how cases were selected and the methodology that was used for their systematization. In addition, since the book is designed to be consulted in another language and in different parts of the world, I explicate, in general terms, the structure and function of Mexico's Supreme Court of Justice, as well as the way in which the Court establishes precedents and the value that they have within the Mexican legal system. Finally, I provide an account of the content of this work in such a way that the reader knows what she or he will find while reading these pages.

### Case selection

The decisions dictated by the Supreme Court selected in order to integrate this book have had a wide impact for the benefit of society. Thus, it was sought that the chosen decisions have a high legal value and have been crucial to trace the path followed in the interpretation of certain human rights cases or related situations.

We have only considered the most relevant decisions of the Supreme Court that are part of the Tenth Epoch of the Mexican Federal Judicial Weekly. The only exception was a case on the voluntary termination of pregnancy that was issued during the Eleventh Epoch of the Mexican Federal Judicial Weekly, which could not be left out of this work due to its importance.

The Mexican Federal Judicial Weekly is the official means of publication of the decisions and precedents in the case-law of the Federal Judiciary of Mexico and was created on December 8th, 1870. The purpose of its creation was to disseminate the criteria issued by the Federal Courts. Starting in 1871 and through the present, the information that is published is divided by Epochs, all of them of different lengths. The tenth Epoch is the last fully concluded period. On May 1, 2021, the Eleventh Epoch of Federal the Judicial Weekly began.

Each Epoch began due to constitutional or legal reforms that introduced paradigmatic changes in the way of integrating, systematizing and publishing the precedents of the Federal Judiciary, or due to events of great historical relevance that modified the national legal order. The Epochs are grouped into two periods: before and after the Constitution of 1917, which is the current fundamental norm. The first four Epochs are previous to this Constitution, for that reason the precedents issued during that period are considered inapplicable or historical. The current or applicable case-law begins from the Fifth Epoch, which goes from 1917 to the present.

The Plenum of Mexico's Supreme Court of Justice declared the beginning of the Tenth Epoch of the Mexican Federal Judicial Weekly due to the constitutional reforms in injunctions (*amparo*) and human rights that were published on June 6th and 10th, 2011. These constitutional amendments introduced a substantial change in the understanding and protection of human rights. Both reforms placed the human rights norms established in international treaties at the top of the legal system and strengthened the protection of human rights through different mechanisms of application and interpretation of these norms.

In particular, the reform published on June 10th, 2011 substantively modified eleven constitutional articles in order to strengthen the protection of human rights and reinforce their guarantee mechanisms. In the first article, the recognition of the enjoyment of human rights contained in the international treaties to which the Mexican State is a party, as well as the guarantees for their protection was incorporated. Likewise, the promotion, respect, protection and guarantee of human rights were established as obligations for all public authorities, in accordance with the principles of universality, interdependence, indivisibility and progressiveness, as well as the obligation to prevent, investigate, punish and repair the violations against these rights, in the terms established by law. In addition, interpretation criteria such as the *pro persona* and conforming interpretation were incorporated into this precept, as well as the prohibition of discrimination based on sexual preference was explicitly regulated.

Some of the modifications introduced by these reforms are related to the powers of the Supreme Court. Among other issues, the Supreme Court was empowered to rule on the

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constitutionality and validity of decrees suspending or restricting the exercise of human rights and their guarantees.

The Supreme Court inaugurated the Tenth Epoch of the Mexican Federal Judicial Weekly because these reforms implied substantive changes in the understanding and interpretation of human rights. Since then, there has been an unprecedented development of human rights case-law by the Supreme Court. The decisions that were chosen to be part of this publication demonstrate that the Supreme Court has given meaning to this important reform, giving content to human rights so that these legislative changes translate into concrete benefits for people. Moreover, in some of these decisions, the Supreme Court has incorporated standards established by the Inter-American Court of Human Rights to solve the cases, which will allow the reader to appreciate the way in which international human rights law has been used by this court.

Another factor that was considered for the design of the book is the quality of the argumentation and the pedagogical nature of the selected decisions. These cases have been so relevant that they have generated a cultural impact of great magnitude that transcends the field of Law.

### **Methodology**

The book was chosen to be published in English because it is the most widely used language in the world. We have tried to make the translation rigorous so that the arguments of the Supreme Court can be properly transmitted. In order to clearly present the arguments used by the Supreme Court in the rulings, certain methodological decisions were made. In the first place, the decisions are not published in their entirety, only excerpts that reflect the legal arguments used by the Supreme Court to resolve the cases were included, with the highest possible level of fidelity to what was said at the time of the issuance of the decision. This allows immediate access to the legal content of the resolution, to the reasons used to decide and to the precedents built in the specific case. In other words, the extracts allow us to identify what was decided and why it was decided that way.

To achieve this goal, the fragments that contained “the voice of the Court” were identified. That is, the series of criteria that were used support the resolution of the case and provide evidence around the logical legal process that was followed at the time of interpretation and ruling. To do this, the central theme or themes of the decision were chosen. Namely, this included the issues that should be socialized or those that make the ruling crucial. Subsequently, the compelling reasons that led to this solution were identified and the most important fragments were selected from among those reasons that support the central decisions made by the Supreme Court.

At all times, we sought to string together the chosen fragments, taking care that they maintained coherence between them and that they accounted for the court’s reasons for ruling in one way or another. At the same time, we tried to make a clear construction of the argumentation, with a minimum extension that reflected the central theme or themes that were intended to be highlighted.

### Supreme Court operation

Mexico’s Supreme Court is the peak of the judicial system. The Court is composed of eleven Justices, one of whom acts as Chief Justice of the Court and of the Federal Council of Judicature. This person is the body in charge of the administration, surveillance, discipline and judicial career of the Federal Judiciary. The Chief Justice serves for a four-year period. The Justices are appointed by the Chamber of Senators, which chooses them from a list proposed by the President of Mexico. The Justices have a fifteen year tenure in office.

The Supreme Court works in Plenary and in two Chambers. The Plenary is composed of the eleven Ministers. The Chambers are composed of five Justices, while the Chief Justice is not part of either of them. The First Chamber hears civil and criminal cases. The Second Chamber deals with labor and administrative cases. Each Chamber in turn has a Chief Justice, who serves for a two-year period. The Supreme Court has two periods of sessions each year: the first begins on the first working day of January and ends on the last working day of the first fortnight of July. The second period begins on the first business day of August and ends on the last business day of the first fortnight of December.

The Supreme Court is the ultimate interpreter of the Constitution and one of its responsibilities is to defend the order established by the Constitution; maintain the balance between the different Branches and spheres of government; resolve cases definitively; and establish precedents that guide the actions of judges throughout the country. I would like to focus on this last task, since it is especially relevant for the purposes of this publication.

Both the Plenary and the Chambers of the Supreme Court can issue precedents that are binding for all judicial authorities in the country, both at the Federal and local levels. There are four mechanisms through which the Supreme Court creates case-law:

1. **Case-Law by mandatory precedents:** this form of precedent creation was introduced with the judicial reform of March 2021. According to this procedure, the reasons that justify the decisions issued by the Supreme Court must be considered binding for all judicial authorities in the country as long as they are taken by a majority of eight votes in Plenary and four votes in the Chambers. Before the reform, it was required that the criteria complied with the reiteration procedure in order to be considered binding. According to this procedure, these criteria had to be based on five decisions not interrupted by another to the contrary, resolved in different sessions, by a majority of at least eight votes in Plenary and four votes in the Chambers.

From my point of view, this judicial reform incorporated the most important change that has been made to the system of case-law in the entire history of the Supreme Court. With these constitutional amendments and the consequent legal reforms, the Supreme Court was consolidated as a true Constitutional Court and a key actor for social change.

As I mentioned before, the reform eliminates the system of creating case-law by reiteration for the Supreme Court and lays the foundations for the transition to a system of precedents. These changes are of such importance that, to respond to them, on May 1st, 2021, by agreement of the Plenary, the Eleventh Epoch of the Mexican Federal Judicial Weekly began.

The reiteration system required that a criterion issued by the Supreme Court should be discussed and reiterated five times to be considered mandatory. This procedure delayed

the impact and effectiveness of the precedents of the Supreme Court. With the entry this reform into force, the reasons that support the decisions approved by a majority of eight votes in Plenary and four votes in the Chambers will be mandatory for all judicial authorities in the country.

In this way, the criteria included in each of the Supreme Court decisions that meet the required vote will have a real impact on society and will replicate their benefits for all people who find themselves in similar situations. This will have the effect that people can appropriate the Constitution and demand that their rights be made effective without having to wait for the Supreme Court to reiterate its criteria.

In addition, the reform provides the Supreme Court with tools for selecting the cases to be resolved. This will allow the Court to define its agenda and choose the most important and appropriate cases to establish precedents and thereby guide the decisions of the country's judicial bodies. In this way, the courts will be able to focus its human and material resources on the interpretation of the Constitution and the establishment of rules so that the judges and courts bound by their criteria resolve future cases.

**2. Resolutions adopted in Actions on the Grounds of Unconstitutionality (*acciones de inconstitucionalidad*) and Constitutional Controversy (*controversias constitucionales*):** these procedures are resolved by the Plenary of the Supreme Court. In these cases, the reasons that justify the decisions will be obligatory for all the judicial authorities of the country as long as they are approved by at least eight votes.

**3. Resolutions adopted when resolving Contradictions in Criteria (*contradicciones de criterios*):** the Supreme Court is competent to elucidate the discrepant criteria held between its chambers, between the regional plenaries or between the collegiate circuit courts (*Tribunales Colegiados*) belonging to different regions. The resolutions to these procedures constitute obligatory precedents for all the judicial authorities of the country.

### Content of the work

The book includes 50 emblematic decisions from 10 years of jurisprudential development. The decisions are grouped into 10 sections on the following topics:

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the standard of constitutional review; the right to the free development of one's personality; the right to the freedom of expression and information; the right to equality and non-discrimination; gender; rights of children and adolescents; the rights of indigenous peoples and communities; economic, social, cultural and environmental rights; criminal guarantees; the right of access to justice and due process; civil liability and patrimonial liability of the State.

The first section includes the emblematic decision, *Contradicción de tesis 293/2011*, in which the Supreme Court interpreted the first constitutional article and determined that there is a block of constitutionality made up of human rights from national and international sources in the Mexican legal system. This block constitutes the regularity parameter of the entire legal order. In addition, this decision is relevant because it declared that the case-law of the Inter-American Court of Human Rights is binding for all judges in the country.

In the second section, we present a case in which the Supreme Court defended individual autonomy to guarantee people their right to choose and materialize their life project. The Supreme Court was one of the first constitutional courts in the region to declare the unconstitutionality of the absolute prohibition of the recreational consumption of marijuana, considering it contrary to the right to the free development of one's personality. Before this decision, the prohibitionist approach prevailed in Mexico and the public rhetoric on drugs revolved around the protection of public health and the fight against violence and insecurity. As of this decision, the approach to public health changed completely and the subject began to be analyzed from a human rights perspective.

The third section includes five cases in which the Supreme Court has interpreted the right to freedom of expression as a necessary condition for democratic life. These cases study the following topics: the regulation of official advertising, the federalization of crimes committed against journalists, the treatment of grievances against journalists, the right of access to information on social networks and hate speech.

The next section presents decisions in which the Supreme Court has interpreted the right to equality and non-discrimination. In these cases, the Supreme Court has

protected the rights of sexual minorities, declaring unconstitutional the regulations that prevented same-sex couples from marrying and establishing parameters so that trans people can adapt their documents according to their self-perceived gender identity. Likewise, we present a case in which the regulation of the interdiction regime was declared unconstitutional, thus incorporating the *social model* to avoid discrimination against persons with disabilities. In addition, we systematized a case in which the Court has declared the unconstitutionality of the obligation to use the traditional surname order and a case in which it has been protected the right to social security for domestic workers.

I do not want to fail to mention that the Supreme Court has been a pioneer in the global sphere, because it has been the first constitutional court on the American continent to declare the norms that prevented access to marriage for same-sex couples unconstitutional, considering them discriminatory. In addition, this decision is the first issued in the world in which a unilateral model of compensation for normative discrimination is implemented. In this case, the Court directly ordered the administrative authorities to allow a same-sex couple to marry even though the contested rules established that marriage could only exist between a man and a woman.

The fifth section includes some decisions in which the Supreme Court has established clear criteria for the authorities to investigate and prosecute cases of femicide and violence against women. In these cases, the Supreme Court has recognized the right of women to a life free of violence and discrimination and has declared that the right of access to justice includes the right to truth and reparation. Moreover, the decisions establish the obligation to investigate and judge using a gender-based perspective in those criminal cases in which women are accused. On the other hand, the Supreme Court has given content to the principle of equality between men and women, interpreting gender parity as a democratic principle, this can be seen in the case on gender parity in electoral matters. At the same time, we included a case in which the Court recognized the double burden and declared that in order to access compensation it is not necessary to prove that the person requesting it devoted herself/himself exclusively to the care of the home and children during the entire validity of the marriage.

This section includes two cases on the voluntary termination of pregnancy. In the first one, a woman who was a beneficiary of public health services requested the interruption

of her high-risk pregnancy. The service was denied, so she filed an injunction (*Amparo*). The Supreme Court determined that the authorities had violated the woman's right to health by denying her the service and ordered that she be provided with the necessary medical and psychological care to restore the damage caused by the refusal to provide a service to which she was entitled.

I would like to make a special mention of the only case that is included in this work that is part of the Eleventh Epoch of the Mexican Federal Judicial Weekly. I am referring to the Action on the Grounds of Unconstitutionality (*Acción de Inconstitucionalidad*) 148/2017. In this case, the Supreme Court declared the unconstitutionality of a norm that penalized those who voluntarily decide to interrupt their pregnancy within a period close to conception. According to the Supreme Court, this regulation completely annulled the constitutional right to decide of women and people with the capacity to gestate, such as transgender men and non-binary people. For this reason, since this decision was issued, the regulations that penalize those who voluntarily decide to interrupt their pregnancy within a period close to conception must be considered unconstitutional by all the country's courts. This resolution is an example of the Supreme Court's commitment to the rights of all people, especially the most vulnerable.

I am interested in using this decision issued through an Action on the Grounds of Unconstitutionality (*Acción de Inconstitucionalidad*) to reflect on the importance of the binding nature of the precedents of the Supreme Court, in light of the change introduced by the judicial reform of 2021. Before the reform, a mandatory doctrine for all the courts of the country -in some cases- could only be established through the Action on the Grounds of Unconstitutionality (*Acción de Inconstitucionalidad*) and Constitutional Controversy (*Controversia Constitucional*) by means of a single decision with the vote of a qualified majority. On the other hand, if the case reached the Supreme Court through an Injunction (*Amparo*), the doctrine had to be reiterated in five decisions without another to the contrary to be considered mandatory case-law. Thus, the most effective way to protect rights was that the doctrine of the Supreme Court should be dictated by a qualified majority through an Action on the Grounds of Unconstitutionality (*Acción de Inconstitucionalidad*) and Constitutional Controversy (*Controversia Constitucional*), because these decisions had binding effects for all courts in the country. The point is that

the Action on the Grounds of Unconstitutionality (*Acción de Inconstitucionalidad*) and Constitutional Controversy (*Controversia Constitucional*) are processes that can only be brought by authoritative bodies and not by people. Fortunately, with the judicial reform of 2021, the precedents issued with a qualified majority in Injunction (*Amparo*) claims can have a similar impact in the protection of the rights to the precedents issued in actions on the grounds of unconstitutionality and in constitutional controversies. In this way, if a case as important as the decriminalization of abortion reaches the Supreme Court after the reform through an injunction (*amparo*) trial (a procedural means through which the people who live in Mexico defend their human rights), it would have an impact on society, without the need to wait for the Supreme Court to reiterate its opinion.

The following section includes some cases in which the Supreme Court has carried out extensive work on the development of the rights of children and adolescents based on the interpretation of the principle of the best interests of the children and adolescents and of some rights such as equality, non-discrimination and free development of one's personality. Among other issues, the Court has established guidelines on the separation of children from mothers in prison and has ordered a school to pay compensation to a child who suffered bullying. In addition, the Supreme Court protected the right to life and health of a girl whose parents refused to accept a treatment that included blood transfusions due to their religious beliefs. In addition, one of the cases recognizes the rights of children and adolescents to be heard in the legal proceedings that affect them. Likewise, a case is presented in which the Supreme Court establishes standards for the assessment of evidence within a civil process on children and adolescents victims of sexual abuse. In other cases, the Supreme Court protected the rights of children and adolescents to a healthy environment and to have access to sex education and determined that the State must give children and adolescents with disabilities access to child care. Finally, in a case on child marriage, the Supreme Court declared that the impossibility of granting judicial dispensations to children and adolescents to marry does not violate the Constitution.

The following section presents decisions in which the Supreme Court has made a real advance in the interpretation of intercultural justice. In one of those cases, the validity of traditional indigenous systems was recognized, allowing the special indigenous jurisdiction to hear some criminal cases. In another decision, it was established that the

right of indigenous peoples and communities to be consulted constitutes a necessary prerogative to protect the self-determination of people and other ancestral cultural and patrimonial rights that are recognized by the Constitution and international treaties. In this way, indigenous peoples and communities have been encouraged to participate actively and constantly in the political affairs of the State. We also systematized a case in which the Supreme Court determined that the fundamental right to effective judicial protection of indigenous peoples implies the implementation of sensitive processes in which their customs and cultural specificities must be considered. In addition, indigenous peoples must have a translator and interpreter in court proceedings. In another case, the Supreme Court determined that a rule that established a limited and differentiated scope for the exercise of linguistic rights in the media violated the rights of indigenous peoples and communities to self-determination, autonomy, to preserve and enrich their native languages, culture and identity, among others.

Section number VII includes decisions in which the Supreme Court has interpreted the content and scope of economic, social, cultural and environmental rights. In one of these cases, a regulation that prohibited cockfighting was challenged for its possible violation of the right to culture. In this case, the Supreme Court determined that any practice that involves the mistreatment of animals cannot be protected or considered a cultural expression. In another decision, the Court indicated that the decision to interrupt the construction of a cultural project called, “City of the Arts” did not affect the right to culture, since that omission was part of a reasonable public policy and that it did not violate the principle of progressiveness. In a different case, the Supreme Court stated that the request for HIV/AIDS detection tests as a requirement to obtain a job violated the Constitution and constituted a discriminatory practice. In another case related to the right to health, the Supreme Court declared a regulation unconstitutional that indicated that medicines could only be granted to hospitalized people because the right to health includes the supply of medicine without discrimination, as well as the provision of medical services of fully, completely and on equal terms. In another decision, the Court resolved a case in which some people suffering from HIV/AIDS stated that the State’s failure to build an adequate care area for their disease was a violation of their right to health. The Supreme Court determined that the State must have the necessary medical facilities and instruments for the care of illnesses, which implies the construction of

specialized areas, the renovation of existing areas or the referral of those patients to hospitals that do have the optimal care conditions.

As can be seen from another group of cases that are part of this section, the Supreme Court has consolidated a progressive constitutional doctrine on the right to a healthy environment that places nature at the center of judicial protection and protects the right to access information, public participation and justice in environmental matters. In the first case on these rights, the construction of a theme park was challenged because it generated various environmental damages. In this case, the Supreme Court interpreted the precautionary principle as a mechanism that allows adopting all necessary measures to avoid or mitigate activities that present a risk to the environment, even when there is no certainty about environmental damage. In addition, it established that people who are beneficiaries or users of the environmental services of an ecosystem have a legitimate interest in seeking protection when there is a risk of damage to the environment. In another decision regarding these rights, an environmental impact authorization had been granted to carry out a real estate project. However, there were new legal provisions that indicated the infeasibility of a project, so the Court ruled that the project should be stopped and that this did not violate the principle of non-retroactivity, since what is sought is the conservation of ecosystems. In another case, a group of residents sued the State for the omission of the authorities to adopt all the measures at their disposal to ecologically restore and clean up the canals of a town due to the damage derived from the dumping of residual waters coming from a river. The Court ruled that, given the problem of the lack of water, the jurisdictional bodies must carry out a rigorous analysis of the violations of the human right to a healthy environment, which is required by the Constitution and by society itself. Likewise, it was determined that the State has the positive obligation to take all measures aimed at protecting this human right against the acts of non-state agents that endanger it.

Finally, this section includes a decision on the right to housing. In the case, a precedent was established that indicates that the lack of statistical information on informal settlements by the State is a violation of the rights of civil associations that seek to protect the right to housing.

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Criminal guarantees, the right of access to justice and due process have been extensively developed by the Supreme Court during the Tenth Epoch of the Mexican Federal Judicial Weekly. The jurisprudential development on the rights of consular assistance, presumption of innocence, due process, right of defense, the prohibition of torture and the right of victims to know the truth become relevant. For this reason, section number IX includes two important decisions on criminal guarantees. In the first one, the Supreme Court established that if the existence of torture is determined, either as a crime or as a violation of the human right to due process, all evidence obtained directly from torture or derived from it must be excluded. In addition, in this case, the Supreme Court determined that when the defendant in a criminal proceeding denounces torture, estoppel cannot exist, since it is a serious violation of human rights that can be alleged at any stage of the judicial proceedings. In the second case, the Supreme Court declared the constitutionality of the criminal offense of femicide because this regulation obeys an objective, constitutional and conventionally valid purpose: the right of women to live a life free of violence.

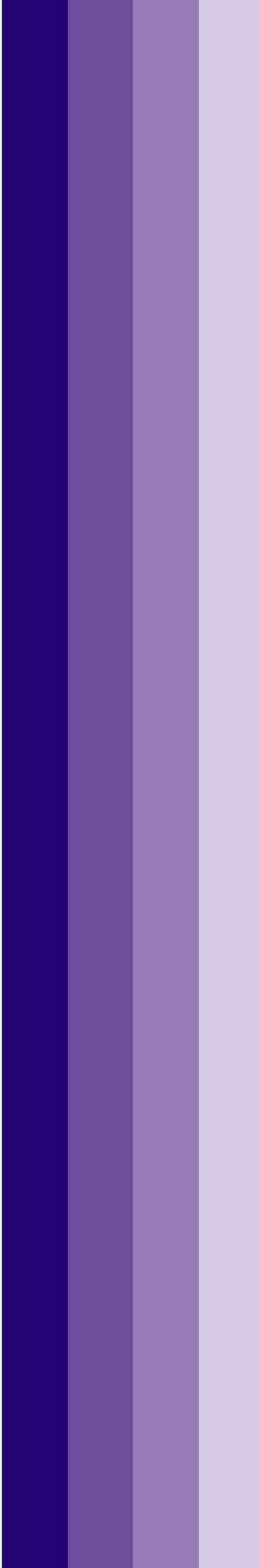
In the next section, decisions on the rights of access to justice and due process are reviewed. In the first case, the Supreme Court protected the right to the truth of the victims of disappearance by determining that when a person appears before the Public Prosecutor's Office requesting recognition as a victim, the authority is obliged to give him/her access to the investigation as long as and when the facts investigated have some connection with this person's account of the disappearance of their relative. In the second case, the Supreme Court determined that when there are violations of the fundamental rights to notification, contact and consular assistance, the right of the detained person to be brought immediately before the Public Prosecutor and to the presumption of innocence, all of the criminal procedure and, therefore, the right to due legal process is affected.

In the last section, we present decisions in which the Supreme Court has interpreted the civil liability and the patrimonial responsibility of the State. The first case is about a teenager that died of electrocution after falling into the water in a hotel's artificial lake. The adolescent's parents demanded compensation for damages arising from civil liability. In this case, the Supreme Court considered that it is unconstitutional that the amount

of compensation for non-pecuniary consequences derived from non-pecuniary damage depends on the economic condition of the victim. This circumstance can only be assessed when it comes to determining the reparation of the patrimonial consequences. In another case, the Supreme Court determined that, even when a patient gave his informed consent for the administration of anesthesia, the damages generated by its negligent administration update a liability of a subjective non-contractual nature, since values unavailable to the patient are at stake, such as the right to health and the right to life. In the same case, it was established that in order to demand compensation for the damage caused by the use of anesthesia, the subjective element of the conduct must be proven as well as that there is a presumption that the damage caused by the anesthesia was caused by negligent action.

In the Office of the Chief Justice of the Supreme Court we are convinced that it is necessary to promote projects like this work to disseminate the content of the resolutions of this court. In this way, the dialogue of the Supreme Court with the courts of other latitudes will be strengthened and the holders of human rights will be given tools to make them effective in judicial instances. I hope that this effort contributes to the collective construction of judicial reasoning that provides increasingly adequate responses to human rights violations and that it contributes to making the protection of the rights of all people effective.





# I. STANDARD OF CONSTITUTIONAL REVIEW



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## STANDARD OF CONSTITUTIONAL REVIEW

### *Contradicción de Tesis 293/2011<sup>1</sup>*

**Keywords:** *standard of constitutional review, 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*

#### **Summary**

On June 24, 2011 this Supreme Court of Justice received a report that there might be conflicting lines of precedent between the criteria of a collegiate court in Morelia around the decision on direct injunction 1060/2008 and the criteria of a Federal District collegiate court when deciding both direct injunctions 344/2008 and 623/2008. Those injunctions discussed: (a) the hierarchical position of the international treaties in human rights matters in relation to the Constitution; (b) the nature of human rights jurisprudence issued by the Inter-American Court of Human Rights (IACHR), and (c) the conventionality control doctrine.

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<sup>1</sup> Decision issued by the First Chamber of Mexico's Supreme Court of Justice (September 3, 2013). Reporting Justice: Arturo Zaldívar Lelo de Larrea. *Conflicting lines of Precedent 293/2011*

### Issue presented to the Supreme 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 jurisprudence in human rights matters issued by the IACHR.

### Holding

There is a difference in the criterion between collegiate courts around conflicting lines of precedent (*contradicción de tesis*). Based on the constitutional reforms of June 2011, Article 1 of the Constitution recognizes a set of human rights derived from both the Federal Constitution and the international treaties to which the Mexican State is a party. 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 hierarchically related 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 standard of constitutional review. Therefore, those rights form part of the group of norms that enjoy constitutional supremacy. However, when there is an express restriction in the Constitution on the exercise of any human right, the constitutional norm should apply. Furthermore, it was established that the jurisprudence 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 judicial proceeding. 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 IACHR decision 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 cases where it is applicable, the jurisprudence of the Inter-American court with the national jurisprudence 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 international treaties

constitute the standard of constitutional review. If there is an express restriction on their exercise in the Constitution, then what is established in the constitutional text must be applied”, and “Jurisprudence is issued by the Inter-American Court of Human Rights. It is binding for Mexican judges provided it is more favorable to the person”.

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### EXTRACT OF THE DECISION

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 a possible criterion conflict was acknowledged between collegiate courts through conflicting lines of precedent (*contradicción de tesis*) among the criteria held by a collegiate court of Morelia when deciding Direct Injunction 1060/2008 and those held by a collegiate court of the Federal District when deciding Direct Injunctions 344/2008 and 623/2008.

p. 2 Direct Injunction 1060/2008 resulted in the isolated criterion with the headings “International Treaties. When conflicts arise in relation to human rights, they must be located at the level of the Constitution” and “Domestic courts control conventionality. Mexican courts are obligated to exercise it accordingly”.

p. 2-3 The criterion held in Direct Injunction 344/2008 resulted in the isolated decision titled “Human rights, the international treaties signed by Mexico. It is possible to invoke them in the injunction proceeding when analyzing the violations of individual rights that imply the violation of human rights”; while Direct Injunction 623/2008 resulted in the isolated decision “International court jurisprudence. Its useful guidance in human rights matters”.

### Study of the merits

- p. 14 To determine if there are contradictory criteria between collegiate courts the following must be verified: (a) that the contending tribunals 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 the 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 direct injunctions 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 jurisprudence 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. The collegiate court of the Federal District held that they are subject to the Constitution, while the collegiate court of Morelia considered that they are of equal relevance.
- p. 16, 17 In relation to point (2), the collegiate court of the Federal District considered the jurisprudence of the IACHR as guiding criterion, while the collegiate court of Morelia considered the precedents of that court and those of any other international human rights body to be binding. Nevertheless, the contradiction of criteria in this case must be limited to establishing the nature of the jurisprudence issued by the IACHR, since the Federal District collegiate court did not decide with respect to the value of the jurisprudence 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 control of conventionality to be within the State, and therefore there is no point of impact between the arguments made by the two courts.

- p. 18 Thus, it was concluded that the reported contradictory criteria do 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 jurisprudence in matters of human rights issued by the IACHR.
- p. 19 This Court does not overlook the fact that the cases that motivated by the present conflicting lines of precedent were decided by applying the constitutional framework that was in force before the constitutional reforms in human rights and injunction proceedings of June 2011 were passed (the constitutional reforms of 2011). In this regard, since the subject matter 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 people.

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

- p. 21 Both, scholars and the jurisprudence, agree that 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 the Mexican legal order. However, the interpretation of this article has not been consistent.
- p. 22 A first determination took place in 1992 as a result of the decision issued in *Amparo en Revisión 2069/91*. This Court placed international treaties on the same level as the federal laws, indicating that both bodies of law occupy a rank immediately below the Constitution and therefore, one cannot be used as a parameter of validity or regularity of the other. Based on these reasons, the isolated criterion (*tesis aislada*) titled “Federal laws and international treaties have the same normative hierarchy” was approved.

- p. 22-23 The second decision occurred as a result of the study of *Amparo en Revisión* 1475/98, in which this Court established that when international treaties are in agreement with the Constitution, as is evidenced by complying with the formal and material requisites for that purpose, they are positioned hierarchically above the federal and local laws. This decision gave rise to the issuance of the isolated criterion titled “International treaties. They are hierarchically positioned above the federal laws and in a second plane with respect to the Federal Constitution”, which caused the overturning of the above mentioned precedent.
- p. 23 Finally, a third decision was issued as a result of the resolution of *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 criterion titled “International treaties. They are part of the Supreme Law of the Union and are hierarchically positioned above the general, federal and local laws. Interpretation of Article 133 of the Constitution”.
- p. 24 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 precedent developed regarding the hierarchy of the international treaties are unsatisfactory for two reasons: 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 doctrine attenuate the hierarchical criteria held in them. Both decisions contemplated the possibility of the human rights decisions from international sources becoming an extension of the Constitution itself.
- p. 26-27 The criterion of hierarchy is unsatisfactory for taking into account the human rights norms recognized 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 clear 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 decisions established in both the Constitution and international treaties to which Mexico is a party without reference to the subject 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 operative implications in light of the constitutional reforms, and especially the new Article 1, as a result of the emergence of a new standard of constitutional review.

#### **1. The constitutional reform on 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 standard of constitutional review or validity 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 where Mexico is a party 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 the 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 injunction (*amparo*) proceeding.
- p. 37 In this regard, the human rights recognized in international treaties have been expressly integrated into our internal legal system in order to expand the constitutional catalog of human rights, in the understanding that, as a

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- p. 40 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. In this regard, based of the fact 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 standard of constitutional review 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 analysis, the human rights recognized in other international treaties.
- p. 40-41 In effect, the two mentioned articles permit the validity of international treaties to be determined by their conformity with or non-violation of certain norms that make up a standard of constitutional review. 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 standard of constitutional review according to which the validity of the rest of the legal norms that make up the Mexican legal system is studied.
- p. 41 In addition to the grammatical and systematic interpretation, this Court considers that if it the intention and purpose of the Reforming Power in approving the reform in question is analyzed, then the conclusion would be reached that, the human rights norms, regardless of their source, constitute a standard of constitutional review 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 standard of constitutional review; and (iii) it was held that not only the norms contained in the international human rights treaties constitute that standard of constitutional review, but also 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 *Varios* 912/2010 case

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

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- 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 standard of constitutional review 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 domestic 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 standard of constitutional review.

- 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 standard of constitutional review 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, this Court concludes 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. 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 where Mexico is a party 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 that, courts may use parameters of constitutionality or of conventionality, which form part of the same normative group and, therefore, integrate the mentioned standard of constitutional review, 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 jurisprudence 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 jurisprudence 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 jurisprudence, 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 standard of constitutional review 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 jurisprudence 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 jurisprudence of the inter-American court must be done in collaboration with and not in contradiction to 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 unwaveringly applying the standard set by the IACHR, overlooking even the court precedent of the Federal Justice Power. 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 decision.

p. 63-64 For all of the above, it is concluded that the criteria emanating from the jurisprudence 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.

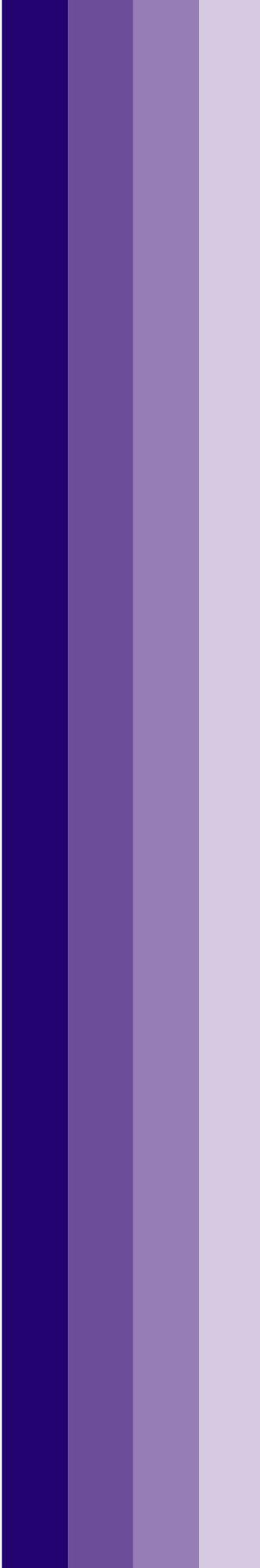
p. 64 Consequently, this binding nature of the inter-American jurisprudence requires the following from the Mexican legal operators: (i) when the criterion has been issued in a case in which the Mexican State has not been a party, the applicability of the precedent to the specific case must be determined 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 jurisprudence 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 The criteria established by this Court must prevail as court precedent (*jurisprudence*) in the following terms:

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

“Jurisprudence issued by the Inter-American Court of Human Rights. Is binding for Mexican judges provided it is more favorable to the person”.



## II. RIGHT TO THE FREE DEVELOPMENT OF ONE'S PERSONALITY



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## RECREATIONAL MARIJUANA CONSUMPTION

### *Amparo en Revisión 237/2014<sup>2</sup>*

**Keywords:** *Right to the free development of one's personality, marijuana, cannabis, recreational use, leisure use, proportionality test, COFEPRIS, General Health Law.*

#### **Summary**

Four persons (the affected parties) requested in writing from the Federal Commission for Protection from Sanitary Risks (COFEPRIS) an authorization that would permit personal and regular consumption with merely leisure or recreational purposes of marijuana, and the exercise of the correlative rights to its personal consumption, such as the planting, cultivation, harvesting, preparation, conditioning, possession, transportation, employment and use; excluding commercial acts, such as the distribution, sale and transfer. The COFEPRIS denied the authorization considering that according to various articles of the General Health Law (Ley General de Salud, LGS), carrying out any act related to the component substances

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<sup>2</sup> Decision issued by the First Chamber of Mexico's Supreme Court of Justice (November 4, 2015). Reporting Justice: Arturo Zaldívar Lelo de Larrea. *Action For Constitutional Relief Through Injunction 237/2014*

of marijuana was prohibited in Mexico. The affected parties filed a two-stage judicial review for relieving an unremedied breach of rights (*amparo indirecto*) against this denial, which was denied by a district judge in Mexico City. The affected parties then filed a motion for review, which the First Chamber of the Mexico's Supreme Court of Justice (this Court) heard since the requirements to exercise its original jurisdiction were met.

### Issue presented to the Supreme Court

Whether the system of administrative prohibitions related to the personal consumption of marijuana regulated in the LGS is constitutional or if, on the contrary, it unjustifiably limits the human right to the free development of one's personality.

### Holding and vote

The appealed decision was revoked and the *amparo* was granted, essentially for the following reasons. It was considered that the articles of LGS that make up the system of prohibitions related to the personal consumption of marijuana affect the *prima facie* content of the human right to the free development of one's personality since they constitute a legal obstacle that impedes those affected from exercising the right to decide what type of recreational or leisure activities they wish to engage in, and at the same time impedes lawfully engaging in all the actions or activities necessary to be able to materialize that election through the personal consumption of marijuana. Nevertheless, this Court determined that the free development of one's personality is not an absolute right, and therefore it could be limited in order to pursue another constitutionally valid purpose. In this regard, through means of a proportionality test, the justification from the constitutional point of view for such articles limiting the content of the mentioned right was examined. This Court concluded that the system of administrative prohibitions related to the personal consumption of marijuana pursues two constitutionally valid purposes: the protection of health and the protection of public order. Furthermore, it was considered that, according to the existing evidence, this system constituted an appropriate means for protecting health and public order. However, it was considered that the system of prohibitions was not a necessary measure, since there were alternative measures equally suitable for protecting health and public order that affected the right to free

development of personality to a lesser degree. It was also considered that the system, as it was regulated, was disproportional, because it generated a minimum protection of health and public order compared with the intense intervention in the right of persons to freely decide what leisure activities they wish to engage in. Therefore, this Court held that the system of administrative prohibitions regulated in the challenged articles was unconstitutional. COFEPRIS was ordered to grant the authorization for those affected to engage in all the activities related to personal consumption with recreational purposes of marijuana, without any of those acts resulting in administrative or criminal sanctions of any kind. This was based on considering that the challenged regulations unjustifiably limit the fundamental right to the free development of one's personality.

The First Chamber ruled on this matter by a majority of four votes of Justices Olga Sánchez Cordero de García Villegas, Arturo Zaldívar Lelo de Larrea, José Ramón Cossío Díaz (reserved the right to formulate concurring vote) and Alfredo Gutiérrez Ortiz Mena (reserved the right to formulate concurring vote). Justice Jorge Mario Pardo Rebolledo voted against (reserved the right to formulate an individual vote).

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### EXTRACT FROM THE DECISION

p. 1 Mexico City. The First Chamber of the Mexico's Supreme Court of Justice, (this Court), in session of November 4, 2015, issues the following decision.

#### Background

p. 2 On May 31, 2013, four persons (the affected parties) requested in writing from the Federal Commission for Protection from Sanitary Risks (COFEPRIS) the issuance of an authorization that would allow them to engage in the personal and regular consumption with merely leisure or recreational purposes of the narcotic cannabis and the psychotropic THC, jointly known as "marijuana".

They also requested an authorization to exercise the rights related to "personal consumption" of marijuana, such as the planting, cultivation, harvesting, preparation, conditioning, possession, transportation, employment,

use and, in general, any act related to the leisure and personal consumption of marijuana, expressly excluding commercial acts, such as the distribution, sale and transfer thereof.

p. 3 On June 13, 2013, the Executive Director of Regulation of Narcotics, Psychotropics and Chemical Substances of the COFEPRIS informed the petitioners that at this time the authorization requested could not be issued since pursuant to Articles 235 and 237 – with respect to the narcotic “cannabis sativa” – and 245, 247 and 248 – with respect to the psychotropic “THC” – all of the General Health Law (LGS), engaging in any act related to those substances was prohibited throughout national territory.

On July 5, 2013, the affected parties filed a two-stage judicial review to relieve an unremediated breach of rights (*amparo indirecto*) against the denial of their request, alleging the unconstitutionality of Articles 235, last paragraph, 237, 245, section I, 247, last paragraph, and 248, all of the LGS.

p. 7 On August 20, 2013, a federal district judge in Mexico City issued a final decision denying the constitutional protection of the affected parties.

p. 10 Disagreeing with the injunction (*amparo*) decision, the affected parties filed an appeal for review (*recurso de revisión*).

p. 16-17 The appeal was sent to a federal collegiate court of Mexico City which ruled that it lacked jurisdiction to hear the action for constitutional relief under an injunction (*amparo*) (*amparo en revisión*). Being that it was a case where there was still a constitutionality problem with respect to the challenged articles, over which there was no court precedent, the original jurisdiction of this Court to hear this matter was activated.

### Study of the merits

p. 20 The affected parties originally claimed the unconstitutionality of various articles of LGS in their injunction (*amparo*). This was filed considering that they establish a “prohibitionist policy” with respect to the individual

consumption of marijuana. This policy was noted to unduly limit, among other things, the fundamental rights to personal identity, one's own image, the free development of one's personality and self-determination; all of which are in relation to the principle of human dignity.

According to the affected parties, the prohibition on the consumption of marijuana implied the suppression of behaviors that confer on the individual a specific difference according to his or her singularity, which restriction is not justified since the imposition of a single standard for a healthy life is not admissible in a liberal State that bases its existence on the recognition of human singularity and independence. Thus, in synthesis, they argued that the prohibition on consuming marijuana is based on a prejudice based on moral values and not on scientific studies, revealing that the State has not acted with ethical neutrality.

- p. 21 This Court notes that the grievances asserted by the affected parties, particularly those that altogether are directed to challenging the decision of the district judge considering the challenged regulations to be constitutional, are essentially grounded and sufficient to revoke the appealed decision and grant the constitutional protection based on the understanding that they unjustifiably limit the fundamental right to the free development of one's personality.

### **I. Regulatory framework on the control of narcotics and psychotropics in the LGS**

- p. 27 This Court understands that the challenged regulations function as a "system of administrative prohibitions" that forms part of the regulatory framework in the LGS on the control of narcotics and psychotropics, which constitute a legal obstacle to be able to lawfully engage in all the actions necessary to engage in the personal consumption of marijuana.
- p. 27-28 On the one hand, the last paragraphs of Articles 235 and 247 establish that the authorization for carrying out acts related to narcotics or psychotropic

substances is conditioned on them having exclusively “medical and/or scientific” purposes, without including the possibility that marijuana can be used for “leisure or recreational” purposes. And on the other hand, Articles 237 and 245, in relation to Article 248, establish an express prohibition through which the Ministry of Health is categorically prohibited from issuing the corresponding authorizations the affected parties requested in relation to marijuana to be able to exercise their right to the free development of one’s personality.

## II. Analysis of the impact of the challenged legislative measure on the *prima facie* content of the free development of one’s personality

- p. 33 This Court has understood that the free development of one’s personality is a fundamental right that arises from the right to dignity, which in turn is established in Article 1 of the Constitution and is implicit in the international human rights treaties signed by our country. In this respect, in Direct Injunction (*Amparo Directo*) 6/2008, the Plenary of this Court held that “individuals, whoever they are, have the right to freely and autonomously choose their life project, how they will achieve the goals and objectives that, for them, are relevant”.

In that case, it was also explained that the right to the free development of one’s personality permits “the achievement of the life project that a human being, as an autonomous being, has for him or herself”, such that it presumes “the recognition by the State of the natural power of all persons to be individually how they want to be, without force, or unjustified controls or impediments by others, in order to achieve the goals and objectives set. In other words, it is the human person who decides the meaning of his or her own existence, according to his or her values, ideas, expectations, likes, etc.”.

- p. 36 In this case, it seems clear that the right to the free development of one’s personality is a right whose contours should be developed in court decisions.
- p. 40 In that regard, the precedents show a jurisprudential line in which this Court has recognized that the right to the free development of one’s personality

covers, in principle, a large variety of actions and decisions connected directly with the exercise of individual autonomy.

Now, in this case the first question that must be resolved is, if the decisions and the actions that the affected parties indicate are protected *prima facie* by the right in question?

- p. 41      The election of any recreational or leisure activity is a decision that undoubtedly belongs to the sphere of personal autonomy which must be protected by the Constitution. It has been indicated that the decision to smoke marijuana can have different purposes, among which include “the relief of stress, the intensification of perceptions or the desire for new personal and spiritual experiences”. Thus, since they are “mental experiences”, they are among the most personal and intimate that someone can experience, such that the decision of an adult individual to “affect” his or her personality in this manner for recreational or leisure purposes is protected *prima facie* by the right to its free development.
- p. 41-42    Having explained the regulatory framework and the *prima facie* content of the right to the free development of one’s personality, this Court concludes that the articles of the LGS identified as challenged acts do impact the *prima facie* content of the fundamental right, since they constitute a legal obstacle that prevents the affected parties from exercising the right to decide what type of recreational or leisure activities they wish to engage in. At the same time these obstacles prevent individuals from lawfully carrying out all the actions or activities necessary to be able to materialize that election through the personal consumption of marijuana: planting, cultivation, harvesting, preparation, conditioning, possession, transportation, etc.

Notwithstanding the above, the free development of one’s personality is not an absolute right, such that it can be limited for the purpose of pursuing another constitutionally valid objective.

- p. 43      Thus, for the interventions carried out under a limit on the free development of one’s personality to be constitutional, they must have certain characteristics:

the legislative measure must be suitable to protect the rights of third parties and/or public order; and it should not unnecessarily and disproportionately limit this fundamental right. In other words, the analyzed measure has to overcome a proportionality test in the broad sense.

### III. Proportionality analysis in the broad sense of the challenged legislative measure

- p. 48 The purpose of the regulatory framework for the control of narcotics and psychotropic substances established in the LGS is the protection of health and public order. From a systematic interpretation of the law, as well as of the different processes of reforming the law, it can be seen that the lawmaker had the intention of procuring the health of consumers of drugs and protecting society from the pernicious consequences of the consumption of drugs given that it has been considered that this activity has harmful effects on both the consumer and on society in general.
- p. 48-49 In this respect, this Court understands that both purposes are constitutionally valid. On the one hand, it is clear that the protection of health is an objective that the State can legitimately pursue, since it is a fundamental right recognized in Article 4 of the Constitution, in which it is expressly established that every person has the right to health protection. In this regard, we should not lose sight of the fact that this right has both an individual or personal and a public or social projection.
- p. 49 With respect to the protection of the health of individuals, this Court has established in multiple precedents that the right to health translates into obtaining a determined general wellbeing composed of the physical, mental, emotional and social states of the person, from which another fundamental right is derived, consisting on the right to physical-psychological integrity. Thus, it is evident that the State has a constitutional interest in procuring for individuals an adequate state of health and wellbeing.
- p. 49-50 On the other hand, the social or public facet of the right to health consists of the duty of the State to address health problems that affect society in general

and to establish the mechanisms so that all persons have access to health services. In this regard, it can be said that the LGS identifies the consumption of marijuana as a public health problem.

- p. 50 In close relationship to the protection of public health is the protection of public order. While it is complicated to define what this constitutional principle consists of, it is a concept that refers to the well-being of society in general. If it is understood in this way, there is no doubt that the public order includes the pursuit of collective social objectives through legislative decisions or public policies. Furthermore, it has to be indicated that the Constitution recognizes that the protection of the social conglomerate is a legitimate interest of the State.
- p. 50-51 In contrast, the prohibition of the consumption of marijuana for the mere moral self-degradation it implies, would not pursue a legitimate purpose. However, the Constitution does not impose an ideal of human excellence. It permits that each individual chooses his or her own life plan and adopts the model of personal virtue that he or she considers valid as long as it does not affect others. Thus, the impacts on social performance caused by marijuana – for example, a decrease in work productivity and the so-called “anti-motivational syndrome” – cannot be considered as valid reasons for intervening in the right to the free development of one’s personality. Furthermore, neither the law now analyzed, nor the legislative processes that have reformed it, show the intention of the lawmaker to promote a particular model of personal virtue.
- p. 54 Regarding the rational connection of the measure, if the consumption of marijuana does not cause damages or harm to health or society in general, the prohibition analyzed will not be a suitable measure to protect those constitutional purposes. As can be seen, the rational connection test thus requires the corroboration of the existence of an empirical relationship between the consumption of marijuana and certain states of things that can be characterized as damage or harm to health or to society.

If the literature is examined that has analyzed the effects of recreational consumption of marijuana, at least the following states of things can be identified that are normally considered associated with the recreational consumption of marijuana: impacts on health; generation of dependence, propensity to use “harder” drugs; and inducement to committing other crimes.

It should also be specified that to overcome the rational connection test it is sufficient that such impacts exist, regardless of the degree or entity they have. In that regard, for the prohibition on the consumption of marijuana to have a constitutional justification from the point of view of the suitability of the measure, it is necessary to demonstrate that it affects health and public order; even when such affect is minimal.

- p. 55-56 In general terms, the studies coincide that from current evidence, the consumption of marijuana in adult persons does not presume a significant health risk unless it is used chronically and excessively. The scientific literature distinguishes the temporary alterations from chronic ones. Thus, while the former only occur while the intoxication of the body lasts, the latter persist even when the consumer is not intoxicated.
- p. 56 The temporary alterations occur as an immediate consequence of the consumption of marijuana. Thus, since these effects depend on the state of intoxication that the marijuana produces, the investigations indicate that they are reversible and do not represent a demonstrated risk to health.
- p. 56-57 On the other hand, the existence of chronic alterations as a consequence of consumption is highly disputed within the literature specialized in the field. The studies indicate that permanent implications are unlikely or minimal, that their persistence is uncertain and that they may even have their origin in a plurality of factors different from the consumption.
- p. 58-59 Nevertheless, the psychological damages that marijuana generates when its consumption initiates in adolescence must be noted. Several studies explain

that there is greater probability of suffering schizophrenia and depression as an adult when the excessive consumption of marijuana initiates at an early age.

- p. 59 In this panorama, this Court observes that while the medical evidence shows that the consumption of marijuana can cause harm to health, these are impacts that can be qualified as non-serious, provided underaged consumers are not involved.

Regarding the development of dependency, there is a distinction between the abuse of and dependency on a substance in the scientific literature. While abuse presumes the continuous use of drugs, dependency specifies that the consumption must satisfy additional criteria, like the development of tolerance to the drug, abstinence syndrome and interference of the consumption with the development of other activities of the consumer. In this regard, regular consumers of marijuana do not necessarily qualify as drug dependent.

- p. 61 In relation to the propensity to use “harder” drugs, in general terms, it can be said that the available studies show that marijuana has a very low level of incidence in the consumption of other, more risky drugs.

- p. 62 In any case, it appears to be that the consumption of subsequent drugs is the result of various factors acting together, but not from the consumption of marijuana itself.

- p. 63-65 Regarding the inducement to commit other crimes, the evidence is speculative. Various studies have concluded that the consumption of marijuana is not a determining factor for committing crimes. From the evidence analyzed, it is seen that the consumption of marijuana does not incentivize crime. Although consumption and criminality are situations that are generally associated, this may be due to other social and contextual explanations, such that both phenomena may have the same causes as their origin. Furthermore, many addicts face the punitive system of the State precisely due to the existence of prohibitions on the consumption of marijuana.

However, it was also determined that the use of marijuana does negatively affect the abilities to drive automotive vehicles which may increase the likelihood of accidents.

p. 65 In conclusion, according to the above explanations, this Court concludes that there is evidence to consider that the consumption of marijuana in fact has various impacts on people's health. In this regard, while in general terms it can be said that the harms are minor, this is not an obstacle to conclude that in the specific case the "system of administrative prohibitions" consisting in the challenged articles in fact is a suitable measure to protect people's health.

Nevertheless, the evidence analyzed did not show that the consumption of marijuana influences an increase in criminality. Although consumption is associated with anti-social or illegal consequences, these may be explained by other factors such as the social context of the consumer or the punitive system of the drug itself. On the other hand, the studies analyzed do allow for the conclusion that the consumption of marijuana by drivers is a factor that increases the likelihood of causing vehicular accidents, which means that the measure challenged only in this aspect is a suitable measure to protect the public order.

p. 65-66 Having completed the rational connection test, now it should be analyzed if the "system of administrative prohibitions" challenged is a necessary legislative measure to protect health and public order or if, on the contrary, there are alternative measures equally appropriate that affect, to a lesser degree, the right to the free development of one's personality.

p. 66 This scrutiny may be done comparing the measure challenged with those that the lawmaker considered adequate for similar situations or the alternatives that in comparative law have been designed to regulate the same phenomenon.

p. 67 In this regard, the measure challenged can be compared to the regulation of substances that provoke damage similar to the consumption of marijuana,

like tobacco and alcohol, and with the regulatory systems of the consumption of marijuana that have been implemented in comparative law.

- p. 67 It is important to mention that both types of measures are referred to, only with the aim to identify the form that an alternative measure could adopt which could legitimately be compared to the measure adopted by a Mexican lawmaker in relation to marijuana consumption.
- p. 72 From the analysis of the above mentioned regulations a series of elements can be seen that could constitute an alternative measure to the absolute prohibition of the leisure and recreational consumption of marijuana as configured by the “system of administrative prohibitions” challenged by the affected parties: (i) limitations on the places of consumption; (ii) prohibition on driving vehicles or handling devices or hazardous substances under the effects of the substance; (iii) prohibitions on the advertising of the product, and (iv) restrictions on the age of those who can consume it. As can be observed, these are measures that seen together do not absolutely prohibit the consumption and, instead, only limit engaging in the activities related to personal consumption of marijuana in circumscribed situations.
- p. 72-73 It is important to indicate that both the legalization of the consumption of marijuana in other countries and the permission of consumption of tobacco and alcohol in Mexico have been accompanied by educational and health policies. In this regard, various information campaigns have been implemented on the adverse effects to health of consumption of such substances as well as social programs to address the damage to the health of those who have developed an addiction. In this respect, it can be said that these types of policies would also form part of an alternative measure to prohibition.
- p. 75 This Court understands that the alternative measures examined are not only appropriate for preventing that the damages or impacts on health and public order indicated previously are produced, but they are also measures that are less restrictive on the free development of one’s personality.

In this regard, it can be said that the challenged legislative measure prevents the consumption of marijuana in any circumstance when it could be limited to discouraging certain behavior or establishing prohibitions in more specific situations such as: driving vehicles or hazardous instruments under the effects of the substance, consuming it in public places, or inducing third parties to also consume it.

- p. 76-77 According to the above, the “system of administrative prohibitions” configured by the challenged articles constitutes an unnecessary measure since there are alternative measures equally appropriate to protect health and public order that affect the right to the free development of one’s personality to a lesser degree.

Therefore, this Court considers that the prohibition on the personal consumption of marijuana for purposes of leisure is unconstitutional since it does not overcome this step of the proportionality test.

#### **IV. Analysis of strict proportionality of the challenged legislative measure**

- p. 80 In the strict proportionality analysis of the measure, it would only be justified to severely limit the *prima facie* content of the right to free development of one’s personality if the damages associated with the consumption of marijuana that the “system of administrative prohibitions” on the consumption of marijuana tries to prevent were also very serious. On the other hand, if the measure only succeeds in avoiding or preventing minor damages, then it is disproportionate that the lawmaker makes use of an absolute prohibition that severely affects the free development of one’s personality.

- p. 80-81 This Court considers that the “system of administrative prohibitions” causes a very intense impact on the right to the free development of one’s personality in comparison with the minimum degree of protection to health and the public order that is achieved with such a measure. In the case of the restriction of the free development of one’s personality that the challenged measure involves, it is not found that such impacts are so serious as to merit

an absolute prohibition on consumption in spite of the fact that this Court recognizes that the lawmaker can limit the exercise of activities that presume impacts on the rights that our Constitution protects.

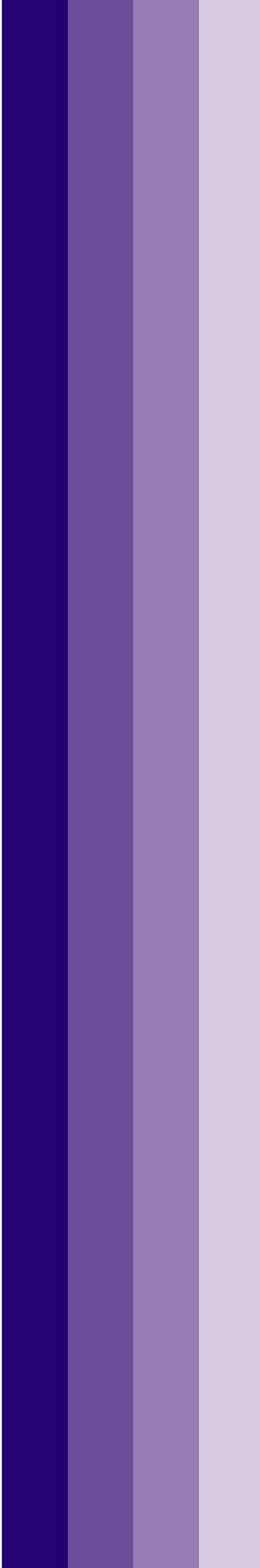
- p. 81-82 Thus, this Court considers that the restrictions are disproportionate in spite of the fact that the “system of administrative prohibitions” overcomes the first two steps of the proportionality test. Though it was established that a measure that seeks to protect health and public order and that it is appropriate for achieving such objectives was involved, this Court considers that the measure is unnecessary because there are alternative, equally appropriate means that affect the right to the free development of one’s personality to a lesser degree. These means generate a minimum protection for health and public order instead of the intense intervention in the right of people to decide what leisure activities they wish to engage in.

Therefore, this Court considers that the possibility of deciding responsibly if he or she wishes to experience the effects of that substance in spite of the harm that this activity may generate to a person, belongs to the strict sphere of individual autonomy protected by the right to the free development of one’s personality.

### Decision

- p. 89-90 This Court considers that Articles 235, last paragraph, 237, 245, section I, 247, last paragraph, and 248, all of the LGS, are unconstitutional, in the regulatory portions that establish a prohibition on the Ministry of Health issuing authorizations for engaging in activities related to the personal consumption for leisure or recreational purposes – planting, cultivating, harvesting, preparing, possessing and transporting – of the narcotic “cannabis” and the psychotropic “THC”, together known as marijuana.
- p. 90 The precision is made that this declaration of unconstitutionality does not presume at all the authorization to engage in acts of commerce, supply or any other that refers to the sale and/or distribution of the aforementioned substances, in the understanding that the exercise of the right should not harm third parties.

p. 90            Consequently, this Court revokes the appealed decision and grants the injunction (*amparo*), directing the Executive Director of Regulation of Narcotics, Psychotropics and Chemical Substances of COFEPRIS, the authority indicated as responsible in the *injunction (amparo)*, to grant to the affected parties the authorization referred to in Articles 235 and 247 of the LGS with respect to the substances and the effects referred to above, in the understanding that such authority may not use the regulatory portions whose unconstitutionality has been declared as a basis for issuing the respective ruling.



### III. RIGHT TO THE FREEDOM OF EXPRESSION AND INFORMATION



## 3

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### LEGISLATIVE OMISSION ON OFFICIAL PUBLICITY

#### *Amparo en Revisión 1359/2015<sup>3</sup>*

**Keywords:** *right to freedom of expression, principle of relativity, absolute legislative omission of mandatory exercise, democracy, official publicity, social communication, indirect measures of censure, organization of civil society*

#### **Summary**

The civil association Campaña Global por la Libertad de Expresión A19 (Article 19 civil association or Article 19) filed a two-stage judicial review relieving an unremediated breach of rights (*amparo indirecto*) against the omission of the Legislative Branch to issue the regulatory law of the eighth paragraph of Article 134 of the Mexican Constitution, as established in the third transitory article of the Decree reforming the Constitution in “political-electoral matters”, published in the Official Federal Gazette on February 10, 2014. This is due to the fact that the omission to issue such regulatory law makes it impossible for Article 19 to perform

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<sup>3</sup> Decision issued by the First Chamber of Mexico’s Supreme Court of Justice (November 15, 2017). Reporting Justice: Arturo Zaldívar Lelo de Larrea. *Injunction Under Review 1359/2015*

its purpose, violating its right to freedom of expression. The district judge of the Federal District that heard the matter decided to dismiss the proceeding. Article 19 filed an appeal (*recurso de revisión*) against this decision which Mexico's Supreme Court of Justice (this Court) heard through the exercise of its authority to assert jurisdiction.

### Issue presented to the Supreme Court

To determine whether the omission of the Legislative Branch to issue the regulatory law of the eighth paragraph of Article 134 of the Constitution, in accordance with the third transitory article of the Decree that reforms the Mexican Constitution in political-electoral matters, is unconstitutional for violating the right to freedom of expression of a civil association, which cannot meet the purpose for which it was created without this law.

### Holding and vote

The injunction (*amparo*) was granted to the Article 19 civil association for the following reasons. The matter of the validity of the injunction (*amparo*) had to be analyzed prior to studying the merits. To declare, first of all, that the injunction (*amparo*) proceeding is valid, this Court considered that the legislative omission did not constitute an electoral matter per se, although the constitutional reform addressed that topic; rather, that there was a possible violation of a fundamental right such as the freedom of expression of the Article 19 civil association. Furthermore, it was recognized that in fact an express obligation to issue a law existed, which had not been done within the time limit established resulting in an absolute legislative omission. In light of the new constitutional and legal framework, the principle of relativity of decisions had to be reinterpreted since the injunction proceedings (*juicio de amparo*) broadened the spectrum of protection of fundamental rights with a collective and/or diffuse dimension. This implies that the concession of the injunction (*amparo*) may benefit third parties unrelated to the dispute in addition to the affected party. With this, this Court recognized that in a constitutional State of law the injunction (*amparo*) courts have the obligation to guarantee that the fundamental rights are not violated by legislative omissions. Furthermore, Article 19 demonstrated it had a legitimate interest in that the regulatory law had to be issued for

it to be able to comply with its corporate purpose. Once this Court determined the validity of the matter, it considered that the absolute legislative omission, in fact, affected the freedom of expression both the individual and collective dimensions of the Article 19 civil association. Thus, it recognized that the freedom of expression remains an indispensable aspect of the exercise of democracy and the construction of an informed and critical society. Therefore, indirectly limiting or restricting the freedom of expression means impeding the media from doing their work without censure while adopting silencing or dissuasive positions in order to continue receiving resources for the official publicity contracted by the government. Therefore, this Court revoked the appealed decision and granted the injunction (*amparo*) to the Article 19 civil association so the Legislative Branch would issue the regulatory law of the eighth paragraph of Article 134 of the Constitution, in accordance with the third transitory article of the Decree, before April 30, 2018.

The First Chamber decided this matter by a majority of votes of the Chief Justice Norma Lucía Piña Hernández (reserving the right to issue a concurring opinion, against the one issued by Justice Jorge Mario Pardo Rebolledo), and Justices Arturo Zaldívar Lelo de Larrea, José Ramón Cossío Díaz (reserved the right to issue a concurring opinion), Alfredo Gutiérrez Ortiz Mena (reserved the right to issue a concurring opinion). Justice Jorge Mario Pardo Rebolledo voted against (reserved the right to issue a dissenting opinion).

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### EXTRACT OF THE DECISION

p. 1 Mexico City. The First Chamber of Mexico's Supreme Court of Justice (this Court), in session of November 15, 2017, issues the following decision.

#### **Background**

Campana Global por la Libertad de Expresión A19 (Article 19 civil association or Article 19) is a Mexican civil association whose purpose is to promote research, analysis, teaching and defense of human rights, in particular the rights to freedom of expression, press and information.

- p. 2,15 On February 10, 2014, the “Decree reforming, adding to and derogating various provisions of the Political Constitution of the United Mexican States in political-electoral matters” was published in the Official Federal Gazette (the Decree). The third transitory article of the Decree establishes that the Congress of the Union (the Congress) must issue (before April 30, 2014) the law that regulates the eighth paragraph of Article 134 of the constitution which establishes the principles that must govern the social communication policies of the authorities of the three branches of government: the institutional nature that must animate such social communication—in contrast to the personal use of the official publicity—and the informative, educational or social orientation purposes that it must pursue.
- p. 2-4 By brief filed on May 23, 2014 before the district administrative courts in the Federal District, the Article 19 civil association, through its representative, filed injunction proceedings (*juicio de amparo*) against the Chamber of Deputies and the Senate of the Congress of the Union and indicated as challenged acts the omission to issue the regulatory law of the eighth paragraph of Article 134 of the Constitution, in accordance with the third transitory article of the Decree. The district judge that heard the matter issued a decision on July 18, 2014 in which it decided to dismiss the injunction proceedings (*juicio de amparo*). Article 19 filed an appeal (*recurso de revisión*) against that decision on November 3, and it was admitted by a collegiate administrative court on November 13th of the same year. In session of August 5, 2015, this Court decided to exercise its authority to assert jurisdiction to hear the appeal (*recurso de revisión*) filed by Article 19 against the decision of July 18, 2014.

### Study of the merits

- p. 8 The dismissal declared by the district judge is supported by two independent arguments: that the proceeding is invalid because it involves an electoral dispute since the political rights of the Article 19 civil association are at

play; and that, based on the challenged act, the injunction proceedings (*juicio de amparo*) are also invalid given that what is challenged is a legislative omission, whose analysis would mean a violation of the principle of relativity. In this regard, in the appeal (*recurso de revisión*), Article 19 challenged the two lines of argument that support the decision to dismiss the injunction proceedings (*juicio de amparo*).

p. 9 In this respect, this Court considers that the injunction proceedings (*juicio de amparo*) filed by Article 19 is valid. To justify this decision, the Court maintains the following: I. this case does not have to do with a question that must be considered an “electoral matter”; II. The injunction proceedings (*juicio de amparo*) are valid against legislative omissions, III. this does not presume a violation of the principle of relativity of decisions, IV. nor that it can be maintained that the injunction (*amparo*) courts lack competency to analyze the constitutionality of these types of acts; V. Article 19 has a legitimate interest to file injunction proceedings (*juicio de amparo*); and finally, VI. the fact that the President and Ministry of the Interior are not indicated as reasonable authorities does not affect the validity of the injunction (*amparo*).

### I. The “political-electoral matter” according to Court doctrine

The district judge considered that the matter was invalid because it involves an electoral matter. For its part, Article 19 alleged that while the constitutional transitory article whose violation is alleged arose in the context of an electoral reform, the article itself does not have any electoral content.

p. 13-14 In this respect, the cause of invalidity in question can be said to consist of two elements whose presence can be alternative or joined: the content of the act that is challenged should be an electoral matter and/or the right whose violation is alleged must be considered a political right, which must be used as a standard of constitutional review.

- p. 14-15 The fact that some of the constitutional articles that the Article 19 civil association considers violated were amended as a result of a reform in “political-electoral” matters does not imply that the cause of invalidity the district judge invokes has been triggered in this case.
- p. 15 First of all, neither the eighth paragraph of Article 134 of the constitution nor the third transitory article of the Decree involve electoral matters per se. Although no one denies that social communication is a matter that can have an impact on electoral questions, it is clear that this transcends the electoral sphere.
- p. 16 The second element of the invalidity criteria of the injunction proceedings (*juicio de amparo*) is also not present, since the Article 19 civil association does not argue that the act it claims is unconstitutional had affected its political rights; rather, the legislative omission in question violated its right to free expression.

### **I. The validity of the injunction proceedings (*juicio de amparo*) against legislative omissions**

- p. 17 In addition to maintaining that the cause of invalidity established in section XXIII of Article 61 of the Amparo Act was present, the judge also argued, as the basis for dismissing the injunction proceedings (*juicio de amparo*), that any concession against a legislative omission would violate the principle of relativity. In this regard, it indicated that the effect of an eventual granting of the injunction (*amparo*) would be to obligate the legislative authority to repair that omission, which would presume giving general effect to the enforcement of the injunction (*amparo*). For its part, Article 19 argues in the appeal (*recurso de revisión*) that such interpretation of the principle of relativity is erroneous and that the injunction (*amparo*) is valid against legislative omissions.

- p. 20 This Court considers that in the framework of the injunction proceedings (*juicio de amparo*) there will be only one legislative omission as such (or absolute legislative omission) when there is a constitutional mandate that establishes precisely the duty of legislating in a particular sense and that obligation has been totally or partially violated.
- p. 22 Thus, the interpretative doubt that is established in this matter is whether the injunction proceedings (*juicio de amparo indirecto*) are valid against the omissions to legislate that are attributed directly to the Legislative Branch in light of the current constitutional and legal framework.
- p. 22-23 This Court understands that the judicial review of the injunction proceedings (*juicio de amparo indirecto*) in fact is valid against legislative omissions. First of all, the Constitution establishes generically the validity of the injunction proceedings (*juicio de amparo*) against “omissions of the authority” without expressly indicating that the omissions attributable to the lawmaker are excluded. In this regard, it is undisputed that the Legislative Branch can be a responsible authority for purposes of the injunction proceedings (*juicio de amparo*). Section VII of Article 107 of the constitution establishes the possibility of filing a injunction proceedings (*juicio de amparo*) against “general norms”, among which are undoubtedly the laws.
- p. 24 To definitively clear up the interpretative doubt stated above and, therefore, be able to hold conclusively that the judicial review of the injunction proceedings (*juicio de amparo indirecto*) is valid against legislative omissions, not only must it be verified that there is no cause of invalidity with an express constitutional basis—which does not occur in this case—, but it also must be ruled out that that procedural impediment can arise from the constitutional principles that discipline the injunction proceedings (*juicio de amparo*). For that reason, the arguments based on those principles supporting the invalidity of the injunction (*amparo*) against legislative omissions are studied below.

### III. Principle of relativity of the injunction (*amparo*) decisions in legislative omissions

- p. 24-25 First of all, this Court considers it relevant to emphasize that the constitutional design of the injunction proceedings (*juicio de amparo*) was substantially changed with the reform of June 10, 2011. In this case, before that constitutional reform, there was a very consolidated position in the doctrine of this Court that the injunction proceedings (*juicio amparo*) was invalid when legislative omissions were challenged because any such process would presume a violation of the principle of relativity.
- p. 26,30 Nevertheless, this Court understands that the new constitutional configuration of the injunction proceedings (*juicio de amparo*) clearly broadened the spectrum of protection of that procedural mechanism, such that now it is possible to better protect fundamental rights that have a collective and/or diffuse dimension, as occurs with the freedom of expression. Thus, the injunction (*amparo*) proceeding which was conceived originally to strictly and exclusively protect individual rights can now also be used to protect more complex rights. For that reason, recently this Court has recognized the need to reinterpret the principle of relativity of the injunction (*amparo*) decisions, so that such procedural mechanism can comply with the constitutional function that is entrusted to it: the protection of all the fundamental rights of people.
- p. 27 With regard to the rest, the need for such reinterpretation has been made especially clear in recent cases in which this Court has analyzed violations of economic, social and cultural rights. In this regard, if a strict interpretation of the principal of relativity is maintained, in the sense that the concession of the injunction (*amparo*) can never presume any type of benefit with respect to third parties unrelated to the proceeding, in the great majority of cases it would be very complicated to protect these types of rights in the framework of the injunction (*amparo*) proceeding, taking into account that one of its most outstanding characteristics is precisely its collective and diffuse dimension.

p. 30 This Court understands that the principle of relativity orders the injunction (*amparo*) courts to study only the arguments of the parties—supplementing them if appropriate— and, if applicable, to grant the injunction (*amparo*) only for purposes of restituting the rights violated of the persons affected. However, it is perfectly admissible that, when protecting them, indirectly and eventually, third parties unrelated to the constitutional dispute may be benefited.

According to the above, it must be concluded that when a two-stage judicial review relieving an unremediated breach of rights (*amparo indirecto*) indicates an absolute legislative omission as a challenged act, no cause of invalidity that presumes a violation of the principle of relativity is triggered.

#### **IV. Competency of the injunction (*amparo*) courts to analyze legislative omissions**

p. 30-31 Aside from the above, it could even be argued that the injunction (*amparo*) is invalid against legislative omissions because, although the principle of relativity is not violated, the injunction (*amparo*) courts do not have powers to force the Legislative Branch to legislate. According to the principle of separation of powers established in Article 49 of the constitution, the government bodies can only exercise the competencies and functions that are granted to them. In this sense, if the Constitution attributed the function of legislating to the Legislative Branch (with the collaboration of the Executive), it could be argued that the courts, when granting an injunction (*amparo*) for legislative omission, would be intervening in the legislative process without having a constitutional basis for doing so and, in this way, they would be violating the principle of separation of powers.

p. 31 Nevertheless, this Court considers that the injunction (*amparo*) courts have constitutional powers to order the restitution of the rights of the people affected when they are violated by an absolute legislative omission.

- p. 31-32 In effect, when the Constitution establishes a duty to legislate with respect to a specific matter entrusted to the Legislative Branch, the exercise of the power to legislate ceases to be discretionary and becomes a competency of mandatory exercise. In this scenario, the only manner to maintain a state of constitutional regularity is if the injunction (*amparo*) courts are able to determine if in a particular case an omission to legislate also means a violation of people's rights. In this respect, this Court considers it is important to emphasize that an act of authority that violates rights is unconstitutional, regardless of whether it involves an action or an omission, or the authority to which this act is attributed.
- p. 32 In this sense, if the injunction (*amparo*) judges have competency to control the constitutionality of laws issued by the Legislative Branch, they also have the power to control their omissions. Under this logic, to hold the invalidity of the injunction (*amparo*) proceeding against legislative omissions when it is alleged they violate fundamental rights would imply ignoring the normative force of the Constitution, which is unacceptable in a Constitutional State of law.

#### V. Legitimate interest of the Article 19 civil association

- p. 34 Although the legitimate interest of the Article 19 civil association was not discussed in the decision of the district judge and, therefore, such question was not challenged in the motion for review, the validity of the injunction (*amparo*) proceeding is a question of public order that must be studied even ex officio in accordance with Article 62 of the Amparo Law. For this reason, in this part this Court will analyze whether in fact Article 19 has a legitimate interest in filing this (*amparo*) proceeding.
- p. 38 This Court has understood that for there to be a legitimate interest the following is necessary: that such interest is guaranteed by an objective right; that the act challenged produces an impact on the legal sphere understood broadly, whether directly or indirectly by the special situation of the claimant in relation to the order; the existence of a link between a person and the

claim, such that the annulment of the act produces a current or future but certain benefit; that the impact is appreciated under a parameter of reasonability; and that such interest is harmonic with the dynamics and reach of the (*amparo*) proceeding.

In this case Article 19 indicates that the omission of the Congress violates its right to the freedom of expression. In this regard, the civil association argues that the purpose of the omitted regulatory law is to generate tools to prevent the expenditure on communications to citizens from functioning as a form of censure on the freedom of expression. According to Article 19, since it is a civil society organization that is dedicated to documenting and denouncing the use of official publicity as a method of censure, the omission challenged clearly obstructs the fulfillment of its purpose and impedes it from having the legislative tools necessary to defend the causes it represents.

p. 38-39 First of all, this Court notes that the Article 19 civil association was founded for the purpose of defending the right to the freedom of expression globally and its bylaws show that its purpose is to promote the research, teaching and defense of human rights, in particular the rights of freedom of expression, press and information; as well as to promote, sponsor and impart courses, studies, surveys, radio and television programs and conferences, among other things, the purpose of which is training, research and dissemination of topics on freedom of expression. Similarly, the corporate purpose of the complainant also includes litigating freedom of expression cases, where it is presumed that those rights have been violated, and analyzing and offering advice regarding the content, reforms, application and fulfillment of the laws on access to information.

p. 40 In particular, Article 19 has documented the violence to censure the media, and in matters of official publicity, Article 19 has presented various reports on expenditure on social communication and how official publicity is awarded in our country. Thus, for this Court it is clear that the principal activity of the Article 19 civil association is the promotion and protection of the freedom of expression, in both its individual and collective dimension; which activity it has engaged in for more than nine years of operations in

Mexico, in which it has documented and denounced the aggressions suffered by journalists, the media and people who in general exercise their right to freedom of expression.

- p. 41 According to the above, this Court understands that the Article 19 civil association proved it has a special interest in the defense and promotion of the freedom of expression, at the same time that the omission it challenges affects its capacity to meet the purpose for which it was created, such that the eventual issuance of the omitted legislation would bring to it a particular, actual and certain benefit: to be able to fully perform the purpose for which it was formed.

### VI. Responsible authorities in a legislative omission

- p. 42 Finally, this Court notes that Article 19 indicated the Chambers of Congress as sole responsible authorities, without including the President of the Republic and the Minister of the Interior. Nevertheless, such circumstance does not make the injunction proceedings (*juicio de amparo*) invalid. In effect, while it is true that the President and Ministry of the Interior must be indicated as responsible authorities when the constitutionality of a law is challenged—to the extent they are authorities that participate in the legislative procedure—, this is not necessary in the case of legislative omissions, since their participation in the legislative process is only required when there is already a law passed by the Congress, which is precisely the omission that is challenged in this matter.
- p. 42-43 In this way, the grievances stated in the appeal (*recurso de revisión*) have been well-founded. No other cause is found *ex officio* that could make the injunction proceedings (*juicio de amparo*) invalid, this Court proceeds to study the claims for relief.
- p. 43 This Court deems it relevant to emphasize from the beginning that to be able to grant the *amparo* against a legislative omission primarily two questions must be proven: VII. that there is a legislative omission *per se*; and VIII. that the omission in question presumes a violation of fundamental rights of the Article 19 civil association.

### VII. Existence of a legislative omission per se (absolute)

- p. 44-45 There is no doubt that the third transitory article of the Decree orders Congress to issue a law that regulates the eighth paragraph of Article 134 of the Constitution before the second period of ordinary sessions of the second year of exercise of the LXII Legislature ends, which period concluded more than three years ago, on April 30, 2014. Although this Court notes that various political forces have presented bills in both chambers of Congress to regulate that constitutional article and to establish the norms that will govern the expenditures and the form of social communications in the country, none of these bills have been certified by any commission or been discussed in the Plenary of either of the chambers.
- p. 45 Thus, given that the Constitution imposes on Congress the duty to issue a law that regulates the eighth paragraph of Article 134 of the Constitution within a period that had already long expired and still has not occurred; it must be concluded that the Legislative Branch has completely violated that obligation. Therefore, Article 19 is right in this point: we have an absolute legislative omission attributable to the two chambers of the Congress.

### VIII. The effects of the legislative omission on the freedom of expression

- p. 45-46 This Court considers that the omission in issuing the regulatory law of the eighth paragraph of Article 134 of the Constitution violates the freedom of expression, press and information, since the absence of that normative framework permits an arbitrary and discretionary use of the distribution of official publicity and generates censure of the media and critical journalists, as Article 19 argued in its injunction (*amparo*) claim. To justify this decision, the following topics will be developed: a) the importance of the freedom of expression in a democratic society; b) the role of the media as fundamental actors for a full exercise of the freedom of expression; and c) the manner in which the arbitrary expenditure of social communication can be used as an indirect restriction on the freedom of expression and analysis of the omission challenged in light of the doctrine of this Court on the freedom of expression.

**a) Importance of the freedom of expression in a democratic society**

- p. 46-47 First it is necessary to recall that the right to freedom of expression is protected in Articles 6 and 7 of the Constitution, as well as Articles 13 of the American Convention on Human Rights and 19 of the International Covenant on Civil and Political Rights. In the constitutional doctrine on this right, this Court has made a special emphasis on showing that the freedom of expression constitutes a precondition of the democratic life. In this way, the connection between the freedom of expression and democracy has been emphasized in numerous precedents.
- p. 48-49 Those precedents are useful for understanding that the freedom of expression has an individual dimension, centrally related to the autonomy of persons. Thus, the possibility of expressing our ideas, backing or criticizing those of others, and disseminating information of all kinds allows people to make decisions on their own lives and act accordingly. In this way, under this right in principle individuals can say anything without state interference. Nevertheless, even from this perspective, autonomy is not protected as an asset in itself, nor as a means of individual self-realization, but rather as a form of promoting broader political purposes, such as the enrichment of the collective debate.
- p. 49 Thus, there is no doubt that the freedom of expression also has a collective dimension, especially relevant when a community decides to live in democracy. In the context of a democratic society collective manifestations of the freedom of expression are indispensable, such as the exchange of ideas, the uninhibited and informed debate on questions of public interest, the formation of a robust public opinion, the elimination of the obstacles to the search for and reception of information, the suppression of mechanisms of direct and indirect censure, the existence of professional and independent media. Otherwise, this aspect of the freedom of expression imposes on the State positive duties that require it to intervene in order to generate all those conditions and eliminate the obstacles to the free circulation of ideas.

- p. 52 As a result of the above, this Court restates that the collective dimension of the freedom of expression contributes to the conformation of an informed and critical citizenship, an indispensable conditions for the adequate functioning of a representative democracy such as Mexico's.

**b) Media for a full exercise of the freedom of expression**

- p. 53 As indicated in the part above, one of the elements of the collective dimension of the freedom of expression is the existence of professional and independent media, because as a key player in the adequate functioning of a democracy, they permit citizens to receive information and know opinions of all kinds by being the vehicle for expressing ideas on matters of public interest and disseminating them in society.

**c) Official publicity as an indirect restriction on the freedom of expression**

- p. 56 As has been explained, if the media are fundamental for the existence of the plural and inclusive debate, a deliberative democracy requires professional and independent media that inform and report the different points of view that exist on a problem of public interest, so that citizens can form an opinion of their own on those matters. Nevertheless, it is clear that the media need financing to be able to operate and perform the above described function.
- p. 56-57 In the case of Mexico, it is an undeniable reality that the public powers, the autonomous bodies, the agencies and entities of the public administration carry out daily activities of social communication to comply with informational, educational or social guidance purposes. Thus, the government buys from the media publicity spaces of different types in order for its message to reach the greatest number of recipients. In this way, the income the media obtain to disseminate social communications from the government may be indispensable for them to stay in business, especially during periods of crisis.

- p. 58-59 It is in this context that the great dependence of the media on official publicity, that the argument made by Article 19 should be examined, in which it indicates that the omission in issuing the regulatory law in question violates their right to freedom of expression. In this respect, this Court considers that the absence of clear and transparent rules on the assignment of the expenditure of social communication propitiates an arbitrary exercise of the budget in this regard, which results in an unconstitutional state of things that violates the freedom of expression in its collective and individual dimensions of the Article 19 civil association. This constitutes a mechanism of indirect restriction or limitation on the freedom of expression, prohibited by Articles 7 of the Constitution and 13.3 of the American Convention on Human Rights.
- p. 60 In this case, the indirect restriction on the freedom of expression also has a “silencing effect” on the critical media, to the extent that through financial asphyxia points of view that enrich the robust debate that should exist in a democracy on matters of public interest are missing. Otherwise, this Court notes that this unconstitutional state of things has a dissuasive effect on the exercise of the freedom of expression of the media in general, since the financial impact suffered by the critical media can lead the rest to adopt deferential positions with the government in order to not lose the resources assigned to the dissemination of official publicity.

### Decision

- p. 62-63 In this case this Court decides to revoke the appealed decision, and grant the injunction (*amparo*) to the Article 19 civil association, for the effect that Congress complies with the obligation established in the third transitory article of the Decree of constitutional reform in “political-electoral matters” on February 10, 2014 and, therefore, proceeds to issue a law that regulates the eighth paragraph of Article 134 of the Constitution, before April 30, 2018.

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### FREEDOM OF EXPRESSION: DEFINITION OF JOURNALIST FOR PURPOSES OF INVESTIGATING CRIMES AGAINST THEM IN THE FEDERAL COURTS

#### *Amparo en Revisión 1422/2015<sup>4</sup>*

**Keywords:** *Protection of journalists, freedom of expression, criteria for determining if a person is a journalist.*

#### **Summary**

EAC was detained and transferred to offices of a municipal government where he was physically assaulted by the police, the local Public Security Director and the Mayor, because he was documenting a road accident that involved a adolescent who drove a van owned by the mayor's brother. The Federal Prosecutor [*Ministerio Público Federal*] (hereinafter "MPF") assigned to the Special Investigative Unit for Crimes against Freedom of Expression initiated an investigation, which resulted in the arrest and detention of several agents from the municipal police department for criminal prosecution. The police challenged this decision, arguing that the case could not be decided at the federal level because it did not meet the requirements

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<sup>4</sup> Decision issued by the First Chamber of Mexico's Supreme Court of Justice (March 1, 2017). Reporting Justice: Arturo Zaldívar Lelo de Larrea

for federal authorities to hear state crimes. The Circuit Court [*Tribunal Unitario de Circuito*] (hereinafter “TUC”) ruled against the police. In spite of this, EAC initiated an injunction (*amparo*) claiming that the crimes had not been reclassified by those who had initiated the criminal process as crimes of torture and wrongful imprisonment. The TUC deemed that it had not been demonstrated that the federal authorities should hear the case and that it had not been proven that EAC was a journalist. EAC filed a review of resources (*recurso de revisión*) and requested the Supreme Court to hear the case.

### Issue presented to the Supreme Court

Whether the determination of the TUC that there was no proof that EAC was a journalist because it was not shown that he worked in a media outlet was correct.

### Holding and vote

The injunction (*amparo*) was granted essentially for the following reasons. It was decided that the determination of who is a journalist must be made in terms of function, and therefore it was enough to prove that the person is dedicated to informing society of public events on a regular basis. Thus, the Court granted the injunction (*amparo*) filed by EAC, indicating that it was correct for the federal authorities to hear the case.

The First Chamber decided this case with the unanimous vote of the five Justices Norma Lucía Piña Hernández, Arturo Zaldívar Lelo de Larrea, José Ramón Cossío Díaz, Jorge Mario Pardo Rebolledo and Alfredo Gutiérrez Ortiz Mena.

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### EXTRACT OF THE DECISION

p. 1 Mexico City. Decision of the First Chamber of Mexico’s Supreme Court of Justice corresponding to March 1, 2017.

#### Background

p. 2 The facts narrated below are those provided by the plaintiff; however, it is important to emphasize that they have not been proven at trial, and therefore

they are included only for the purpose of contextualizing the importance of the matter under review.

- p. 2-3 On January 1, 2014, at approximately 2:00 p. m., EAC received a call from APC, asking him to report that the van owned by the brother of the Mayor of Seyé, Yucatán, driven by the adolescent AC, had hit the wall of APC's house. This was to ensure there would be a record of the damages suffered by the property and the driver of the car would be held accountable for the damages caused.
- p. 3 EAC arrived at the place of the events around 8:00 p. m. and began to take photographs of the van, the damages caused by it, and of the mayor, who left the area once he learned of EAC's presence. Moments later, several officers of the municipal police arrived, questioning EAC's presence and asking him to leave. Since he did not comply with their request, EAC was assaulted and arrested by the police officers. Subsequently he was transferred to the Office of the Treasury in the Municipal Palace. Once there, EAC was physically assaulted by the Mayor, the Public Security Director and some municipal police officers.
- p. 3 As a result of the above events, on February 26, 2014, the MPF initiated a preliminary investigation. It was assigned to a district judge in Yucatán.
- p. 3 On May 29, 2014, the trial court judge issued an arrest warrant and order for trial against JMCA, FATC, FCP, ADC and AVP; the officers of the Municipal Police department accused of assaulting EAC, for probable cause in committing the crimes of abuse of power and assault.
- p. 3-4 The public defender of the accused challenged the trial court determination arguing that the federal authorities could not hear the case since it involved state crimes.
- p. 4 The TUC issued a final decision on September 25, 2014. In that decision, the TUC changed the challenged decision only regarding the suspension of the political rights of the defendants.

- p. 4 EAC decided to file an injunction (*amparo*) against the TUC decision arguing that the Circuit Court had the power and the duty to reclassify the crimes of abuse of power and assault as crimes of wrongful imprisonment and torture.
- p. 5 EAC asserted that there was no cause for his detention, since he had not committed any crime or administrative infraction. Although the arresting officers argued that the cause of the detention was to “calm down” the detainee, this did not constitute a constitutionally valid cause, since the true purpose of the detention was to punish the appellant for practicing journalism. Therefore, the authority did not have to prove the crime of abuse of power but of torture.
- p. 5 The TUC issued a decision on December 12, 2014. The TUC considered that the federal judge did not prove the jurisdiction established in Article 10 of the Federal Criminal Procedures Code establishing that federal judges may hear state crimes committed against a journalist that affect the right to information or the freedom of expression or press. It was also deemed that the victim’s status as a journalist was not accredited just by his statement, since he did not exhibit any document that proves so.
- p. 6 EAC filed a review of resources (*recurso de revisión*). In the brief submitted, the petitioner argued that the appealed decision violates the standards of freedom of expression by requiring proof of being a journalist. EAC stated that the right to freedom of expression includes the dissemination of information, as well as the search for and reception of information through any means, and therefore journalism constitutes the primary and principal manifestation of the freedom of expression. Consequently, journalism cannot be limited to persons registered in a particular professional association, since it is related to the freedom of expression inherent to being human. Therefore, the definition of journalist should be considered from a functional perspective, and include people who regularly observe, describe, document and analyze events.

p. 6-7 On January 15, 2015, EAC requested Mexico's Supreme Court of Justice to exercise its power to assert jurisdiction. In a decision of September 9, 2015, this First Chamber of the Supreme Court decided to assert jurisdiction over the case.

### Study of the merits

p. 8 EAC argues that a constitutionality question endures because the TUC decision violates the standards of freedom of expression established by the Constitution and international treaties. The Supreme Court's decision could set a standard for investigators and judges to determine whether the victim of the crime who claims to engage in journalism is in fact a journalist.

p. 8 In that respect, this First Chamber considers that being a journalist is determined functionally, without requiring proof of belonging to a media outlet, for which it is sufficient to show that the person regularly informs society of public events. Thus, the MPF and the federal judges may hear state crimes when they are committed against journalists, and EAC has that status.

p. 8 This First Chamber will explain the reasons for its decision below.

p. 8-9 As established above, the TUC considered the MPF could not assert jurisdiction over a state crime in terms of Article 10 of the Federal Criminal Code, given that the victim did not exhibit any document that proved he was a journalist. That determination was challenged by EAC and the First Chamber of the Supreme Court must decide if that requirement is in accordance with the right to freedom of expression.

p. 9 To make that determination, the following will be analyzed: i) the content of the right to freedom of expression, ii) the relevance of journalism in the exercise of the freedom of expression, iii) criteria for determining who is a journalist, and iv) the resolution of this particular case.

### I. The right to freedom of expression

- p. 9 The right to the free expression of ideas is protected in Articles 6 and 7 of the Constitution, as well as Articles 13 of the American Convention on Human Rights and 19 of the International Covenant on Civil and Political Rights.
- p. 9-10 According to those provisions, all people enjoy the right to freedom of expression, the exercise of which may only be restricted through a subsequent liability claim when the rights or reputations of others are affected.
- p. 10 The Supreme Court has specified two dimensions of the right to free expression based on its political or individual importance. In its social or political dimension, it constitutes a core component for the adequate functioning of a representative democracy; and in its individual dimension, it ensures essential spaces for individual self-expression.
- p. 12 In this regard, the Supreme Court explained in the Action for Constitutional Relief (*Amparo Directo en Revisión*) 2044/2008 that the freedom of expression also constitutes a functional element that determines the quality of democratic life in a country. Direct Injunction (*Amparo Directo*) 3/2011 indicated that the freedom of expression has a structural relationship with the functioning of the democratic system, since a free and informed citizenry is essential for deliberating on matters that concern everyone and its enhanced guarantee is necessary for an effective control of public administration.
- p. 12 In Direct Injunction (*Amparo Directo*) 6/2009, it was held that the protection of free speech related to matters of public interest is especially relevant for the freedom of expression to fully perform its strategic functions in the formation of public opinion, within the structural system of representative democracy. Similarly, Direct Injunction (*Amparo Directo*) 28/2010 stated that freedom of expression's purpose is to guarantee the free development of public communications that permit the free circulation of ideas and value judgments inherent in the principle of legitimate democracy.

- p. 12-13 In Summary, the political dimension of the freedom of expression has numerous functions, which include maintaining channels open for dissent and political change; it is conceived as a counterweight to political power, since public opinion represents citizen scrutiny of state actions; and it contributes to the formation of public opinion on political matters and the consolidation of a duly informed electorate.

## II. Journalism and freedom of expression

- p. 13 Within this political dimension, the role of journalism fills one of the most important manifestations of the freedom of expression. In this regard, the Advisory Opinion OC-5/85 of the Inter-American Court of Human Rights emphasized that journalism is the main and primary manifestation of the freedom of expression. Its special link to freedom of expression means that, in contrast to other professions, journalism cannot be seen merely as a public service.
- p. 13 Following the case law of the Inter-American Court of Human Rights, the Supreme Court has emphasized in a number of decisions the role of the media as public opinion builders. Action for Constitutional Relief (*Amparo Directo en Revisión*) 2044/2008 identified the following three fundamental issues regarding the media: (i) they play an essential role for the implementation of the social function of the freedom of expression; (ii) they are among the basic builders of public opinion in current democracies; and (iii) the conditions allowing them to house the most diverse information and opinions must be ensured.
- p. 14 In this regard, based on several references of comparative law, the First Chamber of the Supreme Court held in Direct Injunction (*Amparo Directo*) 28/2010 that the freedoms of expression and information reach their highest level when those rights are exercised by professional journalists through the institutionalized vehicle of formation of public opinion, which is the press, understood in its broadest sense.

- p. 14 In Direct Injunction (*Amparo Directo*) 3/2011, the First Chamber also indicated that the journalist is an intermediary in the informative process that is responsible for issuing opinions on current events, as well as investigating the information existing in the social sphere, preparing it based on truthfulness, and returning it to the society from which the news has been extracted. In this regard, journalists must have a certain autonomy and independence that impact the quality of the opinions they express and of the information transferred to the public.
- p. 14 Journalists perform a fundamental role in the production of information, contributing to preserving pluralism and reinforcing opportunities to form an unmanipulated public opinion. Thus, journalists are the main providers in this “marketplace of ideas”, contributing different positions to the public and strengthening the public debate.
- p. 14 In Direct Injunction (*Amparo Directo*) 6/2009, the First Chamber of the Supreme Court explained that the circulation of information and public debate is powerfully limited by civil or criminal lawsuits against journalists, for their own acts or those of others.
- p. 16 That is why journalists must be granted adequate conditions for disseminating the most diverse information, since they represent a great force for building public opinion in democracies today.
- p. 18 On June 25, 2012, the “Decree adding the second paragraph of section XXI of Article 73 of the Federal Constitution” was published, which establishes that: The federal authorities may hear state jurisdiction crimes when they are related to federal crimes or crimes against journalists, persons or facilities that affect, limit or diminish the right to information or the freedoms of expression or press.
- p. 18-19 As a result of this reform, on May 3, 2013, Article 10 of the Federal Criminal Procedures Code was amended to grant jurisdiction to federal judges to

decide state jurisdiction crimes committed against journalists, persons or facilities that affect, limit or diminish the right to information, expression or press. The statement of purpose of the reform indicated that the country's environment of insecurity makes journalism a highly risky profession. It also stated that the institutional weakness of state powers made it impossible for them to give proper attention to crimes committed against journalists.

- p. 19 To address the above, the lawmaker considered that, although Article 10 of the Code establishes the power to hear state crimes related to federal crimes, it was necessary to give federal judges jurisdiction to hear state crimes since they could threaten the freedom of expression and go unprosecuted given the above mentioned context. Thus, section IV was added to Article 50 of the Organic Law of the Federal Judicial Branch.

### III. Criteria for determining who is a journalist

- p. 20 The Action of Unconstitutionality (*Acción de Inconstitucionalidad*) 87/2015 analyzed whether the requirements of “permanency” and “credentials” for the exercise of the journalist role established in the Law for Protection of Defenders of Human Rights and Journalists of the State of Quintana Roo violated the right to freedom of expression. In this respect, the Plenary of the Supreme Court decided that the consideration of permanency, as a feature in the performance of the journalistic role, is constitutional, but does not define who is a journalist. In other words, credentials may contribute to determining who is a journalist, but cannot be considered a necessary requirement in that profession. Requiring journalists to show a credential of the media outlet in which they work to have access to incidents of public interest is contrary to the freedom of expression. The above conclusions were based on the decisions and recommendations issued by different international human rights organizations.
- p. 21 In that regard, the Supreme Court considered that any definition of the term journalist must bear in mind the context of insecurity faced by the

media in undertaking their activity and be intended to permit access to the protection mechanisms the laws offer to those who exercise their right to freedom of expression through journalism.

- p. 21 Thus, the definition of the beneficiaries of the journalist protection mechanisms must incorporate all those who, in any way, fulfill the function of informing society of public interest events. Similarly, the definition must cover the different and changing modes with which journalism is practiced. For these reasons a definition of journalist based on the activities and roles they perform is justified.
- p. 23 In addition to the activities of journalism, the characteristics of those who practice them and the means through which the information is disseminated have been discussed. Thus, international organizations and the Supreme Court, rather than seek to define what constitutes a journalist, have resorted to negative definitions; they have determined what conditions are not necessary to “demonstrate” someone is a journalist. Although this list is not exhaustive, it has been indicated, for example, that it is not necessary that the activity be carried out in a particular media outlet, or that it be an exclusive activity, or that the journalist prove belonging to a media outlet, or an association of journalists.
- p. 23 With respect to channels of communication, in its General Comment 34, the United Nations Human Rights Committee has recognized that a wide variety of people participate in journalism who publish on their own account in the press, on internet or in other media.
- p. 23-24 Furthermore, the Law for the Protection of Defenders of Human Rights and Journalists indicates that journalists may practice their craft in any public, community, private, independent, university, experimental or any other means of communication and dissemination, including print, broadcast or digital transmission of words or images.

- p. 24      Regarding the requirement of journalist “credentials” or belonging to a particular media outlet or association; it has been indicated that the practice of journalism can be independent or associated. In that regard, emphasis has been placed on the protection of the independence of the journalist, inasmuch as the free expression of ideas is not conceivable except within a plurality of sources.
- p. 25      This means that the journalistic activity can be carried out by someone who is related to a media outlet or someone who operates independently. Moreover, protecting the freedom and independence of the journalist is very important for a democratic society.
- p. 25      In Advisory Opinion OC-5/85, the Inter-American Court of Human Rights unanimously determined that the compulsory licensing of journalists is incompatible with Article 13 of the American Convention on Human Rights if it denies any person access to membership in a Journalists Association and thereby inhibits the full use of the news media as a means of expressing and imparting information.
- p. 25-26    Furthermore, the Plenary of the Supreme Court decided in the Action of Unconstitutionality (*Acción de Inconstitucionalidad*) 87/2015 that the requirement of showing a media credential to access public events constitutes a restriction on the exercise of the freedom of expression in its dimension of access to information. Such a requirement would deny access, even when the public interest exists, to those without media credentials. The “credential” therefore limits the exercise of the freedom of expression in its dimension of access to information, by limiting the possibility of covering, reporting on or issuing an opinion with respect to a particular act that could be of public interest to a certain kind of journalist.
- p. 26      Thus, for the Supreme Court, a system of credentialing the journalist will only be valid when its purpose is to grant greater security and access to their activity. So, there must be proper regulation that cannot result in discriminatory practices in which an authority can arbitrarily determine who can cover a particular public event or news.

- p. 27 Finally, regarding how long a person should be engaged in the role to be considered a journalist, the Report of the U.N. Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression indicated that citizens should be included in the definition of journalist when they perform that function “for a time”. In this regard, the U.N. Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions considered those who regularly engage in obtaining information and its dissemination to the public through mass media to be journalists. Likewise, the Joint Declaration on Freedom of Expression and Responses to Conflict Situations included a similar element when indicating that protection should be given to anyone who regularly or professionally engages in the collection and dissemination of information to the public via any means of communication.
- p. 28 When deciding the Action of Unconstitutionality (*Acción de Inconstitucionalidad*) 87/2015, the Supreme Court considered that the requirement of “permanency” to identify a journalist, established in the Law for the Protection of Defenders of Human Rights and Journalists of Quintana Roo, should be understood as “stability, constancy, perseverance or immutability” in carrying out the activities described by the Law.
- p. 28 Thus, no international instrument or organization considers the requirement of permanency to mean performing journalistic roles for an indefinite time. On the contrary, their criteria qualify the mentioned requirement to suggest that it only requires a regularity or habituality in the practice of journalistic activities.
- p. 28 The First Chamber of the Supreme Court considered that material parameters must be established to determine who is recognized as a journalist for purposes related to the protection of human rights and access to security mechanisms. In this regard, any definition must be functional, based on the activities encompassed by the journalistic role.

- p. 28-29 Thus, a journalist is any person who disseminates information with social relevance, regardless of the kind of media (radio, television or internet blogs), whether associated with a particular media outlet, or exercising the profession independently, or carrying out that activity regularly or permanently, etc. What matters, in the judgment of the Supreme Court, is that the journalist has the possibility of accessing the rights protection mechanisms when he or she is a victim of a crime for performing functions of informing the public.

#### IV. Resolution of the case

- p. 29 This First Chamber of the Supreme Court considers it essential to establish that the norms that provide protection to journalists are interrelated, thereby creating a system. Thus, the reformed Article 73 of the Constitution, as well as the repealed Federal Criminal Procedures Code and the National Criminal Procedures Code that substituted it; as well as the Law for the Protection of Defenders of Human Rights and Journalists serve as a frame of reference for each other. Indeed, while such provisions seek, within their respective spheres of application, to grant and generate a special protection for journalists, they do not seek that purpose independently from one another. In fact, the definition of “journalist” in the Law for the Protection of Defenders of Human Rights and Journalists was used by the lawmaker to discuss the reform of Article 10 of the Federal Criminal Procedures Code.
- p. 29 These provisions are clearly complementary. Thus, the Law for the Protection of Defenders of Human Rights and Journalists and other substantive provisions construct the means and mechanisms for protecting journalists, while the Federal Criminal Procedures Code and the National Criminal Procedures Code detail the functioning of those mechanisms.
- p. 29-30 Under the above criteria, for purposes of applying the journalist protection system, the definition of journalist contained in Article 2 of the Law for the Protection of Defenders of Human Rights and Journalists should be used, according to which journalists are individuals, as well as the public,

community, private, independent, university, experimental or any other means of communication and dissemination, whose work consists of collecting, generating, processing, editing, commenting, opining, disseminating, publishing or providing information, through any means of dissemination and communication which may be print, radio, digital or image.

- p. 30 As mentioned, the assertion of jurisdiction over crimes committed against journalists in the states is justified to ensure that the investigations, processing and prosecution of the events are not partial given that normally journalists are confronting the local authorities in exercise of their freedom of expression.
- p. 30 In this regard, the MPF can assert jurisdiction over state crimes when they are committed against a person who is engaging in their journalistic role, without requiring such person to present any media credential. It is enough that the person shows he or she regularly performs that role, whether independently or in a media company.
- p. 30 Therefore, the MPF's authority to assert jurisdiction will be exercised, in terms of Article 10 of the Criminal Procedures Code, in the case of state crimes committed against a journalist, person or facility, that affect, limit or diminish the right to information or the freedoms of expression or press, when the crime is presumed intentional and when any of the circumstances listed in section I to IX of that provision occurs. Thus, federal judges will also have jurisdiction to hear state crimes when the MPF exercises that power to assert jurisdiction.
- p. 31 In light of the criteria cited in the above section, EAC is right in indicating that such decision violates the right to freedom of expression. As explained, it is not necessary that the journalist prove working for a media outlet or having a professional credential; it is enough for the journalist to show that he or she engages in journalism regularly. In effect, journalism should be qualified from a functional perspective, based on the activities it is composed of, and the purpose it serves; to inform society of public events.

- p. 31 Thus, for the First Chamber of the Supreme Court it is clear that EAC showed that he exercises the journalistic role and that there are indications that several public officials participated in the criminal act. Indeed, the supposed criminal events occurred because EAC was documenting relevant public information.
- p. 31-32 As recorded in the documents of this case, as well as in the news stories, it is a well-known fact that EAC has been a reporter for the newspaper “Diario de Yucatán” since 2007. Among his activities as a reporter are to report events of the municipality of Seyé, Yucatán, and other nearby municipalities, to take photographs and videos of them, and write news stories about them. It is also seen that EAC, at the time of reporting the accident caused by the van of the brother of the mayor of Seyé, was acting in the exercise of his freedom of expression.
- p. 32 In that regard, the First Chamber of the Supreme Court considered that federal jurisdiction was implicated. The federal judge can hear state crimes if jurisdiction is asserted by the Federal Prosecutor, as occurred in this case.

### Decision

- p. 32 Based on the above, the Supreme Court overturned the appealed decision ordering the processing of this case to continue in the federal courts and jurisdiction be reserved for the Collegiate Circuit Court hearing the case so that it may resolve the questions that were not addressed in this decision, related to the reclassification of the crime.



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### AGGRESSIONS TOWARDS JOURNALISTS: CASO LYDIA CACHO WATCHDOG JOURNALISM AND RIGHT TO INTIMACY

#### *Amparo Directo 3/2011*<sup>5</sup>

**Keywords:** *Protection of journalists, freedom of expression, criteria for determining if a person is a journalist.*

#### **Summary**

A woman (affected party) sued a journalist and a publisher for the violation of the right to privacy and her own image, since they included without her consent photographs and personal information in a book, related to sexual abuse and exploitation. A judge in Mexico City issued a decision and the journalist and the publisher filed appeals. On January 27, 2010, a chamber of the Superior Court of Justice of Mexico City decided against them. Both filed a direct injunction (*amparo directo*) over which the First Chamber of Mexico's Supreme Court of Justice (this Court) asserted jurisdiction.

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<sup>5</sup> Decision issued by the First Chamber of Mexico's Supreme Court of Justice (March 1, 2017). Reporting Justice: Arturo Zaldívar Lelo de Larrea. Direct Injunction 3/2011

### Issue presented to the Supreme Court

Whether the intrusion in private life was reasonable and in line with the doctrine on the establishment of subsequent liabilities for the dissemination of private information of private individuals with a public profile.

### Holding and vote

The injunction (*amparo*) was essentially granted for the following reasons. After analyzing the doctrine on the freedom of information and intrusions in private life, it was determined that the intrusion was reasonable, given that it was an individual with a public profile and the information was related to trafficking of persons and child pornography. In addition, measures were taken to protect her identity, which was uncovered by the public actions of the affected party and the Public Prosecutor. Therefore, the protection of federal justice was granted, so the Chamber could issue a new decision and exonerate them of liability.

The First Chamber decided this matter unanimously with the five votes of Justices Olga Sánchez Cordero de García Villegas, Arturo Zaldívar Lelo de Larrea, José Ramón Cossío Díaz (reserved the right to issue a concurring opinion), Alfredo Gutiérrez Ortiz Mena and Jorge Mario Pardo Rebolledo.

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### EXTRACT OF THE DECISION

p. 1 Mexico City. The First Chamber of the Supreme Court of Justice of the Nation (this Court), in session of January 30, 2013, issues the following decision.

#### Background

p. 1-2 A woman (the affected party) sued a journalist and a publisher for the violation of her right to privacy and her own image on the grounds that they included without her consent photographs and personal data in a book related to experiences of sexual abuse and exploitation suffered by

children and adolescents. On August 20, 2009, a judge in Mexico City issued a decision in which she determined that the action filed against the publisher was partially proven and the action against the journalist was not proven.

- p. 2 The journalist and the publisher filed appeals. On January 27, 2010, a civil chamber of the Superior Court of Justice of Mexico City (the Chamber) modified the decision determining the actions to be partially proven.
- p. 2-3 The journalist and the publisher filed a direct injunction (*amparo directo*). On July 15, 2010, a collegiate court in Mexico City remitted the case to this Court. On November 24, 2010, this Court decided to exercise its authority to assert jurisdiction over the case.

### Study of the merits

## The constitutional doctrine on the conflicts between freedom of expression and personality rights

### I. Freedom of expression in a representative democracy

- p. 71-72 Freedom of expression has two dimensions. In the individual dimension, it constitutes a mechanism for exercising the autonomy that is essential to building the life model that one wants and the model of society where one wants to live. The collective dimension is structurally related to the democratic system.
- p. 74 The instrumental relationship with the proper development of democratic practices gives this fundamental right a preferred position over the rights of personality. However, this does not mean that it should prevail in all cases.

### II. The media and public opinion

- p. 75-76 In Direct Injunction (*Amparo Directo*) 28/2010, the First Chamber of this Court held that the freedoms of expression and information reach a maximum level when these rights are exercised by professional journalists

through the institutionalized vehicle of formation of public opinion, which is the press. The journalist must have a certain autonomy and independence which will affect the quality of the opinions he expresses and the information he conveys to the public.

### III. Freedom of opinion and freedom of information

- p. 78-79 In Direct Injunction (*Amparo Directo en Revisión*) 2044/2008, the First Chamber of this Court clarified that it makes no sense to advocate the truth or falsehood of opinions. However, this does not mean that from a constitutional point of view the information disseminated in the exercise of freedom of expression must be true. It requires something weaker: the veracity of the information, a requirement of a reasonable exercise of investigation and verification aimed at determining whether it has sufficient basis in reality.
- p. 79-80 The journalist pointed out that in the book he carried out a compilation and documentation of the experiences of sexual abuse and exploitation suffered by children and adolescents entrusted to JSK. He argued that all the data are backed up with official documents and direct testimonies, among which are photographs, the statement at prosecution and personal data of the affected party. Based on this, the issue in dispute is not the value judgments in the book but the facts in it. Thus, there is a conflict between the right to privacy of the affected party and the right to information of the journalist and the publisher.

### IV. Freedom of information, truthfulness and public interest

- p. 80-81 In Direct Injunction (*amparo directo*) 6/2009, this Court stated that the veracity of the information is irrelevant if it transgresses the limit of the right to intimacy. The truth of the information is the prerequisite of any violation of intimacy. In any case, if the information published was false, some other right would probably be violated.

- p. 82 The victim claimed the violation of her right to privacy and her own image by the inclusion in the book of: (i) photographs of the affected party and her relatives; (ii) the statement she made to the prosecuting authority; and (iii) a psychological study.

In this type of case, the criterion that justifies the legitimacy of an invasion of privacy is not truthfulness, but the public interest in the dissemination of the information.

- p. 83-84 If the information about intimate facts or data of a person is in the public interest, it can be said that freedom of information must have greater weight and, consequently, the disclosure of the information and the impact on privacy will be justified.

**The constitutional doctrine on the conflicts between freedom of information and the right to intimacy**

**- The public interest as a justification**

- p. 85 The identification of a public interest in the dissemination of intimate information is considered a justification since it is a legitimate use of a right: freedom of information.
- p. 87 The public interest must be based on information that the public considers relevant to community life. Information is in the public interest when the community can reasonably justify a legitimate interest in its knowledge and dissemination.
- p. 89 The dissemination of information about people's private lives may be covered by freedom of expression in some cases. The public interest is indirect because it is not determined by examining its content, but its connection or relationship to a matter.
- p. 89-90 Journalists have a margin of appreciation to disclose information about a person's intimate life. However, this does not necessarily imply that there is also a public interest in knowing the private details of the persons involved.

p. 91 To decide whether certain private information is in the public interest the following is required: (i) a clear connection between the private information and a topic or information of public interest; and (ii) the invasion of intimacy must be proportionate to the public interest.

The first component has the function of discarding cases in which private information is completely irrelevant, for which it is sufficient to show that there is a more or less obvious connection between the information disclosed and the public interest.

p. 91-92 The second seeks to discard cases where the intensity of the intrusion is not reasonably matched by the importance of the information of public interest. Where the public interest is substantial, a very significant intrusion into privacy is required to attribute liability for the improper exercise of freedom of expression.

#### **IV. The constitutional doctrine on public figures**

p. 92 The Court has adopted the so-called “dual system of protection”, according to which public figures have less resistance than private individuals to intrusions in the rights of personality associated with the exercise of freedom of expression.

In cases of collision between freedom of expression and the right to intimacy, this system is relevant (i) in determining the public interest of the information disseminated and (ii) in the application of the standard of actual malice.

p. 93 In a case of civil liability for the exercise of freedom of expression, it must be analyzed whether or not the person concerned has the status of a public figure. This Court has maintained that public officials and private individuals with a public profile are public figures.

p. 94 A private individual has a public profile when he or she acquires notoriety that justifies the interest of society in knowing information related to that person.

### V. The public domain of private information

- p. 96-97 The fact that private information has been previously disseminated is a factor that decreases the intensity of the violation of intimacy. If the event has been widely disseminated, due to a voluntary or involuntary exposure of the affected party, subsequent disseminations constitute invasions of lesser intensity. Thus, when the information became public knowledge prior to the intrusion into private life, the publication of such information should be privileged even when its social utility is minimal.
- p. 97-98 The intensity of the invasion of a person's intimacy will be much lower when the person disclosed information in the public domain, since it only gave greater publicity to information that had already been made public or when information that the person him or herself left visible is publicized.

### VI. The confidentiality of information

- p. 98 When information about private life has been voluntarily transmitted to a third party who subsequently makes it public, it must be considered whether or not there was an expectation of confidentiality. A communication is confidential when it is carried out in circumstances where the desire to keep such information confined can reasonably be assumed, but excludes communication that is made at a public meeting or in other circumstances in which the parties can reasonably expect the communication to be heard or recorded.

#### - Actual malice as a subjective criterion of imputation

- p. 99-100 The subjective criterion for imputation of liability is what is called "actual malice". In the case of private individuals with a public profile, it is only necessary to prove that it has been disseminated knowing its falsity. In the case of private individuals it must have been disclosed with inexcusable negligence.

- p. 102-103 The irrelevance of the veracity of the information when privacy is at stake means that the criterion of actual malice must undergo some modulation. The adjustment is to stop considering the elements of the actual malice standard related to the truthfulness requirement.

### **Application of constitutional doctrine to the specific case**

- p. 109-110 The argument is unfounded where it is alleged that various provisions of the Civil Liability Law for the Protection of the Right to Privacy, Honor and One's Own Image (Privacy Law) do not meet the requirement of legal coverage and clarity because they do not permit anticipating when it will be considered that an impact was caused.
- p. 111-112 The Inter-American Court, in the case of *Fontevicchia and D'Amico v. Argentina*, held that the precision of a civil rule may be different from what is required in criminal matters and that the civil rule cannot be required to establish the factual assumptions with extreme precision.
- p. 112-113 The requirements of clear and precise wording of the principle of specificity in criminal matters cannot be transferred to civil liability, and therefore they are not required to be clearly and precisely described in a law prior to the event. Thus, the articles do not violate the principle of legal coverage and clear and precise wording.
- p. 113 Also unfounded is the argument alleging that the Privacy Law does not comply with the principle of materiality and proof of harm. Specifically, Article 37 provides for pre-established evidence of the impact.
- p. 114 This Court established that the rules of imputation of liability must require that whoever alleges that a certain expression or information causes harm to his honor has the burden of proving it.

Article 37 complies with this requirement. First, it assigns the burden of proof to the person alleging the impact. Second, it clearly establishes that the plaintiff must prove the damage. Thirdly, it also does not contemplate

pre-established evidence of the impact; what it regulates is the way to quantify or assess the damage.

- p. 115 The arguments that the facts were never proven to be false and, on the other hand, that the Privacy Law violates the doctrine of *exceptio veritatis* are unfounded. The journalist and the publisher allege that in the case of people outside politics, the origin of the action of moral damages is not subject to the veracity of the facts, but simply to the fact that the person considers himself aggrieved.
- p. 116 The requirement of veracity of information becomes irrelevant when what is alleged is an intrusion into private life. The fact that Article 32 of the Privacy Law provides for stricter requirements for the verification of an offensive expression for those affecting public officials, less stringent for those relating to public figures and more stringent for private individuals is compatible with the doctrine of this Court.
- p. 118-119 The irrelevance of truthfulness means actual malice must undergo some modulation. This Court understands that in the case of private individuals with a public profile and private individuals without a public profile, the actual malice is reduced to the hypothesis that the information has been disseminated with inexcusable negligence.

Also unfounded is the argument alleging that Articles 29 to 44 of the Privacy Law violate the principle of gradation of means of demanding liability.

- p. 120 In Action for Constitutional Relief (*amparo directo en revision*) 2044/2008, the First Chamber of this Court warned that the legal system cannot contemplate a single legal responsibility requirement, because the requirement that the impacts of rights are necessary, adequate and proportional demands the existence of minor measures to react to minor impacts and more serious measures for more serious cases. Furthermore, we must bear in mind that alongside the requirement of civil and criminal liability there is the right of reply.

p. 121-122 Furthermore, the Privacy Law fully complies with the doctrine on the ranking of the legal responsibility requirement, since it contemplates different measures to repair the damage and criteria for setting compensation, which precisely allows for ranking the liability. Finally, consequences that from the legislator's perspective could be considered disproportionate are prohibited.

#### a) Minimizing indirect constraints

p. 123-124 The journalist and the publisher maintain that the Privacy Law indirectly restricts freedom of expression by allowing a conviction for moral damages not only against the person who expresses or disseminates information, but also those natural or legal persons who are part of the chain of dissemination.

p. 124-125 In the Action for Constitutional Relief (*amparo directo en revision*) 2044/2008, the First Chamber of this Court explained that freedom of expression can be indirectly restricted through the rules of distribution of liability among those involved in the news broadcast chain. It tries to avoid generating dynamics of distribution of liability that lead to finding interest in the silencing or expressive restriction of others.

p. 125 The interpretation in the decision led to the publisher being held liable in contravention of this prohibition. The criteria by which the publisher should be judged are very different from those that should be used for the conduct of the author of a publication.

In the Direct Injunction (*Amparo Directo*) 6/2009, the First Chamber of this Court held that it is not required for publishers, when they only publish or disclose information authored by others, to verify the intrusion into intimacy since it would generate a distribution of liabilities among all those who participate in the communication, which would unjustifiably restrict freedom of expression and the right to information.

p. 126 However, they must assume a certain responsibility towards third parties, a duty of care where, rather than using a prior control, the obligation is imposed of ensuring certain requirements that will prevent the invalidating of rights of third parties that could be considered affected.

- p. 127 In the Direct Injunction (*Amparo Directo*) 8/2012, the First Chamber of this Court explained that the people who engage in the editing and publishing of media stories transfer the liability to the authors thereof as long as: (i) they identify and keep the identification data of the authors of the stories; and (ii) publish and distribute the articles respecting their content. Consequently, if the media complies, the rights of people who could see their non-pecuniary property affected are safeguarded to be asserted against the real perpetrators: the authors.

This standard of diligence also applies to publishers. In this specific case, the publisher only published the book. Consequently, the journalist is solely responsible for what has been published.

## **b) The public interest test on intimate information**

### **1. The evident connection requirement**

- p. 129-130 The journalist stated that the book was published in order to expose to the public a complaint about a pedophile network, child pornography and child trafficking. Thus, the publication belongs to what the First Chamber of this Court has called, in Direct Injunction (*Amparo Directo*) 16/2012, “watchdog journalism”.
- p. 130 This Court proved that the main theme of the book is a series of facts of public interest. This is seen from various pieces of evidence that were not taken into account by the Chamber, as well as from the extensive coverage by the media.
- p. 133-134 What occurred regarding the figure of the businessman JSK constitutes a notorious fact, whose clarification is undoubtedly a matter of public interest, as it is related to crimes of high social impact and involving characters of public importance. If we start from the premise that criminal acts have a negative impact on society, it is undeniable that journalistic investigations aimed at clarifying and disseminating them are endowed with broad public interest.

- p. 135 This Court considers that there is a clear connection between the private information disclosed and the information of interest. The information contributes to making visible the consequences of pedophilia and child prostitution on its victims and the collusion of economic and political interests that allow the commission of this type of act with impunity.
- p. 136 It has value not only as a public complaint. It also helps to understand the reasons people commit such crimes, as well as the circumstances of the criminal phenomenon. Thus, not only is the social utility of journalistic work indisputable, but also the connection is evident between the criminal acts dealt with in the book and the intimate information disclosed.
- p. 137 The argument that the journalist could have excluded from the book data and images of an intimate nature without lessening the value of the work is not relevant. Journalists must have a margin of appreciation to assess whether disclosure is justified.
- p. 137-138 The courts must not set themselves up as editors of the press. The media must be able to decide on the basis of journalistic criteria how they present information or cover a story. Allowing the courts very strict or intense scrutiny of these decisions would be an indirect restriction on freedom of expression.
- p. 138 The Chamber should have asked itself whether the publication of the intimate information was connected with the facts described in the book, not simply assume that its publication was due to mere curiosity or morbid interest in disseminating details of the private life of the affected party.

## 2. The proportionality requirement

- p. 139 The matter of public interest is of the utmost importance; it involves a complaint about a pedophile and a child pornography network. There are certainly few more alarming and reprehensible crimes. To attribute liability to a journalist for publicizing private information that is connected with

this issue, there must be a much more intense impact on intimacy. Several factors should be addressed.

**i) Factors related to the affected person**

- p. 140 The journalist took several precautionary measures to hide the identity of the affected party: she used a pseudonym and placed a band on people's faces in the photographs. These measures sought to prevent linking intimate information with the person. In this sense, the intrusion into privacy is considerably diminished.
- p. 140-141 The protection of the intimacy of the person concerned must be reduced because it involves a private person with a public profile, an aspect completely neglected. The Chamber had to assess the evidence related to the conduct assumed by the affected party. This Court concludes that the affected party voluntarily made herself a figure of public importance.
- p. 141 On the one hand, the affected party gave an interview where she talked about several facts related to the complaint and the investigation of the Attorney General's Office of Quintana Roo (Public Ministry). While that story was published after the book appeared: (i) she voluntarily agreed to be photographed, without requiring her face to be covered; and (ii) she is identified by her real name. We must not lose sight of the fact that the journalist had used diligent measures aimed at avoiding identification. The attitude of the affected party not only deprived these measures of any effectiveness, but also voluntarily made her an individual with a public profile.
- p. 141-142 In another television interview, she voluntarily agreed to talk about the events. While there is no shot of her face, her voice was not distorted. If this situation is linked to the fact that she subsequently gave another interview to a local newspaper where her face was uncovered, it must be concluded that her own behavior rendered ineffective the measures taken in the television interview to avoid her identification.

**ii) Factors related to the information disclosed**

- p. 145 The Chamber maintained that the fact that the photographs were published in various media was not an exemption from liability, since they required the consent of the affected party to disseminate them. This is contrary to the provisions of Articles 10 and 11 of the Privacy Law, which expressly state that the existence of a public interest may justify the dissemination of private information.
- p. 145 The public interest is a justification that eliminates the anti-legality or wrongfulness of the conduct, regardless of whether there has been no consent. The fact that the information has been previously disclosed is an element to be taken into account in determining the proportionality of the invasion of intimacy. While intimate data do not lose that nature when they have been unlawfully disclosed, the impact on privacy is considerably less.
- p. 146 From the evidentiary material, this Court concludes that the photographs had indeed been disclosed before the book was published.
- p. 147 In addition, both from the statements made by the affected party herself and from the evidence provided, it can be inferred with a sufficient degree of probability that all the photographs entered the public domain for reasons attributable to the Public Prosecutor's Office.
- p. 148 The hypothesis that both the images and the information of the affected party became public knowledge from "leaks" from the Public Prosecutor's Office, also finds corroboration in several indications that emerge from the content of published stories.
- p. 150-151 However, the dissemination of the photographs was also claimed to be a violation of the right to one's own image. In this regard, Article 19 of the Privacy Law provides for the possibility of disseminating images without authorization when they are in the public interest.

- p. 151 Two photographs do not contain any image of the affected party; with these no violation of her right to her own image could have occurred. In the same vein, neither do two other images, since they are images captured at a press conference that the affected party gave to the media, in a public place on the occasion of an event of public interest. Finally, the evident connection is sufficient to justify the public interest in the dissemination of a fifth image. Consequently, it must be ruled out that its publication has been a violation of the right to one's image.
- p. 151-152 It was also argued that the right to privacy had been violated by the publication of a psychological report and part of the statement at prosecution. And there are elements to consider that this report was also part of the preliminary investigation and could also have been "leaked" by prosecutorial authorities.
- p. 152-153 It is also incorrect that the Chamber did not take into consideration that the affected party expressly acknowledged that she had transmitted the intimate information published to the journalist. Assuming that she voluntarily transmitted that information to the journalist, it is relevant to determine whether or not there was a reasonable expectation of confidentiality.
- p. 154 This Court considers that there was no reasonable expectation of confidentiality. The affected party knew she was in conversations with an active member of the press. Although she alleges that she had these communications with the journalist in her capacity as director of a civil association in Cancun, she was aware of the activity she engaged in.
- p. 154-155 When someone speaks freely with a member of the press, and knows that that person is a journalist, it is reasonable to anticipate that such communication may be made public, and therefore the disclosure cannot be considered to be unexpected or unusual. This means that the invasion of privacy of which she complains was not intense or profound enough to justify attributing liability to the journalist.

- p. 155 With regard to the dissemination of statements at prosecution, the intensity of the invasion of privacy is not considerable, since the journalist did not make a direct identification of the victim. Otherwise, the information published was in the public interest.
- p. 155-156 The invasion of privacy was proportional. On the one hand, the issue of crime is of the utmost public interest. On the other hand, the invasion of privacy was not of great intensity, taking into account the measures adopted by the journalist to avoid the identification of the individual with a public profile, whose notoriety was achieved to a large extent by virtue of her own conduct. And finally, the intimate information was already in the public domain and there was no reasonable expectation of confidentiality in relation to the psychological information disseminated.
- p. 156 Consequently, the publication of information on the private life of the injured third party passes both tiers of the public interest test.

**c) Actual malice in the dissemination of intimate information**

- p. 158-159 The standard of actual malice, which corresponds to the impacts on private individuals with a public profile, must be applied. In this type of case, the criterion that governs the impacts on individuals must also be used: that the information has been disclosed with inexcusable negligence on the part of the defendant.
- p. 160 In the case of the press, the legislator made the decision to impose a very high standard in order to be able to attribute civil liability. By requiring that this be inexcusable negligence on the part of the defendant, the legislature intended that not just any kind of negligence in the exercise of freedom of expression could justify a conviction.
- p. 161 Consequently, if a journalist who disseminates intimate information about a person he considers to be in the public interest took various measures, he was diligent in disseminating that information. While such measures may

not be fully effective, because the journalist does not control all the factors that may lead to the identification of the person, no liability should be attributed because the standard requires that his negligence be of a very considerable magnitude.

This is what happens in this specific case. The journalist used the measures of diligence required by her profession in order that the identity of the person whose personal information she was revealing could not be known. It is clear that the journalist's conduct does not satisfy the subjective criterion of imputation. Consequently, the dissemination of information is protected by the journalist's freedom of expression.

### Decision

- p. 162 The Court grants the injunction (amparo) to the publisher and the journalist for the effect that the Chamber cancels the decision and issues another that, following the guidelines of this final decision, considers the action filed by the affected party unfounded and absolves them of all the claims, since the intimate information disseminated in the book is undoubtedly of public interest and they complied with the standard of diligence.



## 6

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### FREEDOM OF EXPRESSION AND THE RIGHT TO INFORMATION ACCESS. SOCIAL MEDIA (TWITTER: BLOCKING OF A USER BY A PUBLIC SERVANT)

#### *Amparo en Revisión 1005/2018<sup>6</sup>*

**Keywords:** *right to freedom of expression, right of access to information, right to privacy, public figure, public servant, journalist, social networks, Twitter.*

#### **Summary**

A journalist noticed that the attorney general of the State of Veracruz had blocked him from the social network Twitter, of which both were users, preventing him from having access to the public and general interest information the attorney general shared in his account. The journalist filed a two stage judicial review relieving an un-remediated breach of rights (*amparo indirecto*) against the block, which was granted by a district judge. The attorney general filed an appeal which was heard by the Supreme Court.

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<sup>6</sup> Decision issued by the First Chamber of Mexico's Supreme Court of Justice (March 20, 2019). Reporting Justice: Eduardo Medina Mora. Action For Constitutional Relief Through Injunction 1005/2018

### Issue presented to the Supreme Court

Whether a public servant can block a citizen in the social network Twitter, and whether the right to privacy of public servants or the right of access to information should prevail.

### Holding and vote

The injunction (*amparo*) decision was upheld. The blocking of the citizen from the account of the attorney general of Veracruz in the social network Twitter violated the affected party's right of access to information because the account contained information on the activities the public servant carried out as attorney general. In this case, the right of access to information prevailed over the right to privacy, since the information contained in the attorney general's Twitter account was of public interest and any other user could access it. The injunction was granted to the citizen so he would be given access to the attorney general's account on Twitter, removing the blocking restrictions imposed on him.

The Second Chamber of Mexico's Supreme Court of Justice decided this case with the unanimous vote of the four Justices Alberto Pérez Dayán, Eduardo Medina Mora I., José Fernando Franco González Salas (issued his vote with reservations) and Javier Laynez Potisek (reserved the right to issue a concurring opinion) and Alfredo Gutiérrez Ortiz Mena (reserved the right to issue a concurring opinion). Justice José Ramón Cossío Díaz was absent.

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### EXTRACT OF THE DECISION

p. 1 Mexico City. The Second Chamber of Mexico's Supreme Court of Justice (the Supreme Court), in session of March 20, 2019, issues the following decision.

#### Background

p. 4-5 A journalist for various media outlets in which he covers topics related to insecurity, human rights, disappearances and clandestine graves, uses the

social network Twitter as a work tool, since it allows him to disseminate the articles he drafts and maintain contact with the authorities of the State of Veracruz.

- p. 5 On October 6, 2017, the citizen noticed that the attorney general of the State of Veracruz, had blocked him in the social network Twitter, preventing him from having access to the information that the attorney general shares as an authority in his personal account, information which is public and of general interest.

The citizen filed an injunction against the above mentioned situation.

- p. 7 The District Judge decided to grant the injunction to the affected party.
- p. 9 The attorney general of the State Veracruz filed an appeal against that decision.

### Study of admissibility

#### 1. The attorney general's blocking of the citizen in the social network Twitter is an act of authority.

- p. 13 To access participation in an injunction trial, the act or omission must be issued by an authority, which is any entity that exercises decision-making powers that are attributed to it by law, such powers constitute an administrative capacity, whose exercise cannot be waved since the source of that faculty is public in nature.
- p. 13 According to the Organic Law of the Attorney General's Office of the State of Veracruz de Ignacio de la Llave, the attorney general's office is a body granted legal capacity and its own patrimony, having autonomy (technical, budgetary, managerial and of rule issuance) according to which it will systematize information under its safekeeping.

p. 14 In addition, according to that law, the attorney general of the State of Veracruz has the responsibility of promoting social communication and disseminating information of public interest linked to the activities carried out in the performance of his position. For this purpose, he will establish the rules and the channels of communication with the citizenry through digital platforms or social networks.

p. 15 Consequently, the private citizen has a correlated right to demand performance of that obligation.

The laws do not obligate the attorney general to have an account in the social network Twitter in order to interact with citizens. However, if the attorney general decided to communicate with the citizenry through his personal account (by sharing through that medium information related to the performance of his job), it is clear that, given the type of information shared, the attorney general voluntarily assumed the normative consequences.

p. 16 It should be noted that the attorney general not only disseminated personal information in his account, but also content on the functions and activities resulting from his job.

Therefore, if he blocks the account of one of his followers, he is violating his obligation to disseminate information relative to his activities. Consequently, he is restricting the right of access to information of the blocked user. This situation constitutes an action of authority for purposes of the injunction trial.

## 2. Non-existence of a personal and direct grievance

p. 17 The account of the attorney general is used for communicating both personal information and information on his activities as a public official. By sharing the latter type of information through this medium, the attorney general tacitly decided to use his personal account in Twitter to inform society of his daily activities as a public servant. Given that this information is relevant, the means of dissemination must be accessible to all citizens, including the affected journalist.

- p. 17-18 When the attorney general blocked the affected journalist from access to the account, he prevented him from learning relevant social information. Therefore, his right of access to information was personally and directly violated, since his right to seek information on the work of a public servant is being restricted.

### Study of the merits

#### 1. Right of access to information

- p. 18 This Supreme Court has established that the right to information is immersed in the right to the freedom of thought and expression, as it includes the freedom to seek, receive and disseminate information and ideas of all kinds, without considering borders, whether verbally, in writing or through artistic means in print or by any other procedure chosen.

Article 6 of the Constitution establishes that all information in possession of any authority is public and may only be reserved temporarily for reasons of public interest in the terms established in the laws.

- p. 23 Access to information constitutes an essential tool for materializing the principle of accountability as well as transparency in public administration and improving the quality of democracy.

“If there is an elemental principle in the functioning of the contemporary public administration, it is that of publicity and transparency, resulting from the relationship between the citizen’s right to have access to administrative information and the consequent obligation of the public administration bodies to inform and, in some cases, to publish information of general interest”.

#### 2. Right to privacy

- p. 26 The Supreme Court has defined as private that which is not public life. It is the sphere preserved from the action and knowledge of others; what we

wish to share only with those we choose; the activities of people in the private sphere related to the home and family.

- p. 27 The notion of privacy is related to the sphere of people's lives where they can freely express their identity, whether in their relations with others or individually. Privacy is linked with other rights.

People have the right to enjoy a sphere of projection of their existence that remains reserved from the invasion and gaze of others. This sphere concerns only them and provides them with adequate conditions for displaying their individuality, for the development of their autonomy and their freedom. People have the right to keep from others (or share only with their closest circle) certain manifestations or dimensions of their existence (conduct, data, information, objects) and the corresponding right to not have others invade them without their consent.

### 3. Elements of the right to privacy

- p. 29 The Inter-American Court of Human Rights has reached conclusions in various cases from which it can be established that the right to privacy has two elements:

i) The right of the person to keep his personal sphere (which includes his family life, his domicile or his correspondence, among other issues) beyond interference or intrusion by unrelated persons.

ii) The right to reserve certain aspects of his private life and control the dissemination of personal information to the public.

- p. 30 Although the authorities are obligated to guarantee the right to privacy of all persons, this right is not absolute; it can be restricted provided that this is not done abusively, arbitrarily or disproportionately.

When the right to privacy collides with the right to information, it is important to consider the activities or actions the persons involved in that

conflict carry out. The greater the public exposure of these persons, the more their right to privacy is reduced, and therefore the perspective for the analysis of this conflict is different depending on the nature of the public interest their activities or actions have.

#### 4. Concept of public figure

- p. 31 The First Chamber has defined public or well-known figures as those who, as a result of social, family, artistic or athletic circumstances, or because they have disseminated facts and events of their private life or any other analogous situation, have projection or notoriety in a community and, therefore, voluntarily submit themselves to the risk that their activities or their private life will be subject to greater dissemination, as well as the opinion and criticism of others, including those that can be irritating, uncomfortable or hurtful.

The concept of public figure contemplates public servants or officials. This is logical since their activities are relevant to society because their work is related to the management of the functions of the State. Therefore, the community has interest in these being handled adequately.

#### 5. Right to privacy of public servants

- p. 32 Given the interest that the activities and functions of public servants have for the community, their right to privacy is more tenuous than the rest of society, since they are subject to greater social scrutiny, not only because of their official activities or the exercise of their functions, but also with respect to those aspects of their private life that can be linked to the performance of their function and, therefore, to the public interest.

The Supreme Court has held that there is information that relates to aspects that are desirable for citizens to know, such as the activities public servants carry out as part of their work.

- p. 34 Nevertheless, the simple fact of being a public servant does not imply that all your activities or circumstances are of interest to society. In each case it would have to be analyzed whether the activity or circumstance involves a public interest. If so, the acts would be more exposed to social scrutiny.

### 6. Spheres of privacy of information in the digital era

- p. 35 In the context of the digital era, three spheres of privacy of information can be distinguished:

i) Strictly private information, which includes that which the issuer wishes to be private, with a single, specific recipient. Text messages and emails are in this category.

ii) Semi-private or semi-public information, which would be all that information that the issuer decides to show to a recipient or person of his choice, and therefore it would not be individualized, such that the recipients would not have the right to make it public or disseminate it in a sphere that is not the one the issuer has chosen. In this case the recipients would not have the power of disposition of this information (for example, the public content in social networks).

iii) Public information which would include any publication that has no restriction on access.

### 7. The interaction of the rights to information and to privacy

The Supreme Court has held that fundamental rights are not absolute and their exercise is subject to limits. The field of action related to these concepts is delineated by the existence of other constitutional rights or purposes that also merit protection and effectiveness. This is so given that there are rights and freedoms that may collide in their daily exercise. This is the case of the right to information and the right to privacy and, in general, the so-called personality rights.

p. 36 Political debate and public discussion of matters of general interest constitute one of the pillars on which the functioning of the democratic system rests, and thus are considered part of a specially valued discourse that, as one of its principal effects, “leads to the reinforced protection of the right of access to information on public matters”.

The right to information related to access to issues referring to the public function and state management enjoy reinforced guarantees and therefore the authorities must ensure their maximization.

p. 37 The First Chamber has held that the level of protection of debate and access to information of public interest can cause certain interferences with the right to privacy, particularly of public servants, as public figures, since they, being engaged in public activities or given the role they perform in a democratic society, are exposed to more vigorous control of their activities and manifestations than individuals without any public projection.

This situation does not imply that public figures do not have a right to privacy; rather, their status – derived from the type of activities they carry out – puts them in a threshold of protection different from private persons. However, this diminishment in their right to privacy cannot go beyond the core matter thereof, and such limitation must be proportional to the rest of the constitutional rights and principles it is intended to favor in each specific case.

p. 39 The right to privacy of public figures and particularly of public servants is limited by the right to information and the democratic principles that underlie this right to information. It can even be asserted that the social control to which they are subject is not limited exclusively to their public manifestations or actions but can also extend to their private activities.

However, in order not to violate the essential core of the right to privacy, especially regarding the activities carried out in the private sphere, it is necessary to evaluate and weigh the different constitutional provisions in

conflict and, in all cases, analyze whether the restriction in question is justified to favor the public interest or concern. In other words, whether it involves relevant information for the discussion of the common matters that interest everyone.

### **8. The exercise of these rights on the internet and in social networks (specifically in the social network Twitter)**

p. 41 The levels of interconnection that the social networks generate have acted as a means for expanding the right to the freedom of expression.

p. 42 Twitter cannot be considered just a platform that promotes and strengthens the freedom of expression of the users. Its work in promoting democratic values such as in the dissemination of content of interest to society – which includes governmental information – as well as the debate of matters of public interest must also be recognized.

p. 42-43 Various freedoms have been strengthened thanks to the opportunities of easy access, expansion and immediacy that the internet and the social networks provide. However, it must be recognized that abuses may also be committed in those virtual mediums. Therefore, the interactions in the digital community cannot be outside the Law and the State will have to intervene in cases in which rights of the users of the network are violated.

Since the issue involves two fundamental rights in collision, this intervention must be made pursuant to case law parameters referring to permissible restrictions. In addition, in the case of the exercise of rights on the internet, the Second Chamber established the principle that the flow of information online must be restricted as little as possible, which means only in exceptional circumstances and to protect other human rights.

p. 44 If a public servant uses a private account in social media to report on his activities as public servant, then the analysis to determine if his blocking of the account of another user is or is not restrictive of the right of access to

information must consider how the public official is currently using his account. It also must be considered that the social networks, and specifically Twitter, are channels to both receive and obtain information.

### 9. Study of the specific case

p. 45 In this case, in May of 2011, the citizen created the account for personal purposes. This is several years before he became attorney general. However, once he was appointed attorney general, he has been reporting his activities as public servant through that account.

By including tweets related to his activities as a public servant, he voluntarily decided to place himself at a level of publicity and scrutiny different from a private person. For this reason, it was the official himself who freely decided to extract his account from the private sphere to transfer it to the public sphere, with all the contents that preexisted in it.

This conclusion is reached, to begin with, by the simple fact that the account is described in relation to his job: “Attorney General of the State of Veracruz, father, husband and constant seeker of justice”; but also because the account disseminates information referring to his activities as attorney general, including attendance at work meetings and public events related to his job.

In this regard, the threshold of protection of the right to privacy that private persons and their respective accounts in social networks enjoy is affected by the choice of the attorney general himself upon deciding to use his Twitter account as a channel of communication with society.

Thus, being a public figure and particularly a public servant, his right to privacy is “blurred” in order to favor the right to information. This is so because the issues of general interest, such as those related to the performance of his governmental duties, are subject to a strong level of scrutiny by the media and society.

p. 46            Blocking the access of a citizen to contents published there represents an improper restriction on his right of access to information.

In this case, the attorney general does not express sufficient reasons for considering that his Twitter account could be classified as a private account, or even less that the information contained there is reserved, whose dissemination violates his right to privacy, nor that he has found abusive behavior by the affected party.

Given that fact, the account must be considered of general interest, protected by the right of access to information, which may only be restricted according to the standard of constitutional review of: 1) being established in the law, 2) pursuing a legitimate end and 3) being appropriate, necessary and proportional.

Although the account does not contain information on human rights, forced disappearances or clandestine graves, the sole fact that the affected party is a citizen, means he is guaranteed access to the information contained in that account. The affected party, as part of a community, is interested in the activities carried out by public servants, such as the attorney general.

p. 47            In addition, the affected party is a journalist, and therefore he is granted reinforced guarantees in the investigation, search for and obtainment of all types of information that he may report as it is of interest to society.

p. 48            It should be mentioned that there is a possibility of finding abusive behavior derived from the nature of this social network, given that it permits bilateral communication and the exchange of messages, opinions and publications among the users.

Therefore, it is possible that abusive behaviors can result in a justified measure of restriction or blocking, but for this to be valid those expressions or conduct must be excluded from constitutional protection in terms of the parameters of the case law that govern the issue.

Comments that express severe, provocative or shocking criticisms that may be indecent, scandalous, disturbing, concerning or cause some form of harassment, discomfort or offense should never be considered abusive behavior of the users of the network.

**10. Analysis of the conflict between the rights to privacy and access to information under the case law parameters governing the issue.**

**a) The information contained in the account must be of general interest to society.**

In this matter, the requirement is met based on the following reasons: first, the Twitter account in question belongs to a public servant, who not only currently holds the position of attorney general, but also has earned public notoriety in that State. Second, the content disseminated through that account refers to, among other things, the public activities that the attorney general carries out daily in fulfillment of his public position.

- p. 48-49 The information contained in and disseminated through the Twitter account of the attorney general has public relevance or general interest in that it can contribute to the debate in a democratic society by projecting the activities and expressions of this public figure.

**b) The prevalence of the right to information over the right to privacy must be proportional and justified.**

- p. 49 In this case, the right to information must prevail over the right to privacy. The public servant's blocking of the account of the journalist implied an improper restriction on the right of access to information of the journalist.

This blocking was not based on the pursuit of a constitutionally legitimate end since, although the attorney general argued that the information published in his Twitter account was personal and belonged to the sphere of his private life, the reality is that the information disseminated there is of public interest. This is so because any other user can have access to it.

It is also not possible to argue that the order to unblock the affected party is a disproportional measure that unjustifiably affects the right to privacy of the public servant. In principle, because he himself voluntarily placed himself in that position of greater public scrutiny and decided to use this digital medium as a channel of communication with the citizenry. He did not prove the need to safeguard the information disseminated in his Twitter account from the interference of society. This is added to the significant national and international case law establishing that the notoriety of public figures generates for them a threshold of protection of the personality rights less extensive than for private individuals, without that reduction representing a disproportionate limitation on their right to privacy.

**c) The public nature of the Twitter account of the attorney general is justified.**

- p. 49-50 The information disseminated through the Twitter account of the attorney general is visible not only to the users of the social network, but to any person with access to the internet, since that account has an open configuration that permits anyone to visualize its content. It was the holder of the account himself who set up the open privacy and determined that everything disseminated there can be accessed by the public. This public servant could have set up a closed account, which he did not do.

At no time was abusive behavior by the journalist that could justifying blocking his account alleged. Nor was it argued that the access by the journalist to the content of the account would violate the core of the right to privacy of the public servant. The obligation of the attorney general to unblock the affected party is not disproportionate nor unduly affects his rights.

Finally, it is important to mention that the attorney general and his Twitter account acquired public notoriety. The first, by undertaking a public position. The second, by being voluntarily used by its holder to disseminate

information referring to the performance of his job. By doing so, he established a channel of communication between a public servant and the citizenry.

In this regard, the challenged action of the authority violates the journalist's right of access to information because the Twitter account contains information on the activities that the attorney general carries out. Given that this information is of public interest, it is subject to greater scrutiny by society.

### Decision

- p. 50-51 Given the impact, the Supreme Court confirmed the decision and consequently, to fully restore the affected party in the enjoyment of his right of access to information, his access to the attorney general's Twitter account must be permitted.



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## FREEDOM OF EXPRESSION AND HATE SPEECH (LIMITS ON FREEDOM OF EXPRESSION AND HATE SPEECH)

### *Amparo Directo en Revisión 4865/2018<sup>7</sup>*

**Keywords:** *right to equality and non-discrimination, right to the free development of one's personality, right to freedom of expression, hate speech, antisemitism, tattoos, restriction of rights, proportionality test.*

#### **Summary**

A worker (the affected party) filed a lawsuit for pain and suffering (*daño moral*) against a commercial company that he considered had discriminated against him for wearing a tattoo with a swastika symbol in the workplace. The company terminated his employment after the affected party refused to remove or hide the tattoo due to the complaints received by other employees that identify themselves as Jews. A first instance civil judge of Mexico City agreed with the affected party and ordered the company to pay an indemnity for pain and suffering, and to offer a public apology in a national newspaper. The company appealed the decision and the

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<sup>7</sup> Decision issued by the First Chamber of Mexico's Supreme Court of Justice (October 30, 2019). Reporting Justice: Norma Lucía Piña Hernández. *Action For Constitutional Relief Through Direct Injunction 4865/2018*

order was revoked by a chamber of the superior court of Mexico City. The affected party then filed a direct injunction (*amparo directo*) against the determination of the chamber, which was granted by a federal collegiate court of Mexico City. The company then filed an appeal (*recurso de revisión*), which Mexico's Supreme Court (this Court) reviewed because it was a direct interpretation of the right to equality and non-discrimination; allowing it to establish a significant and important standard.

### Issue presented to the Supreme Court

Whether the swastika implies a discriminatory message and hate speech toward the Jewish community for ethnic/religious reasons; and if the wearing of a visible tattoo with that symbol in a workplace, where persons who identify themselves as Jewish work, enjoys constitutional protection.

### Holding and vote

The injunction (*amparo*) was denied to the affected party for the following reasons. This Court did not consider that the company discriminated against the affected party by terminating his employment when he refused to hide or remove the tattoo with the swastika, visible to workers who identify as Jews. It also did not consider that there was an unlawful act giving rise to a claim for pain and suffering (*daño moral*). To reach this conclusion, the Court analyzed the right to equality and non-discrimination as a principle that must be observed by authorities and private parties, without dismissing the possibility of making justified distinctions between individuals. The Court deemed that the free development of one's personality includes the power of each person to choose his/her own image and, therefore, to wear a tattoo. The Court recalled that the right to freedom of expression has great democratic value and the right to the free development of one's personality permit manifesting aspects of individuality in any way, including a tattoo. Nevertheless, the Court emphasized that those rights may be validly restricted, particularly when they are expressed through hate speech which is speech whose purpose is to generate discrimination, hostility and violence, and which can also be manifested through symbols. In this regard, it considered that wearing a tattoo with a particular symbol indicates adherence to the ideology or doctrine it fosters; in this case

the swastika. In our cultural context and especially in the circumstances of the case, it communicates hate, since it is directly associated with Nazism and with its ideas of racial superiority and extermination of the Jews. Therefore, this Court determined that the freedom of expression must cede to the rights of the Jewish employees of the workplace, which measure is reasonable since this speech was not communicated in a public but a private context, in a commercial company. Therefore, the injunction (*amparo*) of the affected party was denied.

The First Chamber decided this matter unanimously by five votes of Justices Norma Lucía Piña Hernández, Luis María Aguilar Morales, Jorge Mario Pardo Rebolledo (reserved the right to draft a concurring opinion), Alfredo Gutiérrez Ortiz Mena (reserved the right to draft a concurring opinion) and Juan Luis González Alcántara Carrancá (reserved the right to draft a concurring opinion).

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### EXTRACT OF THE DECISION

p. 1 Mexico City. The First Chamber of Mexico's Supreme Court of Justice (this Court), in its session of October 30, 2019, issues the following decision.

#### Background

p. 5-6 The worker (the affected party) filed an ordinary civil claim against the appellant commercial company (the company), for the payment of an indemnity for pain and suffering (*daño moral*). He was hired by the company but, on his first day of work, they informed him that he could not continue working in the company because he had a tattoo on the back of his left ear (a swastika), and the director and owner of the company would not permit it, since he was Jewish. When he was asked if he could remove or cover the tattoo, he responded no. With that answer his employment was terminated and he alleged in his claim that he was discriminated against by not being allowed to work because he had a tattoo.

p. 7 The company indicated that the people who work there felt upset, violated, terrorized and threatened by the tattoo because it manifested hate and his

antisemitic proselytism, and being Jewish, they felt attacked. It also argued that antisemitism is a form of discrimination and a type of violence. Thus, its conduct should be not considered discriminatory.

- p. 7-8 A civil judge in Mexico City heard the case and on May 5, 2017, ordered the company to pay an indemnity to the affected party and offer a public apology in a national newspaper as a dissuasive measure so it would refrain from engaging in discriminatory conduct.
- p. 8 The company filed an appeal (*recurso de apelación*), which was heard by a civil chamber of the superior court of Mexico City. On September 7, 2017, that chamber determined to revoke the decision.
- p. 1-2 On January 12, 2018, the affected party requested the injunction (*amparo*) against the decision issued by the civil chamber and a federal collegiate court in civil matters in Mexico City admitted it for processing. The company filed an adhesive injunction (*amparo*). On June 14, 2018, the federal collegiate court determined to grant the injunction (*amparo*) to the affected party and deny the injunction (*amparo*) to the company.
- p. 3 The company filed an appeal (*recurso de revisión*) on July 13, 2018. Then, the collegiate court sent the court's record of the injunction (*amparo*) proceeding to this Court, where it was assigned to the First Chamber.

### Study of the merits

- p. 27 This court considers that the present appeal's review is valid because the collegiate court directly interpreted a human right to equality and non-discrimination, in relation to the termination of employment, for the act of wearing a tattoo of a swastika.
- p. 30 In the judgment of this Court, the dispute involves discerning as genuine issues of constitutionality: 1) if the symbol of the swastika entails a message that can be discriminatory for ethnic and religious reasons as hate speech, in particular toward the Jewish community; and 2) if the wearing of a visible

tattoo with that symbol, in the context of a workplace where people who identify themselves as members of the Jewish community work, enjoys constitutional protection and therefore, the refusal of the employer to permit the person to work in that workplace wearing that tattoo was invalid, or if no such protection exists. And with that, be able to establish if the actions attributed to the defendant company constituted a discriminatory act against the affected party for having a tattoo, which triggered the unlawful act that justifies the claim for pain and suffering (*daño moral*).

- p. 31 This study will require a direct interpretation and a weighing of the human rights in play, which are: the scope of the fundamental right of equality and non-discrimination, the relationship with the exercise of the right to the free development of one's personality and the freedom of expression through the use of tattoos; and the possible restrictions on those human rights in the case of manifestations or expressions of hate speech prohibited by Article 1 of the Constitution.

**General scope of the protection of the right to equality and non-discrimination as a constitutional and conventional imperative norm.**

- p. 37. This court has held in its precedents that the equality recognized in Article 1 of the Constitution is a human right that establishes that every person must receive the same treatment and enjoy the same rights in equal conditions as other persons, provided they are in a similar situation that is legally relevant.
- p. 37-38 It has also specified that one aspect of that right is the prohibition of discrimination, which means that no person can be excluded from the enjoyment of a human right, or treated differently from another having similar legally relevant characteristics or conditions. This is especially pertinent when the differentiation falls under any of the categories specified in the mentioned constitutional article, which include ethnic or national origin, religion or any other discrimination that threatens human dignity and whose purpose is to undermine people's rights and freedoms.

- p. 38-39 This does not mean that all individuals must be equal in everything. This Court observes that not every difference in treatment is discriminatory, since distinction and discrimination are legally different, the first constituting a reasonable and objective difference, while the second constitutes an arbitrary difference detracting from human rights. Thus, we must remember that the Constitution does not prohibit the use of suspect categories, just their unjustified use.
- p. 39-40 In addition, this Court has recognized that the observance of these rights not only binds authorities; they are rights that also enjoy full efficacy in relations between private parties. The fundamental rights have the double quality of being public subjective rights and objective elements that inform and permeate the entire legal order such that, the observance of the Constitution impacts private legal relations.
- p. 42 Consequently, this Court considers that the right to equality and the prohibition of discrimination enjoy constitutional and conventional protection. It is an imperative norm that must be assessed especially in conflicts in which their observance is embedded, since there is international consensus on the respect for and guarantee of those two rights, which imposes a duty on States, their authorities and even private parties to prohibit discrimination and adopt positive and immediate measures in that regard.

**The constitutional protection of the rights to the free development of one's personality and freedom of expression in relation to body tattoos**

- p. 42-43 This Court has held that the right to the free development of one's personality implies fundamentally that individuals have the power to choose, freely and autonomously, their life project. This is in conformance with the principle of the freedom of choice, which is the inherent power of human beings to freely decide on their selves and on the conditions in which they wish to live their own lives, in all aspects of their existence.

- p. 44      When deciding Direct Injunction (*Amparo Directo*) 6/2008, the Plenary of this Court indicated that this right entails the power of every person individually to be however he or she wants to be, without coercion or unjustified controls by the State or other persons.
- p. 44-45    This court considers that, among the expressions of this right is the freedom of people to choose their personal appearance, as one aspect of the form in which they wish to project themselves before others, and therefore, they may make this choice according to their own autonomy. In addition, the “undefined freedom” protected by the free development of one’s personality complements other more specific freedoms, such as the freedom of conscience or expression. Its function is to safeguard the “personal sphere” that is not protected by the more traditional and concrete freedoms.
- p. 46,48    Regarding the right to freedom of expression, while we commonly associate this fundamental right with the sociopolitical sphere of dissemination of opinions, ideas and information, it also has a more intimate side, that permits people to express themselves according to their individuality in any context. In effect, it covers the freedom to express one’s own thoughts, ideas and opinions and disseminate them, and to seek, receive, transmit and disseminate information, of any kind and matter, through any media, procedure or way of expression.
- p. 49-50    The precedents of this Court show that the freedom of expression has a plurality of foundations. As with the free development of one’s personality, it also arises from the principle of personal autonomy. The instrumental connection is clear, since the possibility of freely choosing and materializing a life plan requires coordination with other people, which can only be achieved with the freedom to express thoughts, opinions and information.
- p. 50-51    In addition to the above, this Court emphasizes that the freedom of expression has a special connection with the existence and maintenance of a democratic society. Therefore, the freedom of expression has been considered to have special relevance in constitutional democracies; given

the primary obligation of State neutrality before the content of opinions and, consequently, the need to guarantee that no persons, groups, ideas or means of expression are excluded *a priori* from public debate.

- p. 51-52 Nevertheless, this right is not absolute and can be restricted when justified, when it conflicts with another right that under the circumstances has greater relative weight or with a public good especially connected with the protection of other human rights that are imperative to protect. This characteristic is recognized constitutionally and conventionally, where the rights of third parties and public order are expressly recognized as limits on the freedom of expression.
- p. 52 This Court clarifies that, in this case, aspects of interest for public debate are not in play. The questions arising from this case relate to the autonomy of the affected party, and therefore, special weight cannot be given in this case to the freedom of expression in relation to the rights with which it entered into conflict, such as the dignity and equality of the employees for whom the message was meant.
- p. 52-55 Thus, this Court understands that taking into account that the exercise of the right to the free development of one's personality includes the self-determination of people to choose, among other things, their physical appearance, according to their life plan and the form in which they wish to project themselves to others; and, assuming that the right to the freedom to express thoughts, opinions or ideas, allows a person to manifest aspects of their individuality by any means, it is possible that a tattoo visible on the skin constitutes a form of exercising both rights. Thus, although in principle the act of tattooing the skin has a meaning that is internal to the person who wears the tattoo, by placing it in a zone of the body that will be visible to others, obviously the intention is also for it to be seen by others, and this constitutes an act of communication to others of the person's individuality, regardless of the specific content of the message transmitted and of the meaning that the observer of the tattoo assigns it, since in this graphic form of expression no verbal feedback between the subjects is commonly expected.

- p. 56 The wearing of tattoos is a practice that, as a general rule, enjoys constitutional protection, in that it is a manifestation of the free development of one's personality and free expression; it also has the protection of the prohibition of discrimination and expressly of the law.
- p. 57 This protection, from the view of this Court, relates to different contexts in which the tattooed person is found or develops, among them, the work space and sphere in which, as a general rule, employers and co-workers are required to respect the free decision and free expression of people regarding their corporal appearance and to not interfere in that exercise, and even less condition the fundamental right to work denying access to it for wearing tattoos.

**The restrictions or limitations on the rights of the free development of one's personality and freedom of expression**

- p. 57-58 This Court has held that the constitutional principle of free will and the right to the free development of one's personality sustained in that principle, are not absolute. They are limited by the rights of others and by public order, such that the legitimacy of their exercise will depend on the individual right to choose and carry out the life project with its implications not unjustifiably affecting the legal sphere of third parties in a manner that violates their rights or public order.
- p. 60-61 Similarly, this Court has noted that the right to freedom of expression is not absolute since restrictions are imposed constitutionally and conventionally; and such right finds its limit in respecting morality, private life and rights of third parties; prohibiting hate speech and provocations to commit a crime, and ensuring public order. Thus, as an exception, its exercise may be restricted by the imposition of subsequent liabilities according to the constitutional text, the treaties and court precedents interpreting them.
- p. 61 Any restriction on the constitutional and conventional protection of the exercise of these rights must be examined cautiously, and decided on factual and legal grounds according to the circumstances of each case (it must

overcome a proportionality test in a broad sense), in order not to unjustifiably limit the full enjoyment of human rights.

### The status of hate speech

- p. 72 From a constitutional, conventional and legal analysis, this Court considers that discriminatory speech, and particularly hate speech, is contrary to fundamental values on which human rights and constitutional democracy are based, such as equality and dignity, and including the right of those to whom hate speech is directed to, in conditions of equal consideration and respect, exercise their freedom of expression.
- p. 72-73 Nevertheless, not all discriminatory speech, nor all hate speech should be repressed. The response of the legal system must be gradual in function of a set of circumstances that should be weighed by the lawmaker and by the judges. These include the context in which it is expressed; whether it is expressed in a forum of public deliberation or in the private sphere where the public interest that gives the freedom of expression special weight is absent; whether or not its expression implies advocacy of the hate or an incitement to discrimination or violence; whether its expression generates an imminent risk of violence or rupture of public order; whether acts of physical violence or disturbances have already been generated, etc. Given the relevance that the freedom of expression has for fundamental values such as autonomy, democracy, culture or generation of knowledge, special precaution must be taken before admitting restrictions on its exercise.
- p. 73-74 In this regard, the response of the legal system can range from not protecting hate speech to preventing its reproduction and reinforcement; or discouraging it through education; or non-action by the State given the non-violent critical reaction through more freedom of expression; or its tolerance in certain circumstances where its repression entails more costs than benefits; or the imposing of subsequent civil liabilities; or, as an exception, its repression through sanctions in especially serious cases based on the circumstances.

- p. 75-76 This Court reminds us that it has already determined that hate speech is a special case of discriminatory speech, that in our legal system it does not have constitutional protection and can mean a valid limit or restriction on the right to freedom of expression. In this regard distinction has been made between discriminatory language and hate speech.
- p. 76-79 When deciding Action for Constitutional Relief (*Amparo Directo en Revisión*) 2806/2012, the First Chamber of this Court indicated that hate speech is speech that incites violence – physical, verbal, psychological, among others – against citizens in general or against particular groups characterized by dominant historical, sociological, ethnic or religious characteristics. That such speech is characterized by expressing a conception through which there is a deliberate intention to disparage and discriminate against persons or groups because of any personal, ethnic or social condition or circumstance. The problem is that expressions of disparagement generate social sentiments of hostility against persons or groups. They also are intended to generate a climate of hostility, discrimination and violence. Protection from hate speech cannot be simply implicit, it requires the active intervention of the State to ensure that the content of the hate speech is confronted and its incompatibility with a democratic State is shown.
- p. 79 Thus, it is considered that in order to protect the freedom of expression; hate speech can be limited in certain circumstances. The same limitation will operate in the case of the exercise of the right to the free development of one's personality when the manifestation of hate is inviolably linked to the freedom of expression, as occurs when the discriminatory message of the hate speech occurs through the wearing of body tattoos.

### **The symbol of a swastika in a visible tattoo as an expression of hate**

- p. 79-81 This Court considers, taking into account what the United Nations Committee on the Elimination of Racial Discrimination has held, that the expression of hate speech can be materialized by transmission of the message, in any media, either directly or indirectly, through symbols, which

in a particular context leads to the conclusion that it involves a manifestation of hate that necessarily results in discrimination or violence against a particular person or group of persons, as a result of their characteristics of identity, ethnic origin, religion, culture, among others. In this regard, a visible body tattoo, in principle, can be used as a means for expressing hate, when its content is a symbol or image that contains a defined message (explicit or implicit) which, again, can be qualified as hateful and which produces the discrimination or violence of the so-called hate speech, since the wearing of a tattoo with that connotation entails an act of communication or expression of the meaning of the symbol.

- p. 82-83 With respect to the attribution of meaning to the swastika, keep in mind that such emblem has a fully identifiable historic connotation. In the western cultural environment, it represents Nazism, an extreme hate speech that advocates the superiority of the Aryan race and the physical extermination of races, ethnic groups or groups that its members consider “inferior”. Such doctrine not only advocates for a discriminatory treatment, principally against the Jews, but expressly advocates their genocide on the basis of not recognizing the human dignity of that ethnic-religious group. It is speech that intends the destruction of the foundations of democracy and human rights themselves.
- p. 84 For this Court it is viable to admit, in principle, that the use or wearing of the symbol of the Nazi ideology in a body tattoo, in our cultural environment by an adult generates the presumption that the user follows, supports or sympathizes with that extreme hate speech. This is especially notable, given that the election of the design of a tattoo is generally the result of a deliberate personal and autonomous act of the wearer, which implies the assignment of personal meaning to the content of the design or knowledge of the socially recognized or assigned meaning of the graphic element. Furthermore, a visible tattoo is an act of expression of individuality. In this case the record shows that the affected party exhibited an antisemitic symbol before an auditorium composed of employees that were identified as Jewish, refusing

to hide it when he was requested to because of protests, which leads to the assumption that his intention was to express this hate speech specifically before that auditorium.

- p. 86 Thus, this Court considers that in a democratic and multicultural society, freedom of expression and the free development of one's personality can be restricted when hate speech is involved, for the safety of all, including restricting the prohibition of discrimination and respect for the equality and dignity of people, even in the work environment.
- p. 90 The Inter-American Court of Human Rights (IACHR) has referred to the protection of the freedom of expression in work environments, especially when a general or public interest in a democratic society comes from that protection. For this Court, hate speech in the workplace, in the case of a private commercial company, is not protected by the reasons of general or public interest that justify granting a special weight to the freedom of expression when linked with the possibility of a public deliberation related to the functioning of the democracy and therefore the application of restrictions is permissible to preserve the rights of others.
- p. 92-93 Thus, it is considered that the use of the image of the swastika in a tattoo, exhibited in a specific context in the presence of persons of the Jewish faith who will necessarily interact with the person wearing the symbol, does not remain in the category of offensive and opprobrious speech in itself discriminatory and exempt from constitutional protection, but rather transitions to the nature of hate speech, and generates the climate of discrimination and hostility inherent to its message. Therefore, a restriction arises on the protection of the exercise of the rights of freedom of expression and free development of one's personality, through the prohibition of discrimination.
- p. 93 The above is contingent on the understanding that no prejudgment is made on the exhibition of a tattoo with such symbol or with any other one that could be classified as hate speech in different factual contexts. This is especially significant in spheres where the reasons of public interest that

counsel protecting the freedom of expression and public deliberation are more broadly present, This is linked with the functioning of democracy, which can justify tolerating their expression, if circumstances such as those mentioned do not occur. These cases shall be analyzed according to their own relevant circumstances without extrapolating nothing more than the criteria established in this decision, since it has to be weighed case by case whether or not there is an impact on fundamental rights of such a magnitude that it validly justifies restricting the constitutional protection of the rights of the free development of one's personality and freedom of expression embedded in the use of tattoos.

### **Examination of the proportionality of the measures adopted by the defendant, in the circumstances of the case**

- p. 100-103 This Court considers it necessary to analyze the measures the company adopted, according to the circumstances of the case, under a proportionality test, to determine whether or not the conduct of the company should be considered an act of discrimination, constituting an unlawful act for purposes of civil liability. To discern the above, the following parameters are applied concurrently: i) legality and purpose, and ii) necessity and proportionality of the measure applied.

### **V. Legality and Purpose**

- p. 104 On legality, the international consensus on the rights of equality and non-discrimination as an imperative norm and therefore the prohibition of racial discrimination is clear. Furthermore, that the right to freedom of expression and the right to the free development of one's personality may be validly restricted when they affect other rights of third parties, particularly when hate speech is involved.
- p. 104-105 With respect to purpose, this Court considers that the restrictions on the freedom of expression and the free development of one's personality when faced with manifestations of antisemitic hate, weighed against the prohibition of racial discrimination, undoubtedly protects a legitimate end compatible

with the constitution and the conventions examined, corresponding to the protection of the rights to human dignity and safety.

- p. 105 Thus, it must be admitted that, in principle, the challenged action of the defendant had a legitimate purpose, corresponding to protecting its members, who objectively and fundamentally felt discriminated against.

### VI. Necessity and Proportionality

- p. 107-110 This Court considers that the measure that the company adopted was necessary because it had to protect the rights of equality and non-discrimination, human dignity and safety of the Jewish employees and directors. Thus, the need for the company to adopt the measure established in Article 47 of the Federal Labor Law which authorizes the termination of employment when the worker engages in acts of violence or analogous situations can be seen as imperative. Even more so, in view of the fact that there is a need to eradicate a discriminatory practice such as the expression of racial antisemitic hate speech. And in the private sphere, the expression of hate speech also conflicts with aspects of the right of association that permits private organizations to legitimately establish certain requirements to generate a particular environment or culture in its work space, in order to pursue a legitimate purpose consistent with its formation.
- p. 110 This Court also remarks that the measures adopted by the company were not disproportionate and that the actions were gradual since the affected party was first requested to agree to remove the tattoo. Since he did not, there was no alternative but to terminate the employment.
- p. 110-111 When hate speech is expressed in a private sphere, the freedom of expression must be given ordinary weight *vis a vis* the rights to dignity, equality and freedom of the victims (recipients of the message), and therefore, under these circumstances, there is no legal obligation to tolerate it and the coexistence with the aggressor can be ended if this is necessary to preserve their own dignity, sense of equality and, finally, their own freedom to express themselves without fear of being assaulted.

- p. 111 Therefore, it is not considered that the measures that the defendant took were arbitrary, discriminatory or disproportionate against the rights in play. On the contrary, the employer reasonably protected the primary rights of its employees and permitted the termination of the employment. Therefore, its action cannot be identified as discriminatory.
- p. 112 In conclusion, the expression of hate speech by the affected party, which ultimately drove the defendant to separate him from his job, by severance, is not given constitutional protection and is grounds for the lawful actions of the defendant, since it, given the particular circumstances, did not have the legal duty to tolerate this act of racist violence of a symbolic nature against its employees, and therefore the actions of the defendant must be qualified as lawful, considering the circumstances of the case.

#### **Precision on some considerations by the Collegiate Court**

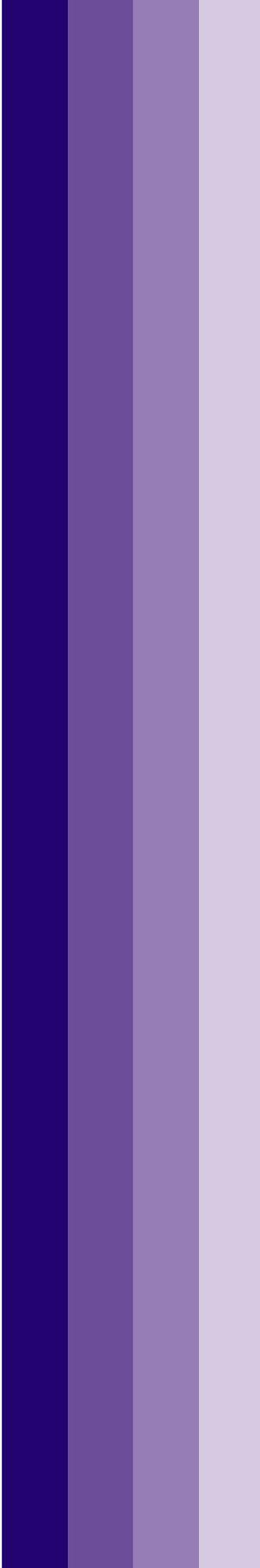
- p. 113 While in this case the fundamental rights of the legal person (the company) are not discussed, that does not exclude its legitimation to protect, as an employer, the legal assets it protected in favor of its personnel.
- p. 113,115 Furthermore, the collegiate court required the company to convincingly prove that the affected party had displayed specific additional discriminatory or violent acts against its members. Nevertheless, the Judicial Branch should refrain from giving protection, in principle, to hate speech and contribute to its eradication. Therefore, in view of the racist content of the swastika that allows it to be classified, *prima facie*, as obvious hate speech, this was unnecessary.
- p. 116-117 Finally, this Court considers that, according to the United Nations Committee, the criteria that must be used by the courts to evaluate the identity of persons, in this case, as Jews, must be that of self-identification or self-assignment, and therefore in a scenario of discrimination for these reasons, the identification of the person as belonging to an ethnic or religious group is sufficient for there to be the presumption that the victim

has been discriminated against for this reason. Which presumption, in any case, must be refuted as part of the dispute and disproved with sufficient evidence by the person it prejudices.

### DECISION

- p. 117-118 This Court recognizes that wearing a tattoo is permitted and no one should be discriminated against for it in the workplace. In this case, the symbol that the affected party wore represents racist (antisemitic) hate speech, that in the specific circumstances, triggered a restriction on the constitutional and conventional protection of the rights of free development of one's personality and freedom of expression exercised by him. Therefore, the measures adopted by the company to safeguard the equality, human dignity and safety of its employees and directors were valid, reasonable and proportional. Therefore, they cannot be considered an act of discrimination against the affected party. Thus, the civil liability action filed to obtain an indemnity for pain and suffering (*daño moral*) does not prosper.
- p. 120 Consequently, the appealed decision should be revoked, and the affected party denied the injunction (*amparo*) against the decision of the civil chamber of the superior court of Mexico City.





## IV. RIGHT TO EQUALITY AND NON-DISCRIMINATION



## 8

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### SAME-SEX MARRIAGE IN OAXACA, EQUALITY AND NON-DISCRIMINATION

#### *Amparo en Revisión 581/2012*<sup>8</sup>

**Keywords:** *same-sex marriage, legislative omission, principle of equality, equality and non-discrimination, sexual preference as a suspect classification, strict scrutiny test.*

#### **Summary**

In 2012, a same-sex couple applied to the Civil Registry of the State of Oaxaca to get married. The petition was denied because it was considered that it was legally impossible to celebrate the marriage, since Article 143 of the Civil Code of the State stated that: “marriage is a civil contract executed between one man and one woman who unite to perpetuate the species and provide each other with mutual help in life.” In light of the refusal, the couple filed a lawsuit to solicit an injunction (*amparo*) on the grounds that they were discriminated against because of their sexual preference. The district judge ruled that the challenged norm violated the principles of equality and non-discrimination, protected by Articles 1 and 4 of

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<sup>8</sup> Decision issued by the First Chamber of Mexico’s Supreme Court of Justice (December 5, 2012). Reporting Justice: Arturo Zaldívar. *Action For Constitutional Relief Through Injunction 581/2012*

the Constitution. The law suit argued that sexual preference is not a valid reason for differential treatment, so this difference is illegitimate. Therefore, the judge ordered the Civil Registry to disregard the law in this case and allow the couple to marry. In view of this determination, the Executive and Legislative branches filed an appeal (*recurso de revisión*). At the couple's request, the Supreme Court asserted jurisdiction over the case because of the importance and significance of the issue involved.

### Issue presented to the Supreme Court

Whether or not the distinction made by a norm establishing that marriage is the union between one man and one woman who unite to perpetuate the species and provide mutual help in life, thus excluding same-sex couples, is constitutional or not. The suit also sought to establish how normative discrimination is to be remedied in this case.

### Holding and vote

The Court decided that the challenged law constitutes a discriminatory legislative measure, since it makes a distinction based on the sexual preference of persons that results in the arbitrary exclusion of homosexual couples from access to the institution of marriage.

The First Chamber decided this case unanimously by four votes of Justices Olga Sánchez Cordero de García Villegas, Arturo Zaldívar Lelo de Larrea, José Ramón Cossío Díaz and Jorge Mario Pardo Rebolledo. Justice Alfredo Gutierrez Ortiz Mena was absent.

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### EXTRACT OF THE DECISION

p. 1 Mexico City. The First Chamber of Mexico's Supreme Court of Justice (the Supreme Court), in session of December 5, 2012, issues the following decision.

#### Background

p. 1-2 In 2012, a same-sex couple applied to the Civil Registry of the State of Oaxaca to get married. The petition was denied because it was considered

legally impossible to celebrate the marriage. Article 143 of the Civil Code of the State stated that: “marriage is a civil contract executed between one man and one woman who unite to perpetuate the species and provide mutual help in life”.

- p. 2 In light of the refusal, the couple filed an injunction (*amparo*) on the grounds that they were discriminated against because of their sexual preference.
- p. 2-3 The district judge determined that the challenged norm violated the principles of equality and non-discrimination, protected by Articles 1 and 4 of the Constitution, since sexual preference is not a valid reason for differential treatment. This difference was determined illegitimate. The judge therefore ordered the Civil Registry to disregard the law in this case and allow the couple to marry.
- p. 3 In view of this determination, the Executive and Legislative branches filed an appeal (*recurso de revisión*).
- p. 3-4 At the request of the couple, the Supreme Court asserted jurisdiction over the case because of the importance and significance of the issue involved.

### Study of the merits

#### I. Same-sex marriages as a constitutional problem

- p. 26 In comparative law, *two ways* of approaching the issue of same-sex marriages can be identified in the constitutional setting. In those cases where legislation *expanding access* to marriage to same-sex couples has been challenged, the question that arises is whether such regulation is constitutionally *legitimate*.
- p. 27 On the other hand, on other occasions the challenge has been directed against rules that *do not allow* same-sex couples access to marriage. In these cases the problem has been analyzed primarily in terms of equality. The question is whether this regulation is *discriminatory* by not allowing homosexual couples access to the institution of marriage.

In this respect, it should be noted that the logic on which these problems are considered is totally different. In the first case, it is a question of determining whether same-sex marriage is *possible or has a place* within the Constitution. The second approach, in contrast, seeks to establish whether the Constitution *requires* same-sex couples to be allowed access to marriage.

- p. 28 The problem posed to the Supreme Court in this appeal (*recurso de revisión*) must be analyzed from the second of these approaches. The couple argued in their lawsuit that Article 143 of Oaxaca's Civil Code was discriminatory for not allowing equal access to the institution of marriage to both heterosexual and homosexual couples. Thus, this case must be examined in light of the criteria developed by the Supreme Court for judging cases alleging violations of the constitutional principle of equality.

## II. Same-sex marriages in light of the principle of equality

- p. 28 The argument that the effects (of the ruling) are incongruous because there is no applicable norm for resolving the request made by the couple to get married is unfounded.
- p. 29 In this regard, this First Chamber held in Action for Constitutional Relief (*Amparo en revisión*) 416/2010 recognized that when the unconstitutionality of a law is claimed by *tacit exclusion* of a classification of persons from a certain legal regime or benefit, that argument must be analyzed in light of the principle of equality.
- p. 30 The challenged law constitutes a discriminatory legislative measure, since it makes a distinction based on a person's sexual preference which results in the arbitrary *exclusion* of homosexual couples from access to the institution of marriage. In order to be in a position to justify that assertion, the challenged measure is examined below in light of the principle of equality.

### 1. The intensity of the scrutiny

- p. 30 A first step is to determine the intensity with which the distinction made by the legislator must be scrutinized. In this regard, the Supreme Court has

held in multiple precedents that when the challenged distinction is based on a “suspect classification” *strict scrutiny* must be applied to examine its constitutionality in light of the principle of equality.

- p. 30-31 In these cases, it has been indicated that the constitutional judge must subject the work of the legislator to a *particularly careful* scrutiny from the point of view of respect for the right to equality.
- p. 31 In this regard, a distinction is based on a suspect classification when it uses any of the criteria set forth in the last paragraph of Article 1 of the Constitution, within which sexual preferences are found.
- p. 31-32 The use of these classifications must be examined more rigorously precisely because they are *suspected* of being unconstitutional. In these cases, it can be said that the laws that use them to make a distinction are affected by a presumption of *unconstitutionality*. However, the Constitution does not prohibit the use of suspect classifications; it prohibits their unjustified use. Strict scrutiny of distinctions based on suspect classifications ensures that only those with a very robust justification will be constitutional.
- p. 32 The challenged provision provides the following: Article 143. Marriage is a civil contract executed between one man and one woman, who come together to perpetuate the species and provide each other with mutual help in life.
- p. 32-33 The legislative measure under consideration *implicitly distinguishes* between different-sex couples and same-sex couples: the former are allowed access to marriage, while the latter do not have that possibility. While it could be argued that the provision does not make a distinction based on people’s sexual preferences because no one is asked to express their sexual preference in order to access marriage, that does not preclude holding that the challenged norm does indeed make a distinction supported by that suspect classification. The fact that *access* to the normative power to get married is apparently not conditioned on sexual preferences does not mean that there is no implicit distinction based on this criterion.

p. 33 In order to establish whether there is an implicit distinction, it is not enough to know *who* has the normative power in question, but also *what it allows those people to do*. In this regard, even if the norm grants the normative power to marry any person, regardless of their sexual preference, if that power can only be exercised to marry someone of the opposite sex, there is no doubt that the challenged norm does actually entail a distinction based on sexual preferences.

In this respect, it can be argued that such norms make an implicit differentiation because homosexuals can only access the same right heterosexuals have *if they deny their sexual orientation*, which is precisely the characteristic that defines them as homosexual. Thus, the Supreme Court considered that the challenged measure is based on a suspect classification, since the distinction it draws in determining who can use the normative power to create a marriage bond is based on the *sexual preferences* of individuals.

## 2. The strict scrutiny test

p. 34 The Supreme Court considered it appropriate to provide an explanation as to the way in which the equality test must be carried out in these cases in order to clarify the differences that exist between ordinary scrutiny and the scrutiny that should be applied to legislative distinctions that are based on a suspect classification.

First, it must be examined whether the distinction based on suspect classification serves a constitutionally *compelling purpose*. Thus, as the intensity of the scrutiny rises, the purpose must have clear constitutional support: it must pursue a *constitutionally important* objective. The legal theory has pointed out that one way of understanding this concept in the continental tradition could be that the measure must seek the satisfaction or protection of a mandate of constitutional rank.

p. 35 Secondly, it must be analyzed whether the legislative distinction is closely linked to the constitutionally compelling purpose. That is, the legislative

measure must be *directly connected* with the achievement of the constitutional objectives outlined above.

Finally, the legislative distinction must be the *least restrictive* measure possible in order to effectively achieve the compelling purpose from the constitutional point of view.

### 3. Strict scrutiny of the challenged measure

p. 35-36 The first thing to be determined is whether the distinction made in the challenged norm serves a constitutionally compelling purpose. From a comprehensive interpretation of the justified report rendered in the injunction (*amparo*) proceeding by the representative of the Legislative Branch and of the appeal (*recurso de revisión*) filed by the authorities involved in the legislative process, it can be deduced that the purpose of the measure under consideration is the protection of the family.

p. 36 Therefore, the challenged distinction pursues a compelling purpose, in so far as Article 4 of the Constitution imposes on the legislator the obligation to protect “the organization and development of the family”. The protection of the family is not only a legitimate purpose for the legislator, but also a constitutionally required purpose. Consequently, it must be understood that the measure at issue satisfies the first tier of a strict scrutiny of the equality of the measure.

However, in order to determine whether the distinction is *directly connected* with the stated compelling purpose, two things must be specified: (i) who is included and who is excluded in the classification used; and (ii) what is the precise content of the constitutional mandate for the protection of the family.

On the one hand, the definition of marriage in the challenged norm includes only heterosexual couples who intend to procreate.

p. 36-37 On the other hand, the Plenary of the Supreme Court in the *Action of unconstitutionality 2/2010* established that although Article 4 of the Constitution mandates the protection of the family, this provision does not refer to an “ideal family model” that presumes a heterosexual marriage and whose purpose is procreation. The Constitution protects the family understood as a *social reality*. This means that this protection must cover all its forms and manifestations existing in society.

p. 37 In accordance with the foregoing, the Supreme Court considered that the distinction made by the contested norm based on the suspect classification of sexual preferences is *not directly connected* with the constitutional mandate of protection of the family interpreted in the terms set forth above.

On the one hand, the distinction is clearly *over-inclusive* because heterosexual couples who do not marry for the purpose of procreating are included in the definition of marriage.

p. 39 In this regard, in the precedent cited above, the Supreme Court determined that the institution of marriage is based primarily on the *emotional, sexual, identity, solidarity* and *mutual commitment* bonds of those who wish to have a life in common.

p. 39 On the other hand, the measure under consideration is *sub-inclusive* because it unjustifiably excludes from access to marriage homosexual couples who are situated in similar conditions to couples who are covered by the definition. The distinction is *discriminatory* because sexual preferences are not a relevant aspect for making the distinction in relation to the constitutionally compelling purpose.

In this regard, the measure is clearly discriminatory because the relationships entered into by homosexual couples can be perfectly adapted to the current foundations of the institution of marriage and more broadly to those of the family. For all relevant purposes, homosexual couples are in an *equivalent situation* to heterosexual couples, and therefore their exclusion from marriage is totally unjustified.

- p. 40-41 If the distinction is not directly connected with the compelling purpose that marriage may have from a constitutional point of view, the Supreme Court cannot consider such a measure constitutional because it would be endorsing a decision based on prejudices that have historically existed against homosexuals. The absence of the benefits that the law assigns to the institution of marriage is a direct consequence of the prolonged discrimination that has existed against homosexual couples on the basis of their sexual preference.
- p. 41-42 The right to marry entails not only the right to have access to the *expressive benefits* associated with marriage, but also the right to the *material benefits* that the laws ascribe to the institution. In this regard, access to marriage actually entails “a right to other rights”. The rights granted by civil marriage significantly increase people’s quality of life. In the Mexican legal system there are a large number of economic and non-economic benefits associated with marriage. These include: (1) *tax* benefits; (2) *solidarity* benefits; (3) benefits *caused by the death of one of the spouses*; (4) *property* benefits; (5) benefits in *subrogation of medical decisions*; and (6) *immigration* benefits for foreign spouses. Some examples may serve to show how deprivation of these benefits affects the quality of life of homosexual couples.
- p. 42 The Income Tax Law, for example, provides for the following *tax benefits*: (i) exemption from the payment of income tax when the income derives from a donation made by one of the spouses or from withdrawals made from the retirement, advanced age and elderly sub-account for “marriage expenses” and (ii) personal deductions for the payment of medical, dental and hospital expenses by one the spouses for the other, and premiums for complementary or independent medical insurance for health services provided by social security institutions when the beneficiary is the spouse.
- p. 42-43 With regard to *solidarity* benefits in marriage, the Social Security Law considers the spouse of the insured person or pensioner to be his or her “beneficiary” for purposes of said Law, which means that the spouse becomes the creditor of all the benefits due to the insured or pensioner,

which are unseizable unless there are alimony obligations. For example, there are “family allowances” consisting of support for a family burden granted to beneficiaries of the pensioner with disability and where the spouses receive the highest percentage of the amount of the pension. And of course, the spouse of an insured person has the right to receive medical, maternity, surgical, pharmaceutical, and hospital care guaranteed by social security.

- p. 43 With respect to *alimony*, the Civil Code of the State of Oaxaca establishes, for example, a preferential right over the salaries, income and property of the spouse who is responsible for the economic support of the family. In connection with this right, the Federal Labor Law prohibits deductions from workers’ wages, except in cases where they are for the payment of alimony “in favor of the wife”.

With regard to *death* benefits, the Civil Code of Oaxaca establishes that the surviving spouse has the right to inherit under intestate succession. In the event that the community property system was chosen and one of the spouses dies, the Civil Code also establishes that the one who survives maintains the possession and administration of the social fund, until the distribution is made.

- p. 43-44 The Federal Labor Law establishes that a widow or widower who has been financially dependent on the worker and who has a disability of fifty percent or more shall be entitled to compensation in cases of death of the worker due to an occupational hazard. In the same vein, the Social Security Law contemplates a large number of benefits that are granted to the spouse of an insured or pensioned person when his/her death occurs.

- p. 44 The Civil Code of Oaxaca establishes the following property rights under the community property system: (i) cessation of the effects of the community property system for the spouse who unjustifiably left the marital home for more than six months since the first day of abandonment; (ii) the right to have the inventory, partition and award of property carried out after the

marriage has been dissolved; and (iii) the right that any transfer of part of the property of each spouse to the other is regarded as a donation, without financial encumbrances for the one who received the property.

p. 44-45 Regarding the *subrogation of medical decisions*, the Civil Code of Oaxaca establishes that a spouse will become guardian in case the other spouse becomes disabled, thus exercising all the rights and obligations conferred to guardians. Similarly, the Regulations of the General Health Law on the Provision of Medical Services confer rights on the spouse, as a relative or guardian of the other spouse, to make certain medical decisions. The spouse's written authorization is required in cases of emergency or when the spouse is in a state of temporary or permanent disability, to perform any diagnostic or therapeutic procedure, or any surgical procedures, or to have their spouse admitted to a hospital.

p. 45 With regard to *post-mortem* medical decisions, the General Health Law establishes that the spouse must give consent for the following decisions to be taken: (i) whether the body of the spouse or its components are donated in the event of death, unless the deceased has manifested refusal; (ii) dispense with artificial means of support when the brain death of the other spouse is established; (iii) give consent for the performance of autopsies on the corpse of his/her partner; and (iv) whether educational institutions may use the corpse of the deceased spouse.

As for *immigration* benefits, according to the Immigration Law, foreign spouses can access different immigration statuses by being married to a Mexican. Access to nationality is also a benefit granted by the Nationality Law to the foreign spouse of a Mexican who has resided and lived together in the matrimonial domicile established in national territory, during the two years immediately preceding the application.

p. 45-46 As can be seen, marriage gives spouses a large number of rights. In this respect, denying gay couples the tangible and intangible benefits that are accessible to heterosexuals through marriage means treating homosexuals

as if they were “second-class citizens.” There is no rational justification for not giving homosexuals *all* the fundamental rights they are entitled to as individuals and, at the same time, granting them *an incomplete set* of rights when behaving according to their sexual orientation and bonding in stable relationships.

p. 46 Thus, the exclusion of homosexual couples from the matrimonial regime results in *double discrimination*: not only are homosexual couples deprived of the expressive benefits of marriage, but they are also excluded from the material benefits. Furthermore, this exclusion affects not only homosexual couples, but also the children of those who live a family life with the couple.

p. 47 In this specific case, the most effective way to *redress normative discrimination* is, on the one hand, to declare the unconstitutionality of the normative portion that states that the purpose of marriage is “to perpetuate the species” and, on the other hand, to make a conforming interpretation of the expression “one man and one woman” to understand that this meeting of the minds is between “two persons”, in such a way that this interpretation avoids the declaration of unconstitutionality of this normative portion.

The Legislative Branch argued that there was no need to “disfigure” the institution of marriage, since it is possible for the legislator to conceive “new legal concepts” according to the reality of homosexual couples. According to the Supreme Court, such an approach is totally unacceptable in a constitutional State under the rule of law that aspires to treat all its citizens with equal consideration and respect.

p. 48 If access to marriage is denied, the existence of a differentiated legal regime that homosexual couples can choose *instead of marrying*, even if the concept in question had the same rights as marriage, evokes the measures endorsed by the well-known doctrine of “separate but equal” arising in the United States in the context of racial discrimination in the late nineteenth century.

- p. 48-49 Models for the recognition of same-sex couples, regardless of whether their only difference from marriage is the designation given to both types of institutions, are inherently discriminatory because they constitute a regime of “separate but equal”. Just as racial segregation was based on the unacceptable idea of white supremacy, the exclusion of same-sex couples from marriage is also based on the prejudices that have historically existed against homosexuals. The exclusion of same-sex couples from the institution of marriage perpetuates the notion that same-sex couples are less deserving of recognition than heterosexual couples, thereby offending their dignity as individuals.
- p. 49 In this regard, the Inter-American Court of Human Rights in the case of *Atala Riffo y niñas v. Chile* has also stated that “States must refrain from actions that in any way are intended, directly or indirectly, to create situations of *de jure* or *de facto* discrimination”, in addition to being obligated to “adopt positive measures to reverse or change discriminatory situations existing in their societies, to the detriment of a certain group of people.”
- p. 50 Finally, the Supreme Court pointed out that the freedom of configuration that the State Congresses possess to regulate the civil status of individuals is limited by constitutional mandates. In this sense, the fundamental rights materially condition that regulation.

### Decision

- p. 54 The couple is covered and protected against Article 143 of the Civil Code of the State of Oaxaca, of which the normative portion that states that the purpose of marriage is “to perpetuate the species” is declared unconstitutional and it is ordered that the expression “one man and one woman” be construed to refer to the meeting of minds between “two people”.



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## THE RIGHTS OF PEOPLE WITH DISABILITIES (INTERDICTION: DISPROPORTIONAL RESTRICTION ON THE LEGAL CAPACITY OF PERSONS WITH DISABILITIES)

### *Amparo en Revisión 1368/2015*<sup>9</sup>

**Keywords:** *Human dignity, right to equality and non-discrimination, right to legal capacity, right to personal autonomy, right to live independently, model of best interpretation possible of will and preferences, system of support and safeguards, Convention on the Rights of Persons with Disabilities, status of interdiction, persons with disabilities.*

#### **Summary**

In 1995, a family judge of the Federal District declared “Ernesto” in a state of interdiction and appointed his mother, “Luisa”, as definitive guardian. When “Luisa” died she named “Ernesto” as her sole and universal heir of a piece of property. Subsequently, different guardians were appointed for “Ernesto”, both provisional and definitive. In 2012, “Ernesto” married “Martha” and, based on his request, the family judge removed the person who was guardian of “Ernesto” and

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<sup>9</sup> Decision issued by the First Chamber of Mexico’s Supreme Court of Justice (March 13, 2019). Reporting Justice: Alfredo Gutiérrez Ortiz Mena. *Action For Constitutional Relief Through Injunction 1368/2015*

designated “Martha” as his guardian. The former guardian and the Local Guardians Council in the Miguel Hidalgo Delegation (Local Guardians Council) appealed this ruling. While such appeals were being resolved, in 2013 “Ernesto” requested that the family judge recognize certain rights in the exercise of his autonomy, but the judge denied the request until it could be filed by his legal representative. “Ernesto” filed an indirect injunction as a two-stage judicial review relieving an unremediated breach of rights (*amparo indirecto*). When the appeals filed by the guardian and Local Guardians Council were resolved, the court ordered the appointment of a provisional guardian from the list of aids of the Superior Court of Justice of the Federal District, against which “Ernesto” filed his first expansion of the injunction (*amparo*) claim. In parallel, during the processing of his mother’s will, “Ernesto” requested the award of the property he inherited and the recognition of other rights in exercise of his autonomy. The judge determined that she could not respond to his request until a decision is presented showing that “Ernesto’s” state of interdiction had been revoked. “Ernesto” filed a second expansion of the injunction (*amparo*) against this ruling. The district judge in the Federal District that heard the injunction (*amparo*) granted it only against the appeal decision that designated a provisional guardian, since he considered that “Ernesto’s” opinion had not been heard. “Ernesto” filed a motion for review against this decision which the First Chamber of Mexico’s Supreme Court of Justice heard upon resuming its original jurisdiction.

### Issue presented to the Supreme Court

Whether the concept of interdiction is constitutional in accordance with the right to legal capacity, to live independently and to equality, and to determine the scope of the obligation of the authorities to establish adequate and effective safeguards.

### Holding and vote

The appealed decision was revoked and the injunction (*amparo*) was granted for essentially the following reasons. Disability refers to the barriers and social attitudes that impede persons with deficiencies from full and effective participation in society on equal terms. The state of interdiction concept is not in accordance with the Convention on the Rights of Persons with Disabilities and cannot be interpreted to be in accordance because it violates the right to equality and non-discrimination. In this regard, the state

of interdiction is a disproportionate restriction on the right to legal capacity, and therefore it does not pass the strict scrutiny test because it is a distinction based on a suspect classification – disability. Furthermore, the concept is excessively inclusive, since it limits legal capacity entirely, regardless of the specific support and safeguards that each type of disability requires. Interdiction is also not compatible with the right to an independent life and to be included in the community because it is a model that completely substitutes the will of a person, instead of pursuing the best interpretation possible of a person’s will and preferences. Therefore, it was determined that the concept of state of interdiction must be declared unconstitutional; the family judge was ordered to cancel the state of interdiction declared against “Ernesto” and was instructed to issue a new ruling establishing the safeguards and necessary support so that “Ernesto” could fully exercise his legal capacity.

The First Chamber decided this matter by five unanimous votes of Justices Norma Lucía Piña Hernández (reserved the right to issue a concurring vote), Luis María Aguilar Morales (reserved the right to issue a concurring vote), Jorge Mario Pardo Rebolledo (reserved the right to issue a concurring vote), Alfredo Gutiérrez Ortiz Mena and Juan Luis González Alcántara Carrancá.

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## EXTRACT OF THE DECISION

p. 1 Mexico City. The First Chamber of Mexico’s Supreme Court of Justice (this Court), in session of March 13, 2019, issues the following decision.

### Background

The facts will be grouped into two subsections due to the procedural complexity and wide range of facts.

### I. Declaration of state of interdiction

p. 1-2 In a voluntary jurisdiction proceeding, “Luisa” filed the declaration of interdiction of her children “Ernesto” and “Sofia” and requested that the legitimate guardianship be declared in her favor. A family judge in the Federal

District declared a state of interdiction for “Ernesto” and “Sofia” through decision of August 14, 1995. In turn, their mother “Luisa” was declared as definitive guardian and their brothers “Ramiro” and “Hector” as stewards.

- p. 2 In 2008 the mother and guardian died. “Ernesto” lived with his half sister “Flor”, who subsequently also died. After that date, “Fernanda”, daughter of “Flor” and niece of “Ernesto” assisted “Ernesto”.

Later, based on a writ presented by the steward “Hector”, “Patricia” (also niece of “Ernesto”) was designated as guardian.

- p. 2-3 In 2012, “Ernesto” married “Martha” who filed an ancillary proceeding in which she requested the separation of “Patricia” from the position of guardian (it should be mentioned that in 2016 the marriage of “Ernesto” and “Martha” was declared null and void). The family judge, through an interlocutory decision, removed “Patricia” from her position as guardian and appointed “Martha” as guardian.

- p. 3 The president of the Local Guardians Council in Miguel Hidalgo Delegation (the Guardians Council), and “Patricia” filed appeals of the above ruling.

While those appeals were pending, in 2013 “Ernesto” filed, in his own right, a writ before the family judge in which he requested: the judicial recognition of his place of residence, as well as his right to live there; to live independently and to choose the persons with whom he wished to live; to dispose of his income and manage the expenses of his independent life; the provision by the judge of reasonable accommodations and the necessary support in making decisions in order to be able to live independently, and that the judge refrain from ordering or subjecting him to living in a particular residence and with a particular person.

- p. 4 The judge issued a ruling in which he determined not to resolve “Ernesto’s” request until the petition was filed by his legal representative. “Ernesto” filed an injunction with a two-stage review relieving and unremediated breach of rights (*amparo indirecto*) against this ruling.

While the ruling on the injunction (*amparo*) was pending, the family chamber that heard the appeals issued a decision modifying the interlocutory decision, requiring the judge to designate a provisional guardian from the list of assistants of the Superior Court of Justice of the Federal District [Tribunal Superior de Justicia del Distrito Federal (TSJ)], instead of “Martha”. “Ernesto” filed his first expansion of the original injunction (*amparo*) against this ruling.

## II. Probate Proceedings

Upon “Luisa’s” death, “Fernanda”, as executor, challenged the testamentary succession. “Luisa” appointed her children “Ernesto” and “Sofia” as heirs of her entire estate and, by request of “Hector”, brother and steward of “Ernesto”, “Patricia” was appointed as definitive guardian, who had already been appointed in that position in the voluntary jurisdiction.

p. 5 At this point in the probate proceeding, “Ernesto” lived with “Fernanda”, who was acting as executor. Thus, after multiple procedures, “Patricia”, as definitive guardian of “Ernesto”, accepted the appointment of heir and, a few days later, the judge hearing the probate proceeding recognized “Ernesto” as sole and universal heir of the succession.

Later, in his own right, “Ernesto” authorized certain persons to receive notifications and requested certified copies of all the documents in the testamentary succession. The judge ruled that, as long as “Ernesto” has a disability, he would rule according to the law, until the filing was presented by his guardian.

p. 5-6 Finally, “Ernesto”, in his own right, requested the awarding of the property of which he was the sole and universal heir, but the judge determined that the prior ruling must prevail until the ruling revoking the state of interdiction of “Ernesto” is exhibited. “Ernesto” filed his second expansion of the original injunction (*amparo*) against this ruling.

p. 9 The judge of the Federal District Court who heard the matter granted the injunction (*amparo*) to “Ernesto” but only against the decision of October 22, 2013, considering that the ruling of the appeals filed by the Guardians Council and by “Patricia”, designated one of the persons registered on the TSJ lists as guardian, without considering any opinion “Ernesto” may have had in that respect.

p. 35 With respect to other acts and authorities, the district judge determined that the injunction (*amparo*) was invalid because, given that “Ernesto’s” level of mental retardation does not prevent him from understanding the situations in which he was involved, “Ernesto” could have challenged the application of certain articles of the Civil Code for the Federal District (Civil Code) once he was declared interdicted, and those rules had to be challenged 15 days after their first act of application.

Furthermore, in relation to the constitutionality of Articles 1313, 1316 and 1341 of the Civil Code, the district judge considered that there was never an act of application and therefore the claim was invalid.

p. 10 “Ernesto” filed a motion for review on which this Court decided to resume its original jurisdiction.

### Study of the merits

p. 40 First the grievances that “Ernesto” asserts against the dismissal declared by the district judge will be examined.

#### I. Study of grievances

p. 41-42 This Court considers that the argument of the district judge that “Ernesto” was duly represented by his guardian and had knowledge of the challenged acts, through his legal representative, who was authorized to file the injunction (*amparo*) against the actions that caused harm to him is not consistent with the Convention on the Rights of Persons with Disability (CRPD), since it adopts an interpretation based on the model of substitution of the will.

- p. 42 The interdiction process implies interference in a person's possibilities for action and therefore presumes a limitation on his or her fundamental rights, and therefore it can never be admitted, under the social and human rights model, that the right to a hearing of the person with disabilities is satisfied by the manifestations of his or her guardian, as the district judge asserts.
- p. 43 In this case, the case records do not show that it had been explained to "Ernesto", in accessible language and taking into account his disability, the legal consequences of the judicial process in which he was involved nor is there any record of his opinion in this respect.
- p. 44 Therefore, it must be concluded that, as "Ernesto" argues in his grievances, they cannot be considered acts consented to and, thus, the dismissal declared should be lifted.
- p. 44-45 The judge presiding over the injunction (*amparo*) failed to issue a ruling in an accessible format, notwithstanding "Ernesto's" express petition in the injunction (*amparo*) claim. Accessibility is one of the principles on which the CRPD is based, an essential preliminary condition for the enjoyment of all the rights on equal terms as other persons and that must be guaranteed with special care by judges.
- p. 45 According to the social and rights model, disability is the result of the interaction between persons with deficiencies and the environmental barriers that prevent their full and effective participation in society on equal terms with others. From this perspective, the environmental barriers are what do not satisfy the needs of persons with disabilities and not their deficiency; in other words, the environment can be a facilitator or limiting factor because it may impose other types of barriers.

One very important aspect for the full participation of persons with disabilities in society, on equal terms, is cognitive accessibility. Cognitive accessibility consists of the right to understand the information provided by the environment, to master the communication we maintain with it and to

be able to easily do the activities carried out in it, without discrimination for reasons of age, language, emotional state or cognitive ability.

- p. 46 The general design of the system of justice is not conceived to be accessible to persons with disabilities, so the judge must make the necessary adjustments so that it is. If the information is only provided – if provided at all – using a specialized language (inaccessible to the interested party), the disability becomes a fact, product of the interrelationship of the deficiency with the environmental barrier. Seen this way, the system of justice itself can become a barrier.

One of the measures for making cognitive accessibility in the justice system a reality is to issue rulings in an accessible format, in the cases in which persons with disabilities are involved and according to the disabilities involved. An accessible format implies the supplying of information easy to understand and, if necessary, the acceptance of a support person who communicates the wishes of the interested party. These types of rulings are accommodations to the proceeding: they are a means for guaranteeing the accessibility of the judicial process, of the judicial rulings and in general all the procedural acts.

- p. 48 In view of the above, this Court wishes to emphasize the obligation of the judge to make the necessary accommodations to facilitate the understanding of the information and the legal consequences of the judicial procedures in which persons with disabilities participate, in simple language, through accessible formats and with the necessary support, so they may state their arguments in a way that their right to a hearing is fully respected: it is a form of respecting the right to access to justice, and the right to equality and non-discrimination.

- p. 48-49 Regarding the incorrect specification of the challenged acts, it should be understood that “Ernesto” challenges the interdiction regime of the Civil Code, not just in Articles 23 and 450 section II, but understanding this concept as a regulatory system that is reflected in other guardianship provisions – such as Article 537.

## II. Study of the grounds for violation

- p. 49 This Chamber considers that the grounds for violation in which “Ernesto” considers that Articles 1313 and 1341 of the Civil Code, and Article 859 of the Civil Procedures Code for the Federal District (the Procedural Code), violate his capacity to inherit, to own property, to control his own economic affairs, to live independently in the community, to choose his place of residence and to request the distribution of the estate, part from a mistaken premise.
- p. 50 This is because the capacity to inherit that, as a general rule, all persons have, can be restricted for certain persons due to certain impediments, which are listed in Article 131, and there is no reference to persons with disabilities.
- p. 51 Furthermore, this Court has already stated in various precedents that in the social model of disability the priority is the dignity of persons with disabilities, and therefore every law must recognize at all times that persons with disabilities have rights with full legal capacity on equal terms with other persons.
- p. 53 Therefore, disabilities should not be understood as an illness, because that assumption has huge implications on how we conceive and regulate matters related to disability and, in turn, has profound consequences in the legal sphere.
- This Court observes that every rule that touches on the topic of persons with disabilities must always be analyzed from the perspective of principles of equality and non-discrimination.
- p. 54 Thus, the purpose of the CRPD must be kept in mind and the legal solution that enacts it always chosen. The constitutional and conventional regularity of the concept of the status of interdiction must be analyzed from this perspective.

- p. 54-55 It must be considered that discriminatory rules do not admit a compatible interpretation, since if a rule is discriminatory, the compatible interpretation does not repair the discrimination which perpetuates its constant impact.
- p. 55-56 While in the Petition for Constitutional Relief (*Amparo en Revisión*) 159/2013 it was considered that the state of interdiction admitted a compatible interpretation, a new reflection based on the evolution of human rights and seeking an interpretation that enacts the CRDP – particularly Article 12 – this Court determines that the concept of state of interdiction is not compatible with the CRPD and does not admit a compatible interpretation since it violates the right to equality and non-discrimination, among other rights.
- p. 56 This Court has determined that when a rule makes a distinction based on a suspect classification, which is to say a prohibited factor of discrimination, the legislative measure must be given strict scrutiny.
- p. 57 The articles of the Civil Code that establish the state of interdiction and the elimination of legal capacity, clearly make a distinction based on disability. Therefore, it must be proven that the distinction based on disability, the interdiction regime established, has a constitutionally imperative objective.
- p. 58 Historically, the purpose of the state of interdiction was to protect persons with disabilities. Although protection can generally have a constitutionally valid purpose, the state of interdiction is premised on a paternalistic, welfare-based notion of substitution of will that does not recognize human rights: instead of seeking that persons with disabilities make their own decisions, it is designed for a guardian to make the legal decisions of the person with disabilities.

It is possible to infer from Articles 23 and 450, section II, of the Civil Code that once the disability of a person is materially proven, then that person can be declared in a state of interdiction, which implies the person is incompetent and the exercise of rights must be restricted.

p. 58-59 In the judgment of this Court, the concept of the state of interdiction is a disproportionate restriction on the right to legal capacity and represents an undue interference that is not compatible with the CRPD. This disproportion is reflected in the repercussion it has on other rights, since the recognition of legal capacity is inextricably linked to the enjoyment of many other human rights, and therefore it is concluded that the importance of the pursued purpose does not correspond with the harmful effects that the interdiction produces on other rights.

p. 59 The elimination of legal capacity presumes a complete substitution of the will of the person with disability, since the article itself mentions that persons with disabilities may only exercise their rights through their representatives. Furthermore, the measure is excessively inclusive and does not contextualize the right with respect to the support and safeguards that the person needs to exercise his or her legal capacity, instead putting the accent on the deficiency and not on the barriers in the environment for the full exercise of all the rights.

p. 60 Therefore, to deny or limit legal capacity violates the right to equal recognition as a person before the law and constitutes a violation of Articles 5 and 12 of the CRPD, as well as Article 1 of the Constitution.

p. 61 Legal capacity consists of both the capacity to hold rights and obligations (capacity of enjoyment) and the capacity to exercise those rights and obligations (capacity of exercise).

Mental capacity refers to the aptitude of a person to make decisions that, naturally, vary from one person to another and can be different for a particular person in function of many factors, such as environmental and social. The fact that a person has a disability or a deficiency should never be a reason for denying that person legal capacity or any right.

p. 61-62 It is a common error that mental capacity and legal capacity are confused. Thus, when it is considered that a person has a “deficient” aptitude for making decisions – often because of a cognitive or psychosocial disability – his or

her legal capacity is removed through the state of interdiction. However, contrary to the position of the substitution of the will, the CRPD expressly and unquestionably recognizes the right to legal capacity of all persons with disability, without any exception: it does not distinguish among disabilities.

- p. 62 For this Court the right of legal capacity is not a question of intelligence in the decisions that are adopted, nor should it be linked to mental conditions. It is based simply on the recognition of the will of every human being as a central element of the system of rights.
- p. 62-63 Furthermore, this Court affirms that there are different modes or manners of exercising that capacity and, therefore, access to the support needed to exercise their legal capacity and to make decisions should be provided. This assumes that each type of disability requires specific measures in view of the particular condition and personal requirements of each person, so that such persons can fully exercise their autonomy and all their rights.
- p. 63 Providing support is a mechanism established in the CRPD to enforce the rights of persons with disabilities, to guarantee their autonomy in the activities of daily life and to strengthen the exercise of legal capacity, and therefore the lack of support increases the risk of segregation and institutionalization.
- p. 64 Thus, the system of support should be designed according to the specific needs and circumstances of each person, and can be composed of a person, a family, professionals in the area, objects, instruments, products and, in general, any other support that facilitates the full exercise of the rights of persons with disabilities on equal terms with others.
- p. 65 As indicated by the Special Rapporteur on the Rights of Persons with Disabilities (the Rapporteur), the support system should comply with four essential elements which may vary in function of the differences in the conditions and types of accommodations and services to provide such support. These four elements are: availability, accessibility, acceptability and possibility of choice and control.

Regarding availability, it is indicated that there should be accommodations and support services adequate and in sufficient quantity for all persons with disabilities.

- p. 66 With respect to accessibility, the accommodations and support services should be accessible to all persons with disabilities, especially the most disfavored, without discrimination, and the conditions for having access to the support should be reasonable, proportional and transparent.

Acceptability means that the States adopt all appropriate measures to ensure that the support programs incorporate a focus based on rights, are provided voluntarily and respect the rights and dignity of the persons with disabilities. The support should be appropriate from the cultural point of view, take into account gender aspects, deficiencies and needs throughout the life cycle, be designed in a way that respects the intimacy of the users and be of good quality.

Finally, States should design accommodations and support services to ensure that persons with disabilities have choice and direct control, and can plan and direct their own support through various measures.

- p. 66-67 The purpose of the safeguards is to ensure that the measures for exercising legal capacity respect the rights, the will and the preferences of the person with disabilities, and that there is no improper conflict of interest. The safeguards should be subject to periodic exams by a competent and impartial authority or judicial body.

- p. 67 This Court understands that any person that has knowledge of an improper influence or conflict of interest may report it to the judge, which constitutes a safeguard.

Thus, the so-called “best interest” should be substituted with the “best interpretation possible of the will and the preferences”, since under this paradigm personal autonomy and freedom are respected and, in general, all the rights on equal terms with other persons, and therefore the best interest

does not consist of someone else deciding, but in procuring that the persons with disabilities have the maximum autonomy to make decisions for themselves over their life.

p. 68 This Court considers that the right to live independently and be included in the community means having the freedom to choose, and the capacity of control over the decisions that affect one's own life.

p. 69 In this regard, the choice of how, where and with whom to live is the central idea of the right to live independently and to be included in the community. Therefore, personal decisions are not limited to the place of residence, but cover all aspects of life of the person.

From this perspective, it is emphasized that interdiction is not compatible with the right to an independent life and to be included in the community, since the right to an independent life is related to the recognition and exercise of legal capacity.

p. 69-70 The fact that the challenged rules do not recognize the existence of a multiplicity of functional diversities means that the message is transmitted that disability is a disease that can only be "treated" or "mitigated" through extreme measures such as the absolute restriction of the capacity to exercise one's rights.

p. 70 This form of seeing and conceiving disability implies treating persons with disabilities as mere objects of care and not as subjects of rights, since its premise is that the disability completely disqualifies the person, and accents the deficiency.

Instead of achieving the full inclusion of persons with disabilities, the state of interdiction, by establishing the absolute restriction of the capacity to exercise one's rights, makes persons with disabilities invisible and excludes them, since it does not allow them to act with autonomy and interact with other groups, persons and interests that make up society, and therefore reinforces the stigmas and stereotypes.

### Decision

The injunction (*amparo*) will be granted to “Ernesto” in order to delete Articles 23 and 450, section II of the Civil Code from his legal sphere, with the following effect:

- p. 71      The family judge shall void the interdiction declared through the decision of August 14, 1995, as well as all the court proceedings derived from the declaration of interdiction, and issue a ruling establishing the safeguards and support necessary so that “Ernesto” can fully exercise his legal capacity.
- p. 72-73    In that ruling, the judge will disregard the articles declared unconstitutional, as well as the provisions of the Procedural Code that regulate the procedure of interdiction, as incompatible with the social and human rights model.
- p. 73      In the proceeding, the judge shall make the accommodations to the proceeding necessary to guarantee “Ernesto’s” right of access to justice.
- p. 74      Regarding the measures or systems of support, the judge shall always consider the opinions and requests of “Ernesto”, so that it is he who determines what measures of support he needs, including – if he so wishes – the designation of one or more persons he trusts so that, with full respect for his personal wishes and preferences, they may assist him in different tasks.
- p. 75-76    In his ruling, the judge shall clearly establish the safeguards to ensure that “Ernesto”, any third party, or even the court itself, can allege a violation of “Ernesto’s” rights, so that the judge may take the measures to prevent or remedy the violations he was subject to and, if necessary, change the support.
- p. 76      The judge shall notify the Public Defender’s Office of the Federal District (the Public Defender) for purposes of providing free legal advice to “Ernesto” and “Ernesto” will be informed of the existence of this Public Defender in case he wishes to make use of their services.

p. 76-77 The judge shall give notice to the Persons with disabilities Institute of Mexico City, and the System for the Full Development of the Family of Mexico City so, if they are requested by the interested party, those authorities may provide the information necessary in a timely manner to ensure that “Ernesto” will have access to the current programs for assistance, inclusion and wellbeing of persons with disabilities and for the determination of the measures of support and safeguarding.

p. 78 In addition, the judge shall order that notice be given to the Civil Registry of the cessation of the state of interdiction, to cancel the inscription made on the birth certificate of “Ernesto”, in the understanding that both the inscription and the cancellation should be reserved.

To guarantee the full recognition of the legal capacity of “Ernesto”, the judge shall give notice to the National Council for the Development and Inclusion of Persons with Disabilities so it may facilitate the institutional channels to ensure that “Ernesto” can demand before the competent authority the full enjoyment and exercise of his rights.

p. 78-79 Similarly, the judge shall give notice to the National Electoral Institute so that, if “Ernesto” does not already have a voter’s card and he wishes to, his voter’s card may be issued to him.

# 10

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## RIGHTS OF WOMEN DOMESTIC WORKERS

### *Amparo Directo 9/2018<sup>10</sup>*

**Keywords:** *Right to social security, principle of equality, gender discrimination, home workers, domestic workers, IMSS, voluntary regime, mandatory regime.*

#### **Summary**

In 2016, a woman domestic worker sued her employers, the Mexican Social Security Institute (IMSS) and the National Workers Housing Fund Institute (INFONAVIT) for certain relief in a labor lawsuit. The local board of Mexico City issued an award in which it held that the employer was not obligated to register the worker in IMSS. It also absolved IMSS and INFONAVIT of the relief sought from them. The worker filed a direct injunction (*amparo directo*) proceeding against that ruling, which was heard by the Second Chamber of Mexico's Supreme Court of Justice (this Court) through exercise of its power to remove a case from a lower court.

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<sup>10</sup> Decision issued by the First Chamber of Mexico's Supreme Court of Justice (December 5, 2018). Reporting Justice: Alberto Pérez Dayán. *Direct Injunction 9/2018*

### Issue presented to the Supreme Court

Whether the fact that employers do not have the legal obligation to register domestic workers before IMSS constitutes discriminatory treatment, as well as a violation of the human right to social security.

### Holding and vote

The injunction (*amparo*) was granted for essentially the following reasons. Article 13, section II of the Social Security Law (LSS) causes domestic work to be excluded from the mandatory Social Security regime, which disproportionately harms women since, in spite of having been drafted in neutral terms from the gender point of view, domestic work is done primarily by women, and so its effects have a negative impact that principally affects women workers. Article 12, section I of the Social Security Law permits various workers subject to the special work regime, which includes domestic work, to be registered in the mandatory regime of IMSS, and therefore no reason is seen that justifies that domestic work remain excluded from the mentioned social security regime. On the contrary, it was considered that this differentiation implies in itself a violation by the Mexican State of the principle of accessibility to the human right to social security. It was considered that, with this discriminatory treatment, excluding the domestic worker from the mandatory regime of Social Security has generated and permitted an increase in the condition of vulnerability of a group that is vulnerable as such: women domestic workers. In that regard, it was deemed that for the State to be able to mitigate the exclusion and poverty that domestic workers frequently suffer, the means necessary must be generated to provide this vulnerable group adequate, accessible and sufficient social security coverage in order to achieve greater formality in the labor sector and to make it possible for domestic workers to develop a dignified life project through full access to the human right to social security. In view of the above, the Supreme Court held Article 13 to be unconstitutional, section II of the Social Security Law (LSS) which excludes domestic workers from the mandatory IMSS regime, because this Court considered it discriminatory and in violation of the human right to social security in equal conditions. Therefore, it ordered its non-application in that specific case.

Additionally, addressing the systematic and structural importance of the discrimination problem detected, this Court, in its decision, proposed to IMSS to create a pilot program, following certain guidelines, in order to design and execute a special social security regime for women domestic workers.

The Second Chamber ruled on this matter by a unanimous five votes of the Justices Alberto Perez Dayan, Javier Laynez Potisek, Jose Fernando Franco Gonzalez Salas (issued his vote with reservations), Eduardo Medina Mora I. and Margarita Beatriz Luna Ramos (issued her vote against certain considerations).

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### EXTRACT OF THE DECISION

p. 1 Mexico City. The Second Chamber of Mexico's Supreme Court of Justice (this Court), in session of December 5, 2018, issues the following decision.

#### Background

p. 4 By brief filed on April 28, 2016, MRGG sued her employers for the following relief: constitutional indemnity; payment of wages accrued since her dismissal, year-end bonus (*aguinaldo*), vacations, vacation premium, seniority premium and overtime; as well as the retroactive registration before the Mexican Social Security Institute (IMSS). MRGG also sued IMSS and the National Workers Housing Fund Institute (INFONAVIT) for the determination of the fees and application of social security liability for negligence.

p. 5 On February 9, 2017, a Conciliation and Arbitration Board in Mexico City issued an award in which it considered that it was proved that the domestic worker voluntarily resigned, and therefore it absolved the defendants from the payment of the constitutional indemnity and wages accrued since her dismissal. However, it ordered them to pay vacations, vacation premium and year-end bonus, but only with respect to the year prior to the filing of the claim. It also ordered the defendants to pay overtime.

p. 6 Furthermore, it considered that in terms of Article 338, section II of the Federal Labor Law (LFT), the employer is obligated to provide to domestic workers, in case of illness that is not work-related and is not chronic, medical assistance until she is cured; which rules out the possibility that the employer is obligated to register such workers in IMSS. That conclusion is also supported in Article 13, section II of the Social Security Law (LSS). Therefore, the employer is not obligated to register such employees before IMSS.

p. 6 It also considered that the employer is not obligated, in the case of domestic workers, to pay the contribution to INFONAVIT. Therefore, the defendants were absolved from the retroactive registration, as well as the payment of the contributions claimed before IMSS.

Finally, the board absolved IMSS and INFONAVIT from the payment and compliance with all the relief sought.

p. 7 Disagreeing with the decision, MRGG filed a direct injunction (*amparo directo*) proceeding before a collegiate court in Mexico City, which requested this Court to exercise its power to remove this case from a lower court and resolve it.

### Study of the merits

p. 10 The problem of constitutionality raised consists of determining if the fact that employers do not have the legal obligation to register domestic workers before IMSS constitutes discriminatory treatment proscribed by Article 1 of the Constitution, as well as a violation of the human right to social security.

p. 11 In order to resolve the problem, the content and scope of the human right to social security under equal conditions will be examined, as well as the problems that domestic workers confront with respect to access to and enjoyment of the mentioned human right. From there, this Court will determine the constitutionality of the exclusion of domestic employees in the mandatory regime of IMSS.

### I. Right to social security in equal conditions

- p. 11-12 The principle of equality is complex in nature in that it underlies the entire constitutional structure and it becomes positive law in multiple provisions of the Federal Constitution, which impose specific obligations or duties on the public powers. However, such powers, in particular the legislative, are linked to the general principle of equality, established in, among others, Article 16 of the Constitution in that acting with an excess of power or arbitrarily is prohibited.

Thus, from this principle two rules are derived that specifically bind the ordinary lawmaker: (I) on the one hand, an order of equal treatment in situations of equivalent facts, unless there is an objective and reasonable basis that allows giving unequal treatment and; (II) on the other hand, a mandate for unequal treatment, that obligates the lawmaker to establish differences between situations of different facts when the Federal Constitution imposes them.

- p. 12 The cited human right, as a principle, has two forms conceptually: (I) formal or legal equality and (II) substantive or factual equality. The first is a protection against arbitrary distinctions or treatment and it is composed in turn of equality before the law, such as uniformity in the application of the laws by all the authorities, and equality in the law. This is directed to the legislative authority and it consists of the control of the content of the rules in order to avoid legislative differentiations without constitutional justification or violating the principle of proportionality in the broad sense.
- p. 12-13 The second form lies in reaching a parity of opportunities in the real and effective enjoyment and exercise of the human rights of all people, which means that in some cases it is necessary to remove and/or diminish the social, political, cultural, economic or any other kind of obstacles that prevent members of certain vulnerable social groups from enjoying and exercising such rights.

- p. 13-14 Furthermore, the Second Chamber of this Court has reiterated that in order for the differences in the law to be considered in line with the principle of equality it is essential that there is an objective and reasonable justification for making such differentiation; that seeks a constitutionally valid purpose and is adequate for achieving the legitimate end sought, and there must be a relationship of proportionality between the means employed and the end pursued.
- p. 15-16 Now, with regard to the application of the principle of equality in the specific case of the human right to social security, it should be kept in mind that social security includes the right not to be submitted to arbitrary or unreasonable restrictions of the existing social coverage, whether of the public or the private sector, in the understanding that the mentioned right must be implemented under standards of availability, accessibility and affordability.
- p. 16-17 In this regard, as was indicated in General Observation 19 of the Economic, Social and Cultural Rights Committee of the United Nations, while a progressive application exists of the right to social security in which the obstacles that establish the limited resources available of the State to fulfill the rights recognized in the International Covenant on Economic Social and Cultural Rights (ICESCR), it is also true that the State has immediate obligations with respect to the right to social security, like to guarantee the exercise of this right without any discrimination; the equality of rights of men and women; and the obligation to adopt measures to achieve the full application of the referenced right to social security.
- p. 17 This is why, as indicated in the mentioned General Observation, within the essential core or minimum essential levels of the human right to social security, the State must ensure “the right of access to the social security systems or plans without any discrimination, especially for disfavored and marginalized people and groups.”
- p. 18 This is so because the right to social security is of fundamental importance to guarantee all persons their human dignity when they face circumstances

that deprive them of their capacity to fully exercise the economic, social and cultural rights.

- p. 19 In addition to the above, this Court considers that the analysis with respect to compliance with the human right mentioned in this case, cannot start merely from a general conception of the scope of the right to social security, but rather it is also essential to take into account the particular situation domestic employees face, regarding the protection and enjoyment of this social right. This will be developed in the following section.

## II. Problems with respect to the coverage of domestic labor by social security

According to the International Labor Organization (ILO), domestic work “has been traditionally subject to inadequate work conditions, long hours, low wages, forced labor and scarce or no social protection; in other words, exposed to conditions that are far from the concept of decent work”.

- p. 19-20 It has also established that those who carry out domestic work “are a group with a high level of discrimination in its various forms, including the fact that, with great frequency, they are outside the scope of coverage of the social security systems, which makes them a highly vulnerable population”.
- p. 21 There are notable differences in the configuration of social security regimes for domestic work, principally in aspects related to the design of the programs and their functioning. The principal differentiating aspects are related to: the type of regime used to cover workers, the enrollment system – mandatory or voluntary – the quantity of contingencies or branches of social security subject to coverage, the financing, the availability of provision of coverage for migrant domestic work and the effective coverage of the regimes.
- p. 21-22 The process of enrollment of domestic workers in the Social Security regimes can constitute a complex task, due to the atypical nature of the occupation, since the work is done in a private house, which inhibits in certain aspects the application of the workplace inspection; the labor relations are not

usually established through an employment contract; the employers in general do not know their responsibilities or how to comply with the law; there is a high variability in the quantity of hours worked; in-kind wages are common (food, transportation, housing); in some cases the workers have their workplace as their domicile (“inside door”); and, in some cases the workers are in an irregular migratory situation, among other reasons.

p. 22-23 Access to social security is a right that every worker should have, but this is not always the case. Voluntary coverage, according to the ILO, “is ineffective, since the burden falls on the domestic worker of the difficult task of convincing the employer to register in Social Security”. The international evidence seems to indicate that “the mandatory nature of the enrollment plays a fundamental role in the extension of coverage”.

p. 23 In addition, this Court considers it important to mention that the vulnerability and the labor and social security problems that domestic employees face primarily affect women. In the case of the Mexican State, according to data of the National Statistics and Geography Institute, in 2008 it is estimated that 2.3 million people are domestic workers and nine out of ten are women.

The above is relevant not only with respect to the focus on gender that should be adopted at the time of analyzing the violations that arise in the case of domestic workers, but also implies recognizing that a large part of society does not consider domestic work as a “real” occupation, but rather as part of the “normal” or “natural” work of women.

p. 24 Therefore, having an underlying question of gender in the problem of domestic workers with respect to their work conditions and social protection, it is essential that the analysis of the differentiated treatment that is claimed by MRGG address not only the character or the nature of the work performed, but also the disproportional harm that the distinction in the law challenged here produces on women, which, of course, involves a possible intersectional discrimination that increases the vulnerability of such persons.

### III. Constitutional regularity of the differentiation challenged

- p. 24-25 The direct understanding of the duties generated by the principle of equality – in its formal and material component – implies that the Mexican State is obligated to ensure that women domestic workers enjoy the human right to social security, without any discrimination. This fundamental right is directed, evidently, to “every person” and covers, of course, the disfavored groups, such as women employees that perform domestic work.
- p. 26 In this regard, the State can generate differentiated social security regimes to address the different needs of the population, including the vulnerable or marginalized groups. This means that the State has a margin of discretion or configurative freedom necessary to determine, according to the resources it has available and given its specific circumstances, the different manners in which people can access social security, according to the different plans, regimes or existing public policies.

Thus, this Court concludes that the fact that women domestic employees are not contemplated in the mandatory regime of IMSS does not violate in itself and by itself the human right to social security, unless that exclusion is based on discriminatory criteria, or that, depending on the situation of vulnerability of such group, this exclusion generates that in practice such workers lack adequate coverage with respect to the various state welfare benefits they require to have a dignified life project.

#### a) Constitutional regularity of the exclusion of domestic workers from the mandatory regime of Social Security

- p. 26-27 In order to examine if it is discriminatory that employers are not obligated to register their domestic workers before IMSS, it is necessary to analyze the legal regulation of such workers for which both the Federal Labor Law (LFT) and the LSS should be examined harmoniously.

p. 31 As a result of such study, this Court deduces that the fact that women domestic workers are not contemplated within the mandatory regime of Social Security – directed toward workers in general – is not the result of an objective and reasonable differentiation from the constitutional perspective.

p. 31-32 For a differentiated treatment to be in line with the parameter of constitutional regularity, it is necessary: (I) that the differentiation pursue a constitutionally valid purpose; (II) that the different treatment challenged be adequate to achieve the legitimate purpose sought; which means that the measure be capable of reaching its purpose; and, (III) that the legislative measure in question be proportional, that is, be a reasonable relationship to the intended purpose, which presumes a weighing of its advantages and disadvantages.

p. 32 From points (I) and (II), it is important to stress that, if the differentiation challenged concerns one of the specific prohibitions of discrimination contained in Article 1, first and third paragraphs of the Federal Constitution, “it is not sufficient that the purpose sought be constitutionally acceptable, rather it must be imperative” and that “the measure is directly connected to the purpose sought”.

In this regard, this Court considers that in this case strict scrutiny must be applied with respect to the challenged differentiation. While it is true that the regulatory exclusion of domestic workers was formulated by the lawmaker in “neutral terms”, it is also true that factually, it leads to a legal asymmetry that preponderantly and disproportionately affects one of those groups or categories referred to in the non-discrimination clause contained in Article 1 of the Constitution: which is discrimination motivated by “gender”.

p. 32 Indeed, discrimination of treatment whether with respect to norms or acts can occur both directly and indirectly. Thus, “direct discrimination” is produced when certain persons receive treatment less favorable than others due to their different personal condition related to a prohibited motive. For example, when the different treatment is based “expressly” on questions of gender, it is understood that there is direct discrimination.

- p. 32-33 In contrast, “indirect discrimination” means that the laws, policies or public or private practices are neutral in appearance but disproportionately harm a particular group or class of persons. Thus, there can be indirect discrimination against women when the laws, policies and programs are based on criteria that apparently are neutral from the gender point of view but that, in fact, have negative repercussions on women. The laws, policies and programs that are neutral from the gender point of view can, without intending to, perpetuate the consequences of discrimination.
- p. 34 In this regard, this Court cannot overlook that the differentiation of treatment challenged here and, therefore, the impact generated by the fact that domestic labor is excluded from the mandatory regime of Social Security, disproportionately harms women, in spite of being drafted in neutral terms from the gender point of view – statistically domestic work is done primarily by women. Thus, the effects of the challenged law have a negative impact that preponderantly affects women workers and, therefore, generates an indication of discriminatory treatment of women.
- p. 34-35 On this basis, this Court considers that the challenged norms, by excluding women domestic workers from the protection of the mandatory regime of Social Security, become indirect discrimination proscribed by the principle of equality and equity, since that differentiation does not overcome constitutional scrutiny with respect to its proper purpose, suitability and proportionality.
- p. 35 This is so because this Court does not find any constitutional justification for excluding women domestic workers from the mandatory regime of Social Security. The fact that under the LFT such workers engage in “special work”, in any way it implies that, for that simple fact, they can be deprived of adequate social security coverage that allows them to engage in such productive activity in dignified conditions.

In fact, by virtue of section I of Article 12 of the LSS, it is permitted for various workers subject to the special work regime to be registered in the.

mandatory regime of IMSS. Therefore, no reason is seen that justifies, from the constitutional perspective, that contrary to other special work, domestic work must be excluded from that social security regime

On the contrary, this Court considers that this differentiation implies in itself a violation by the Mexican State of the principle of accessibility of the human right to social security.

- p. 35-36 In this regard, with the mentioned discriminatory treatment, the State authorities far from taking the measures necessary to protect the most disfavored or marginalized groups – such as women domestic workers – by excluding them from the mandatory regime of Social Security, it has generated and permitted an increase in the condition of vulnerability and marginalization of a group of the population that, due to its characteristics, is already sufficiently vulnerable.

The challenged law leaves women that perform domestic work in a relegated role. These women unjustifiably endure an undue obstacle to access the State social benefits that would allow them to be protected against circumstances and unforeseen events that restrict their means of subsistence and income. This prevents them from being able to generate a life project in dignified conditions, which is the ultimate purpose of the human right to social security.

The exclusion from adequate coverage and social protection causes domestic workers to face a situation of precariousness and social neglect that worsens their condition of marginalization and contributes to the increase of labor and social inequalities between men and women, as well as the perpetuation of stereotypes and prejudices with respect to the “lack of value” of domestic work. This in turn, affects the dignity of the women who engage in such productive activity.

- p. 36-37 There is a State reticence to generate the strategies and policies for social security that are necessary and adequate so that such highly vulnerable groups can have real access to the State social security benefits that would

prevent such workers from being unduly and disproportionately affected, from an economic perspective, in case of facing unforeseen events that can result in a risk to their project for a dignified life – such as illness, severance, and aging, among others.

- p. 38 Thus, there is an unavoidable obligation on the part of the State to mitigate the state of social exclusion and poverty that women domestic workers frequently endure. And that obligation begins by generating the means necessary to provide this vulnerable group social security coverage that is adequate, accessible and sufficient in order to, on the one hand, achieve greater formality in the labor sector and, on the other hand, allow such workers to develop a dignified life project through full access to the human right to social security.
- p. 38-39 In that regard, in the judgment of this Court, not only does the exclusion from the mandatory regime of Social Security involve a discriminatory act that perpetuates and strengthens the social marginalization of women domestic workers, but in addition, this violation cannot be remedied or overcome simply because under the legal system such workers can access the so-called voluntary social security regime.
- p. 39-40 In light of the above, this Court concludes that the fact that women domestic workers are excluded from the mandatory regime of IMSS violates the human right to social security in equal conditions. Thus, it is appropriate to declare the unconstitutionality of Article 13, section II of the LSS.

### Decision

- p. 45 The arguments of MRGG are grounded. Now, what is appropriate is to grant the *amparo* requested for the following effects. Article 13, section II of the LSS is unconstitutional, since excluding domestic workers from the mandatory regime of Social Security is discriminatory and violates the human right to social security.

Now, with respect to the unconstitutionality of the challenged article and, consequently, its non-application in the challenged decision – since it is a direct injunction (*amparo directo*) – this Court considers that it is not possible to order either the employer or IMSS to retroactively pay the respective social security fees, or other benefits that are established in the mandatory regime of IMSS, since it is obvious that the challenged rule enjoyed full presumption of constitutionality. Prior to the filing of this *amparo* proceeding, there was no legal obligation that could be claimed from the employer with respect to the “failure” to register MRGG before IMSS and to pay the respective social security fees, nor any debt that could be legally charged to IMSS.

- p. 46            However, this Court, upon seeing the existence of discriminatory norms that affect the dignity of a vulnerable sector, such as women domestic workers, is obligated to issue guidelines that orient the competent State authorities with respect to the need and duty they have to comply, effectively, with the protection and enjoyment of the human right to social security of women domestic workers.
- p. 46-47        Indeed, this Court concludes that the unconstitutionality found, generates a structural problem from the institutional point of view that implies that the state authorities, whose power is linked with the granting of adequate, available, accessible and sufficient social security coverage of women domestic workers, must in turn undertake the measures necessary to structurally modify the rules and public policies that concern the social security of this highly vulnerable sector, so that the Mexican State can comply with the obligations related to the full enjoyment of such human right.
- p. 47-48        Taking into account the systemic and structural importance of the problem of discrimination detected, as well as the obligation derived from Article 1 of the Federal Constitution, it is appropriate to convey to IMSS that the exclusion of women domestic workers from the mandatory regime of Social Security generates discrimination. Also, it is important to convey that the voluntary social security regime is ineffective to protect, adequately and with dignity, the human right to social security of such women workers.

Furthermore, to guide the implementation of the public policy that must be undertaken to resolve this social security problem, this Court suggests to IMSS that, within a reasonable period, which could be at the end of the year 2019 – and requesting for this the budget line items that are considered necessary in the exercise of that year – implement a pilot program whose ultimate purpose is to design and execute a special social security regime for women domestic workers, based on the following guidelines:

- p. 48-51
- 1) The special social security regime must have conditions no less favorable to those established for other workers; 2) it must take into account the particularities of domestic work; 3) it must be easy to implement for the employers; 4) it cannot be voluntary, but rather mandatory; 5) it must be viable for IMSS, from a financial point of view; and 6) the possibility should be explored of administratively facilitating compliance with the obligations that arise from this employers' regime.

Finally, this Court considers that the purpose of the above guidelines or instructions is to ensure that, in a period of no more than 18 months from the implementation of the mentioned pilot program, the IMSS, according to its technical, operative and budget capacities, be able to propose to the Congress of the Union the necessary regulatory adjustments for the formal incorporation of the new special system of social security for women domestic workers gradually and, in this regard, in a period of no more than three years, be able to obtain effective, robust and sufficient social security for all women domestic employees.



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## REGIMEN OF SEPARATE BUT EQUAL AND SAME-SEX MARRIAGE (ADOPTION BY SAME-SEX COUPLES)

### *Acción de Inconstitucionalidad 8/2014<sup>11</sup>*

**Keywords:** *Principle of equality and non-discrimination, best interest of the child, adoption, strict scrutiny test, suspect classifications, prohibited classifications of discrimination, regime of separate but equal, same-sex couples, equal marriage, marriage between people of the same sex, Campeche, civil domestic partnerships, alternatives to marriage, families, parental rights.*

#### **Summary**

The Regulatory Law of Civil Domestic Partnerships of the State of Campeche [Ley Regulatoria de Sociedades Civiles de Convivencia del Estado de Campeche (LRSCC)] was published on December 27, 2013. On January 30, 2014, Ana Patricia Lara Guerrero, president of the Human Rights Commission of the State of Campeche [Comision de Derechos Humanos del Estado de Campeche (CDHC)], filed before Mexico's Supreme Court of Justice (this Court) an action on the grounds of

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<sup>11</sup> Decision issued by the First Chamber of Mexico's Supreme Court of Justice (August 11, 2015). Reporting Justice: Margarita Beatriz Luna Ramos. Action On The Grounds Of Unconstitutionality 8/2014

unconstitutionality (*acción de inconstitucionalidad*) against the approval, promulgation and publication of Article 19 of the LRSCC, which prohibited domestic partners from adopting together or individually and/or sharing or entrusting parental authority or guardianship and custody of children and adolescents with the other partner. According to the CDHC, this was contrary to Articles 1 and 4 of the Federal Constitution, as well as Articles 1, 17 and 24 of the American Convention on Human Rights.

### Issue presented to the Supreme Court

Whether or not it is constitutionally valid to prohibit domestic partners from adopting together or individually, and sharing or entrusting the parental authority or guardianship and custody of the children and adolescents to the other partner, in accordance with protection of the development and organization of the family, the best interest of the child and the principles of equality and non-discrimination.

### Holding

Article 19 of the LRSCC was declared invalid, for essentially the following reasons. The article prevented children and adolescents in adoption from forming part of a family composed of domestic partners, which was contrary to the constitutional concept of family and the principle of the best interest of the child since, instead of looking at the suitability of the adopting parents, it made a generic prohibition on a particular civil status – domestic partnership. In this regard, the article discriminated against both same-sex and different-sex couples in domestic partnerships, making an unconstitutional distinction based on the suspect classification of civil status. It also discriminated against them by not protecting that couple's family in the same manner, which threatened the principle of equality and non-discrimination and, therefore, did not pass the first level of strict scrutiny of the measure. Furthermore, the domestic partnership was the only concept in Campeche accessible to couples of the same sex and the only one that prohibited adopting and sharing parental authority of children and adolescents, which was a discrimination by impact and a violation of the constitutional principal of equality and non-discrimination based on the suspect classification of sexual orientation, since it should not be relevant to the formation of a family or to adopting or to sharing parental

authority. Therefore, it was determined that the article was unconstitutional and contrary to the constitutional concept of family, to the best interest of the child and the principle of equality and non-discrimination.

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### EXTRACT OF THE DECISION

p. 1 Mexico City. Mexico's Supreme Court of Justice (this Court) sitting in plenary, in session of August 11, 2015, issued the following decision.

#### Background

By brief presented on January 30, 2014, Ana Patricia Lara Guerrero, president of the Human Rights Commission of the State of Campeche [Comision de Derechos Humanos del Estado de Campeche (CDHC)], filed an action on the grounds of unconstitutionality (*acción de inconstitucionalidad*) against the approval, promulgation and publication of Article 19 of the Regulatory Law of Civil Domestic Partnerships of the State of Campeche [Ley Regulatoria de Sociedades Civiles de Convivencia del Estado de Campeche (LRSCC)].

p. 2-3 The CDHC held that the challenged article was contrary to Articles 1 and 4 of the Federal Constitution, as well as Articles 1, 17 and 24 of the American Convention on Human Rights (ACHR) because the article in question had a discriminatory impact on those who, wishing to live together and provide long term mutual support, established a domestic partnership and eroded the right to the protection, organization and development of the family.

#### Study of the merits

p. 13-14 The civil domestic partnership is a civil contract that is defined by: a) the union of two persons of the same or a different sex; b) the desire for permanency; c) mutual assistance; d) life in common, and e) common address. This Court observes that such concept is similar to the definition of marriage and concubinage, in relation to mutual assistance, permanence and a common address. Partnerships also generate support, succession and guardianship rights and establish rules regarding the property of the couple.

- p. 14 For this Court it is clear that the domestic partnership generates a civil status different from cohabitants, since it has a purpose, obligations and rights, similar to marriage and concubinage but only for persons who do not fall under those other premises, and it generates rights and obligations that do not apply to the civil status of being single.
- p. 14-15 In the action for constitutional relief under an injunction (amparo) (*Amparo Directo en Revisión*) 597-2014, the First Chamber of this Court emphasized that civil status is defined, in the strictest sense of the concept, as the personal situation of the individual, whether single or a couple, and for a couple, whether it is *de iure* or *de facto*. Civil status is closely related to personal liberty, dignity and freedom of thought, and addresses the autonomous decision of whether or not to enter into a permanent personal relationship with another person, with respect to which consequences are created, depending on that status.
- p. 15 Thus, the domestic partnership is a civil status in Campeche whose partners – under the challenged article – are being expressly prohibited from adopting individually or together, and sharing or entrusting the parental authority or guardianship and custody of the children and adolescents of the other partner.
- This Court has been clear in determining that those who unite as a couple in fact or in law in order to form a life in common are part of a family group, essentially equal in the sense that care, support, loyalty and solidarity are provided, and that the various forms of family are all protected by Article 4 of the Constitution. This protection, as this Court sitting in plenary determined in the action on the grounds of unconstitutionality (*Acción de Inconstitucionalidad*) 2/2010, must cover all its forms and manifestations in society, including – among others – the families that are constituted through *de facto* or legal unions (of same-sex or different-sex couples), as well as single parent families
- p. 15-16 This Court considers that there are at least two ways to look at the challenged article. First, from the best interest of children and adolescents and the

constitutional concept of family and, second, from the principle of equality and non-discrimination.

**I. Article 4 of the Constitution. Best interest of children and adolescents and the constitutional concept of family.**

- p. 18 Adoption is an institution that seeks to protect and guarantee the rights of children and adolescents, in order to incorporate them into a family that can provide them with affection, care, education and adequate conditions for their development. Thus, adoption must be considered a right of children and adolescents for which the protection of their interests must be guaranteed.
- For this Court it is clear that the fundamental point to consider in an adoption is the best interest of the children or adolescents, so that they may form or join a family where they will receive affection, care, education and adequate conditions for their development, all rights inherent to them.
- p. 19 The type of family into which the adopted children or adolescents will be integrated is not a factor to consider; rather what matters is the suitability of the adoptive parent or parents for providing them affection, care, education and adequate conditions for development, since that, and not the type of family, is what will permit the child or adolescent to fully develop.
- p. 22 The State's obligation in an adoption process is to protect the interest of children and adolescents in being adopted by a suitable person or persons, that allows them to form part of a family and to grow up in an environment in which they develop their potential and are cared for.
- p. 23 Thus, for this Court it is clear that the challenged rule absolutely limits the possibility of domestic partners adopting – alone or as a couple – which has an impact not only on them, but also on the children and adolescents who may be adopted, preventing them from joining a family of domestic partners.

This Court considers that the absolute and *ex ante* prohibition on being considered as an adoptive parent due to the type of civil union does not have any valid constitutional justification, and absolutely prevents children and adolescents from joining a constitutionally protected family composed of persons who would be suitable to provide a family where they can fully develop. This violates the right of children and adolescents to form part of or join a family, as long as the adoptive parent or parents meet the suitability requirements.

- p. 24 This Court thinks that belonging to a domestic partnership does not put at risk, in itself, the best interest of the child or adolescent, since any person individually and any couple of the same or different sex must be considered under equal circumstances. Furthermore, the type of civil union to which the possible adoptive parents belong cannot be among the essential requisites for adoption, nor their sexual orientation, since these circumstances have no effect on their suitability to provide the children and adolescents a family where they can fully develop.

## **II. Article 1 of the Constitution. Principle of equality and non-discrimination**

- p. 26 This Court see two different kinds of discrimination in the challenged rule: on the one hand, discrimination that affects the domestic partners generically, based on the suspect classification of civil status recognized in Article 1 of the Federal Constitution and, on the other hand, discrimination based on the suspect classification of sexual orientation, recognized in the same constitutional article.

### **a) Fundamental elements that make up the general parameters of the principle of equality and non-discrimination**

Article 1 of the Constitution prohibits discrimination based on the suspect classifications arising from ethnic or national origin, gender, age, disability, social condition, health conditions, religion, opinions, sexual preferences, civil status or any other that threatens human dignity and the purpose of which is to cancel or threaten the rights and freedoms of people.

- p. 27-28     However, not every difference in treatment toward a person or group of persons is discriminatory. Distinction and discrimination are legally different, since the first constitutes a reasonable and objective difference, while the second constitutes an arbitrary difference that redounds at the expense of human rights. Similarly, the Federal Constitution does not prohibit the use of suspect classifications, but rather their unjustified use. A characteristic note of discrimination is that the different treatment affects the exercise of a human right. The First Chamber of this Court has held that strict scrutiny of distinctions based on suspect classifications guarantees that only those that have a very robust justification will be constitutional.
- p. 28-29     The First Chamber of this Court has developed, in several actions for constitutional relief (*amparos en revision*), the form in which equality must be examined in these cases to clarify the differences between ordinary scrutiny and the scrutiny that must be applied to legislative distinctions based on a suspect classification.
- p. 28-29     Thus, first it should be examined whether the distinction based on the suspect classification meets a compelling purpose from the constitutional point of view. When the strict scrutiny test is applied to a legislative measure that makes a distinction, the measure must have more than a constitutionally admissible purpose. Under a higher level of scrutiny, the measure must have a compelling constitutional mandate.
- p. 29         Secondly, the legislative measure must be narrowly tailored to achieving the above indicated constitutional objectives; in other words, the measure must be fully focused on achieving the purpose and cannot just be related to those objectives.

Third and last, the legislative distinction must be the least restrictive measure possible to effectively achieve the imperative purpose from the constitutional point of view.

**b) Discrimination that affects domestic partners generically, based on the suspect classification of civil status recognized in Article 1 of the Federal Constitution**

- p. 30-31 According to Article 1 of the Constitution, civil status constitutes a suspect classification. Furthermore, under the Civil Code of the State of Campeche (the Civil Code), domestic partnerships are the only civil status for which adoption is precluded.
- p. 32 In this respect, this Court considers that the distinction made by Article 19 of the LRSCC based on the suspect classification of civil status not only discriminates equally against same-sex and different-sex couples who enter into a domestic partnership in function of their civil status, but also discriminates against them by not protecting the family formed by that couple equally.
- p. 32-33 Thus, the national legal order can no longer tolerate allowing the type of relationship – in this case civil status and applying strict scrutiny – whether such couple is same sex or different sex, whose effects are the establishment of family ties, to result in a difference in treatment introduced by the law and not argued constitutionally, because it threatens the principle of equality and non-discrimination and does not pass the first level of strict scrutiny of the measure.

**c) Sexual orientation discrimination recognized in Article 1 of the Federal Constitution**

- p. 33 This Court has identified a second aspect of discrimination for sexual orientation, which involves discrimination by results or by disproportionate impact.
- p. 33-34 In this regard, the First Chamber of this Court, in the action for constitutional relief (*Amparo Directo en Revision*) 1464/2013, established that discrimination may occur when the rules and practices are apparently neutral but their result or application has a disproportionate impact on persons or groups in

a situation of historic disadvantage based exactly on that disadvantage, without any objective and reasonable justification. Thus, the discrimination is not only felt when the rule directly regulates the conduct of a vulnerable group, but also when the effects of its application generate discrimination against them. This means that, as was established in the action for constitutional relief (*Amparo en Revision*) 152/2013, a law that in principle appears neutral, could have discriminatory effects for certain groups of persons.

- p. 35 To be able to establish that a rule or public policy that does not contemplate an explicit distinction, restriction or exclusion does generate a discriminatory effect on a person, given the place that person occupies in the social order or to the extent that person belongs to a particular social group, contextual or structural factors in the discrimination must be analyzed. Among those factors are relations of subordination regarding gender, sex-gender identity, sexual orientation, class or ethnic belonging; social and cultural practices that assign a different value to certain activities when carried out by historically disadvantaged groups, and socioeconomic conditions.
- p. 36-37 In this regard, laws do not regulate human conduct in a neutral vacuum; they do so to transmit an official evaluation of the state of something, a democratic judgment on a question of general interest.
- p. 37 This Court observes that while domestic partnerships are not specified as limited to same-sex couples, in reality they constitute the only regime for those couples, which creates an axiological burden for these types of unions.
- p. 38 In this regard, the statement of intent of the challenged law shows that the intention behind domestic partnerships was to create a concept different from marriage and concubinage, emphasizing that such partnerships do not violate the matrimonial institution nor impede concubinage. It also observes that such concept does not challenge the “conventional family”, nor attempts to undermine moral values, even emphasizing that the creation of such concept does not change the rules regarding adoption.

This is very important, since while in the first draft of the law there was no express prohibition on couples united in civil domestic partnerships adopting, it was clear from the statement of intent that the concept of the partnerships would not include adoption. This Court also observes that when the legislative process advanced, the article challenged today prohibiting adoption was included without any explanation given in the diary of debates.

- p. 39 In this regard, it is clear that the Civil Code of Campeche reserves marriage and concubinage for heterosexual couples and, although the statement about the domestic partnerships did not seem directly discriminatory, seeing it in the local legislative context, it is clear that it is the only concept available to same-sex couples.
- p. 40-41 For this Court, the discriminatory nature of the rule is clear because adoption is only prohibited for the civil domestic partnership, and therefore the rule attempts to prevent couples of the same sex from having access to adoption based exactly on the suspect classification of sexual orientation, which is a violation of the constitutional principle of equality and non-discrimination. The idea that the homosexuality of the domestic partners implies an impact on the best interest of the adopted children and adolescents cannot be upheld.
- p. 42 To ignore the clear intention of the rule and merely analyze the protection of the family or civil status discrimination would mean ignoring a constitutional grievance with a profound impact on the principle of equality and non-discrimination.
- p. 43 Thus, the fact that same-sex couples can only avail of domestic partnerships generates a disproportionate impact constituting a discriminatory concept that, in this case, constitutes a regime of separate but equal.
- p. 44 In relation to the second regulatory portion of Article 19 under analysis, regarding the prohibition on sharing or entrusting parental authority over the children and adolescents, this Court emphasizes that under the rule, entrusting the parental authority would refer only to cases of mothers or fathers, where there is a possibility of sharing with or entrusting the parental authority to the partner.

In this regard, this Court considers that such regulatory portion is equally discriminatory, since it has the clear intention of prohibiting same-sex couples from adopting or sharing parental authority over children and adolescents, since that would imply – according to the local legislator – violating moral values of the traditional family.

This Court does not share this conception, since sexual orientation is not a relevant element to take into consideration in the formation of a family, in undertaking adoption, or in sharing the parental authority with a mother or father.

### Decision

- p. 24 This Court concludes that the arguments of the CDHC are justified, since the challenged article is unconstitutional because it violates both the best interest of children and adolescents, and the constitutional protection of all forms of family, in light of Article 4 of the Federal Constitution.
- p. 32-33 This Court considers that the distinction made by Article 19 of the LRSCC based on the suspect classification of civil status is not directly connected with the constitutional mandate of protection of the family, nor with the protection of the best interest of the children and adolescents. Therefore the rule must be eliminated from the national legal order since it threatens the principle of equality and non-discrimination and does not pass the first level of strict scrutiny of the measure.
- p. 45 It is also concluded that the difference in treatment introduced and not argued constitutionally that absolutely prevents and prohibits adoptions and the sharing of parental authority does not pass the first level of strict scrutiny and, therefore, must be eliminated from the legal order since it threatens the principle of equality and non-discrimination, based on the prohibited classification of sexual orientation.

This is in view of the fact that the rule analyzed does not pursue a constitutionally valid purpose, but rather, on the contrary, has the purpose

of discriminating based on a classification prohibited by Article 1 of the Constitution, relative to sexual orientation, and therefore it is considered that the CDHC's concept of invalidity relative to the violation of the principle of equality and non-discrimination is justified.

p. 46 Therefore, Article 19 of the LRSCC is declared invalid. The declaration of invalidity reached in this decision has general effects and will take effect from the date of notification of the rulings of this final decision to the Congress of the State of Campeche.

The local Congress may issue a new provision in substitution of the one that has been invalidated at its discretion.

The legislative gap may be filled by the provisions referring to the rules of adoption applicable for marriage and concubinage.

## 12

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### RIGHT TO EQUALITY, RIGHT TO THE NAME OF TRANSGENDER PERSONS (RECOGNITION OF THE GENDER IDENTITY OF TRANS PEOPLE IN OFFICIAL DOCUMENTS)

#### *Amparo en Revisión 1317/2017<sup>12</sup>*

**Keywords:** *right to the free development of one's personality, right to personal identity, right to a name, right to sexual identity, right to gender identity, right to a private life, right to intimacy, adjustment of documents, birth certificate, sex and gender reassignment, recognition of identity, trans people*

#### **Summary**

CLM went to the Civil Registry in Manlio Fabio Altamirano, Veracruz (the Civil Registry) to request the modification of her birth certificate so that it would reflect her gender identity. The authority did not respond to her petition for almost four months, so she filed an injunction requiring a two-stage judicial review for relief of an unremediated breach of rights (*amparo indirecto*) against the failure to respond. In the injunction (*amparo*) proceeding, the Civil Registry rendered its report responding that under current local law, the changing of the birth certificate

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<sup>12</sup> Decision issued by the First Chamber of Mexico's Supreme Court of Justice (October 17, 2018). Reporting Justice: Norma Lucía Piña Hernández. Action For Constitutional Relief Through Injunction 1317/2017

must be processed before a judicial authority, since it is a change of name and sex, which are essential circumstances of the act and, therefore, the procedure could not be carried out through the administrative procedure requested. The district judge of Veracruz that heard the case denied the injunction (*amparo*), confirming that the procedure requested should be carried out judicially. CLM filed a motion for review which the First Chamber of Mexico's Supreme Court of Justice (this Court) heard upon resuming its original jurisdiction.

### Issue presented to the Supreme Court

To determine if it was constitutional for the Civil Registry to refuse to adjust CLM's self-perceived gender identity on her the birth certificate through an administrative procedure, given that the local law established that the procedure must be through a judicial proceeding or whether, on the contrary, the law and the actions of the Civil Registry were discriminatory and contrary to the right to the free development of one's personality and, specifically, the right to gender identity.

### Holding and vote

The appealed decision was modified and the *amparo* granted for the following reasons. Gender identity is a constituent and constitutive element of a person's identity, and therefore its recognition by the State is vitally important for guaranteeing the full enjoyment of the human rights for trans people, including protection against violence, torture, mistreatment, and rights to health, education, employment, housing, social security, and freedom of expression and association. Thus, the right to gender identity is enforced by guaranteeing that the definition of one's own sexual identity and gender coincides with the identification information stated in the different registries and identification documents. Therefore, the State must guarantee that people can exercise their rights without being obligated to maintain another identity that does not represent their individuality and which could also generate the violation of other human rights. In this case, it was observed that the Civil Code for the State of Veracruz distinguishes the type of proceeding for two equivalent situations: (1) for a sex and gender adjustment or concordance on the birth certificate, a formally judicial procedure before the Courts is established and (2) for the change of last names in cases of voluntary recognition of a

child; a formally administrative procedure before the Civil Registry is established. This Court considered that there is no reason for this distinction, since it did not observe an objective and reasonable basis for permitting an unequal treatment of the two situations, and therefore it concluded that the difference was the result of direct regulatory discrimination. Consequently, the injunction (*amparo*) was granted to CLM and the Civil Registry was ordered to process her request in order to allow her to make use of the formally and materially administrative procedure to obtain the adjustment of her gender identity. In addition, it was held that the procedure must comply with the standards indicated by both this Court and the Inter-American Court of Human Rights. Thus it was ordered that a new birth certificate be issued that reflects the relevant changes but without evidencing the prior identity, and that the original birth certificate be reserved, without publishing it or issuing any record, except by judicial order or ministerial request.

The First Chamber ruled on this matter by a majority of four votes of Justices Arturo Zaldívar Lelo de Larrea, José Ramón Cossío Díaz (reserved the right to issue a concurring opinion), Alfredo Gutiérrez Ortiz Mena and Norma Lucía Piña Hernández. Justice Jorge Mario Pardo Rebolledo voted against (reserved the right to issue a dissenting vote).

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### EXTRACT OF THE DECISION

p. 1 Mexico City. The First Chamber of Mexico's Supreme Court of Justice (this Court), in session of October 17, 2018, issues the following decision.

#### Background

p. 6-7 On April 23, 2015, CLM (the affected party) filed an indirect injunction as a two-stage judicial review relieving an unremediated breach of rights (*amparo indirecto*) against the head of the Civil Registry of Manlio Fabio Altamirano, Veracruz (the Civil Registry), for the failure to respond in a timely manner to her petition filed on January 8, 2015. In that petition, the affected party requested that her birth certificate be changed as a result of a sex and gender reassignment so that it says "female" instead of "male" in relation to her sex; and that the original name be changed. She also explained that

she made this request because she is a transsexual person who finds her full aspirations in the female sex.

- p. 7 On May 22, 2015, the Civil Registry issued its report and, in response to the request to change the birth certificate stated that the correction requested involved a change in order to reach her aspirations and not an error on the birth certificate, and therefore CLM must process it before the judicial authority.
- p. 8 On June 16, 2015, the affected party expanded her injunction (*amparo*) claim in order to challenge the articles of the Civil Code for the State of Veracruz (the Civil Code) and indicated the response of the Civil Registry to her request to change her birth certificate as the first applicable act.
- p. 9-10 The district judge of Veracruz that heard the matter issued a decision on October 18, 2016 ruling to deny the injunction (*amparo*) regarding the articles challenged and their application.
- p. 11 CLM filed a motion for review over which this Court assumed original jurisdiction to hear the matter.

### Study on the merits

- p. 36 This Court considers that the affected party's grievances are essentially justified and sufficient to change the challenged decision.
- p. 39 This is so because the Civil Code establishes a distinction that requires two procedures for the adjustment of essential information on the birth certificate, which must be processed before different authorities (one judicial and the other administrative); and that distinction, being unreasonable, is the result of direct regulatory discrimination.
- p. 40 The Federal Constitution recognizes that human dignity is the basis and condition for all other rights. In this respect, the Plenary of this Court, in the Direct Injunction as an action for constitutional relief (*Amparo Directo*) 6/2008, held that all the other rights stem from the right to human dignity,

in that they are necessary for individuals to fully develop their personality, among which are the right to privacy, to name, to image, to personal dignity and to free development of their personality.

- p. 41 The Plenary of this Court has also established that the free development of one's personality includes, among other expressions, the freedom to choose one's personal appearance, and free sexual choice, to the extent that these aspects are part of the manner in which a person wishes to project herself and live her life and that, therefore, only she can decide for herself.

Related to the free development of one's personality is the right to personal identity and, in particular, the right to gender identity, which is how the person sees herself.

Gender identity is the internal and individual life of gender as each person perceives it, which may or may not correspond to the sex assigned at the time of birth, including the personal life of the body (which may or may not involve the change of appearance or bodily function through medical, surgical or other types of procedures, as long as it is freely chosen) and other expressions of gender, including dress, mode of speaking and manners.

- p. 42 Thus, gender identity is a constituent and constitutive element of the identity of people, and consequently its recognition by the State is vitally important in order to guarantee the full enjoyment of the human rights of trans people, including protection from violence, torture, mistreatment, right to health, education, employment, housing, access to social security, as well as the right to free expression and association.

- p. 43 The right of people to autonomously define their own sexual and gender identity is enforced by guaranteeing that such definitions coincide with the identification information in the registries and identity documents. This means all persons have a right to have the attributes of their personality indicated in those registries and other identification documents coincide with the identity definitions they have of themselves and, if they do not coincide, it should be possible to change them.

- p. 45 Thus, the failure to recognize the right to gender identity can in turn obstruct the exercise of other fundamental rights and, therefore, have an important differential impact on trans people, who often find themselves in a vulnerable position. Therefore, the right of each person to autonomously define their sexual and gender identity and to have the information in the registries and the identity documents correspond to the definition they have of themselves, is protected by the American Convention on Human Rights (ACHR) through the provisions that guarantee the free development of one's personality, the right to privacy, the recognition of legal personality and the right to a name.
- p. 45-46 In this regard, the State must guarantee that people can exercise their rights and contract obligations according to that same identity, without having to maintain another identity that does not represent their individuality. This is especially pertinent when it involves continuous exposure to social questioning of that identity thereby affecting the effective exercise and enjoyment of the rights recognized by the internal law and international law.
- p. 46 This Court observes that the challenged rules do contemplate the possibility of using a procedure that allows the interested person to obtain the sex or gender adjustment on the birth certificate; however, they establish that such procedure must be carried out before a formally judicial authority.
- p. 51 In contrast to this, Article 759 of the Civil Code establishes the voluntary recognition by a father of his child as an exception for requesting the correction or modification of a civil registry certificate before a Judicial authority.
- p. 52 Several provisions of that code establish that a child may be recognized by one of the parents after the birth certificate is prepared, and that this can be done through an administrative procedure before the Civil Registry, specifically through a certificate of recognition and, in that certificate, the birth certificate will be mentioned through the corresponding notation.

- p. 52-53 This Court considers that the recognition of a child after the birth certificate is prepared will involve the change of an essential piece of information of that certificate (of birth), which is the last name of the person whose birth was registered.
- p. 53-54 In spite of the fact that both proceedings (recognition of child or sex or gender reassignment) have equivalent situations of fact, since in both the purpose is to change an essential piece of information of the birth certificate, which result in reflecting this change in the corresponding certificate, one of those proceedings must be processed before a formally judicial authority – the sex or gender reassignment – and the other before a formally administrative authority – the recognition of a child; however, such distinction with respect to the authority that must hear and process the request is unreasonable, since there is no objective and reasonable basis for treating one or the other situation differently regarding the formal nature of the authority that must process the request.
- p. 54 Regulatory discrimination exists when two equivalent situations of fact are regulated differently without a reasonable justification for that differentiated treatment, as occurs in the challenged article, and therefore it is unconstitutional.
- p. 55 The regulatory discrimination indicated here directly harms the affected party because, while for purposes of the adjustment of self-perceived gender identity, proceedings could be carried out before a judicial authority or before an administrative authority, the most logical proceeding for that purpose would be carried out administratively before an administrative authority.
- p. 56-57 In this regard, following the Inter-America Court of Human Rights (IACHR), the nature of the authority that processes it, in principle, is not relevant for determining which proceeding is more appropriate for adjusting gender identity, and therefore it may be processed before a judicial or an administrative authority; what is relevant is that the respective procedure have a materially administrative nature and, ideally, that the procedure be materially and formally administrative, which means processed before a

formally administrative authority, in an administrative proceeding, since such a procedure would imply fewer formalities and delays than a judicial procedure.

- p. 60 This Court is convinced by the above that the regulation that requires CLM to carry out a procedure for the adjustment of self-perceived gender identity before the Judicial Branch is unconstitutional and should not be applied; rather, in all cases, a formally and materially administrative procedure before the Civil Registry should be permitted to adjust her gender identity.

Consequently, given the unconstitutionality of the analyzed article, the Civil Registry should process the request made by the affected party to adjust the sex or gender on the birth certificate, for which purpose such authority must adhere to certain standards.

The necessary characteristics of a procedure for adjusting self-perceived gender identity in order for it to be appropriate for that purpose and consistent with the standards indicated by both this Court and the IACHR in its Consultative Opinion OC-24/17 must be understood.

- p. 61 In this regard, the IACHR has indicated that, regardless of the formal nature (judicial or administrative) of the procedures for the change of name, adjustment of image and correction of the reference to sex or gender, they must comply with the following five requirements:

**1. Procedure focused on the full adjustment of the self-perceived gender identity**

- p. 63 In addition to the name, which is just one element of identity, these procedures must focus on the full adjustment of other identity components so that they reflect the self-perceived gender identity of the interested persons. Therefore, they must permit changing the registration of the name and, if applicable, adjust the photographic image, and correct the registry of gender or sex, in both the identity documents and the registries that are relevant for the interested parties to exercise their rights.

- p. 63-64 The State must ensure that the changes of a person's information made before the civil registries are updated in any other documents and institutions without requiring the involvement of the petitioner, so that person is not submitted to unreasonable burdens for adjusting their self-perceived gender identity in all the relevant registries.
- p. 64 On this point the Plenary of this Court, when ruling on Direct Injunction (*Amparo Directo*) 6/2008, held that if a complete adjustment of gender identity is not permitted through issuance of new identity documents, this would require trans people to show a document with information that would reveal their condition as a trans person, without the full recognition of the person he or she really is, generating a tortuous situation in their daily life, which unquestionably affects their emotional or mental state and, therefore, their right to full health.

**2. Procedure based solely on the free and informed consent of the petitioner without demanding medical and/or psychological requirements such as certifications that could be unreasonable or pathological**

- p. 65 The regulation and implementation of these processes must be based solely on the free and informed consent of the petitioner. Thus, they must rest on the principle that gender identity is not proven. Therefore, States must respect the physical and psychological integrity of people, legally recognizing the self-perceived gender identity without any obstacles or challenges by third parties or abusive requirements that may be violations of human rights.
- p. 66 In this regard, any medical, psychological or psychiatric certificates that an authority or law requires in this type of procedure are invasive and question the identity assignment chosen by the person, since they are based on the presumption that having an identity contrary to the sex that was assigned at birth is a pathology. Therefore, these types of requirements or medical certificates contribute to perpetuating the prejudices associated with the binary construction of masculine and feminine genders, and therefore they should not be required.

Regarding the requirements of good conduct or police certificates, the Plenary of this Court indicated in Direct Injunction (*Amparo Directo*) 6/2008 that while they may have a legitimate purpose, such as not eluding the law, they result in a disproportionate restriction by unreasonably transferring an obligation of the State, which is the unification of the registries containing the identity information of people, to the petitioner of the proceeding.

- p. 67 Therefore, the protection of third parties and public order must be guaranteed through different legal mechanisms that do not imply, permit or result in the diminishment, harming or sacrifice of people's fundamental rights. Otherwise, the essential core of the free development of one's personality, the right to privacy and intimacy, the right to personal and sexual identity, the right to health and, consequently, the dignity of people and their right to equality and non-discrimination would be affected.

**3. The respective proceedings must be confidential. In addition, the changes, corrections or adjustments in the registries and the identity documents should not reflect the changes according to gender identity**

- p. 68-69 Undesired publicity of a gender identity change, consummated or in progress, can put the petitioning persons in a situation of greater vulnerability to acts of discrimination against them, against their honor or reputation and, in the end, can be a greater obstacle to the exercise of other fundamental rights.
- p. 69 In that regard, both the proceedings and the corrections made to the registries and identity documents according to self-perceived gender identity should not be accessible to the public nor appear on the identity document itself.
- p. 70 The Plenary of this Court has already ruled that if the information concerning the name and sex of people who changed their gender identity on their documents, including the birth certificate, is maintained as originally registered at birth and just a marginal note is inserted of the decision that granted the correction, with the consequent publicity of that information, their fundamental rights to human dignity, equality and non-discrimination, intimacy, privacy, image, personal and sexual identity, free development of one's personality and

health, are violated, because the marginal note propitiates that such persons must exteriorize in even the most simple activities of their lives their former condition, generating potential discriminatory acts toward their person.

#### **4. The adjustment procedures must be expedited, and to the extent possible, should be free of charge**

- p. 71 The IACHR has indicated that the reasonable duration of a proceeding, whether judicial or administrative, is determined by, among other elements, the impact of the duration of the proceeding on the legal situation of the person involved in it.
- p. 72 Therefore, the degree of impact this type of procedure to change a name and adjust the self-perceived identity of people can have is of such magnitude that it should be carried out as quickly as possible.

In addition to this, the procedures related to registration processes should be free or the least onerous possible for the people interested in them, in particular if they are poor and vulnerable; this is because pecuniary requirements for accessing a right should not result in a denial of its exercise.

#### **5. The procedures should not require proving surgical and/or hormonal operations**

- p. 72-73 Gender identity is not a concept that should be systematically associated with physical transformations of the body, since trans people construct their identity independently of a medical treatment or surgical interventions.
- p. 73 In line with the above, the procedure for requesting a name change and adjustment of the image of the reference to sex or gender in the registries and identity documents cannot require that total or partial surgical interventions be carried out or hormonal therapies, sterilizations or body changes to support the request, since this is contrary to the right to personal integrity, and would imply conditioning the full exercise of various rights, among them the right to privacy and the right to freely choose the options and circumstances that give meaning to one's existence.

- p. 74 Health, as part of the right to personal integrity, also covers the freedom of all people to control their health and their body and the right not to suffer interferences, such as be submitted to torture or treatments and medical experiments not consented to.

### DECISION

- p. 78 CLM is granted the injunction (*amparo*) and protection of the federal law with respect to the regulation that requires her to carry out a procedure for the adjustment of self-perceived gender identity before the Judicial Branch, so that she be permitted to make use of a formally and materially administrative procedure before the Civil Registry. The rest of the articles whose constitutional regularity is disputed should also not be applied.

- p. 79 The constitutional protection granted here extends to the act of application of the challenged regulations (response to the request for adjustment of the birth certificate); therefore, the Civil Registry shall process the request that was made by CLM in order to adjust her birth certificate regarding the self-perceived gender identity.

Furthermore, for the administrative procedure to be appropriate and fully comply with the indicated standards, once the administrative procedure is concluded, a new birth certificate must be issued that reflects the relevant changes but without evidencing the prior identity, and the original birth certificate should be reserved and no record will be published or issued, except with a judicial order or ministerial request.

- p. 80 To guarantee that the persons who request the adjustment of their gender identity do not thereby evade obligations or responsibilities undertaken with the former identity, the Civil Registry may send official notices indicating the adjustment of the identity (obviously as reserved information) to the different Ministries and Federal or State bodies that need to know of the change of identity due to the rights and obligations contracted by the person requesting the proceeding.

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## UNCONSTITUTIONAL OBLIGATION IN THE USE OF THE TRADITIONAL ORDER OF LAST NAMES

### *Amparo en Revisión 208/2016*<sup>13</sup>

**Keywords:** *right to equal treatment and non-discrimination, right to a name, right to private and family life, unconstitutionality of the traditional order of surnames.*

#### **Summary**

A couple married and from this union their daughters A and B were born. The mother and father went to a civil registry court to register the children. In doing so, they requested that the surnames of the children be registered as M P (paternal surname of the mother first and paternal surname of the father second) instead of the traditional order. The Civil Registry authorities refused and given the state of health of their daughters and the need to register them within 6 months of their birth, the parents had no choice but to agree to register their daughters in accordance with Article 58 of Mexico City's Civil Code. However, the parents initiated a lawsuit for legal protection to challenge this refusal. In deciding, a

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<sup>13</sup> Decision issued by the First Chamber of Mexico's Supreme Court of Justice (October 19, 2016). Reporting Justice: Arturo Zaldívar Lelo de Larrea

federal judge in Mexico City granted the sought legal protection on the grounds that Article 58 was unconstitutional. The authorities in question filed an appeal (*recursos de revisión*) against that decision, which were heard by the First Chamber of Mexico's Supreme Court of Justice (the Supreme Court), after exercising its authority to assert jurisdiction.

### Issue presented to the Supreme Court

Whether Article 58 of Mexico City's Civil Code limits the right to private and family life in its dimension of the right of parents to decide the name of their children.

### Holding and vote

The challenged decision was modified and the legal protection was granted to the parents and their daughters A and B for the following reasons. From a literal interpretation of the challenged ruling, the Supreme Court found that Article 58 represented a limitation on the decision of the parents to determine the order of the surnames of their children, given that it established that the paternal surname must be registered first and the maternal surname second. In this regard, the Court recognized that this decision is protected by the right to private and family life, so it continued to examine whether, in this specific case, there was a constitutional justification for the legislative measure to require parents to register their children with the paternal surname first and the maternal surname second. Although it was determined that the establishment of the order of surnames was intended to give greater legal certainty to family relations, the chosen order in which the paternal surname is privileged perpetuates discriminatory conceptions and practices against women, since it recognizes their secondary role to men in the family, an unacceptable purpose from the point of view of the right to equal treatment. Therefore, the Supreme Court determined that both the "paternal and maternal" normative portion of Article 58, and the refusal of the responsible authorities to register the children with the surnames in the order desired by their parents were unconstitutional. Consequently, the injunction (*amparo*) was granted and the issuance of new birth certificates for A and B was ordered, so that the surnames appear in the order desired by the parents, i.e., the paternal surname of the mother first and the paternal surname of the father second.

The First Chamber of the Supreme Court decided this case by a three-vote majority of Justices Norma Lucía Piña Hernández (reserved the right to issue a concurrent opinion), Arturo Zaldívar Lelo de Larrea and José Ramón Cossío Díaz (reserved the right to issue a concurrent opinion). Justice Jorge Mario Pardo Rebolledo voted against (reserved the right to issue a dissenting opinion). Justice Alfredo Gutiérrez Ortiz Mena was absent.

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### EXTRACT FROM THE DECISION

p. 1 Mexico City. The First Chamber of Mexico's Supreme Court of Justice (the Supreme Court), in session of October 19, 2016, issues the following decision.

#### Background

p. 1-2 Ms. X and Mr. Y (the parents) married and, from that union, their daughters A and B were born. Because of their weight, the children were classified as premature.

p. 2 The parents went to the civil registry court to register the children. When doing so, they requested that the surnames of the children be registered as M P (paternal surname of the mother first and paternal surname of the father second) instead of P M (paternal surname of the father first and paternal surname of the mother second). The Civil Registry authorities verbally refused and, given the state of health of their daughters and the need to register them within 6 months of their birth, the parents had no choice but to agree to register their daughters in accordance with Article 58 of Mexico City's Civil Code.

p. 2-3 As a result, the parents, in their own right and on behalf of their daughters, filed an injunction (*amparo*) arguing that the right to a name and the right to equal treatment had been violated. The district court ruled in favor of the parents.

- p. 4 The Mayor and the Legislative Assembly of Mexico City, as well as Judge 42 of the Civil Registry, filed a review of resources. The decision of the Collegiate Circuit Court referred the matter to the Supreme Court. Finally, the Supreme Court decided to assert jurisdiction.

**Study of the merits**

- p. 14 The Supreme Court observed that parents have the right to decide the order of their children's surnames and that this decision cannot be limited by reasons of gender. In this regard, it will first evaluate whether the challenged norm limits the right to private and family life - in its dimension of the right of parents to decide the name of their children - and then review whether such a limit is justified.

**- Analysis of the impact of the challenged law on the *prima facie* content of the right to a name in relation to private and family life**

- p. 14 As mentioned, the review of constitutionality will be conducted in two stages. The first will determine whether the challenged law limits the fundamental right in question. At this stage of the analysis it is necessary to resort to the interpretation of the regulations. On the one hand, the challenged legal provision must be interpreted in order to determine the scope of the prohibition or obligation it establishes. On the other hand, the constitutional provision containing the fundamental right in question must also be interpreted in order to determine the scope or *prima facie* content of that right.
- p. 15 Once this is done, it must be determined whether or not the challenged rule limits the scope of *prima facie* protection of the mentioned right. If the conclusion is negative, the examination should end at this stage with the declaration that the challenged law is constitutional. On the other hand, if the conclusion is positive, it should be passed to another level of analysis, through which, it will be determined if the limits established by the measure are constitutional.

- p. 15 The Supreme Court finds that a literal interpretation of Article 58 establishes that the paternal surname must be registered first and the maternal surname second. This is because the norm establishes one option over another without specifying that it can be altered or agreed otherwise.
- p. 15-16 Therefore, the Supreme Court will analyze the constitutionality of the norm that limits the decision of parents to determine the order of their children's surnames. As will be explained below, the Court considers that this decision is protected, at least *prima facie*, by the right to a name regarding private and family life.

### VIII. Right to a name regarding private and family life

- p. 16 Protection of family is recognized in Article 4 of the Constitution as well as in Article 17 of the American Convention on Human Rights. Similarly, in the field of human rights, it has been established that the family is the natural and fundamental element of society and that it deserves the widest protection. This is set forth in Articles 10 of the International Covenant on Economic, Social and Cultural Rights and 23 of the International Covenant on Civil and Political Rights. In addition, Article 8 of the Convention on the Rights of the Child asks States' parties to respect and preserve the child's family relations.
- p. 16 A series of rights emerge from this broad protection of the family, among them, respect for private and family life, which is expressly understood as a human right in Articles 12.1 and 11.2 of the Universal Declaration of Human Rights.
- p. 17 This right is also found in Article 16 of the Constitution, which prohibits arbitrary interference in the family and was recently recognized by the First Chamber of the Supreme Court in the direct Injunction Under Review (*Amparo Directo en Revision*) 3859/2014. That case concerned whether a father, who had not lost parental authority over his child, had the right to participate in the process of adoption of his child, and the Court determined that he was protected by the right to private and family life as a human right.

- p. 17      Regarding the relationships or decisions protected by the right to private and family life the Supreme Court considers that family is a sociological concept, and therefore, the family as a social reality should be constitutionally protected as is held by the Plenary of the Supreme Court in the Action of Inconstitutionality (*Accion de Inconstitucionalidad*) 2/2010. Thus, rather than a legal creation, the family originates in human relations corresponding to a social design that is different in each culture. For this reason, precedents of the Supreme Court have established that the basis of the family group is in the pursuit of affection, support, loyalty, and solidarity.
- p. 17-18    These duties of support and mutual respect lead to various obligations and rights, which include decisions or activities that are protected by the right to private and family life. This means that certain decisions concern only the family and the State cannot intervene in them unjustifiably.
- p. 18      One of the most important decisions for the nuclear family, particularly for parents, is to determine the name of their children. Indeed, through the name, composed of the first name and the surnames that accompany it, a sense of identity and belonging to the family is created.
- p. 18      Moreover, the choice of a child's name by the parents is a personal and emotional moment, which is why it is circumscribed in their private sphere. No one else cares how their children will be named. Indeed, the choice of the name of the children generates a special bond between them and their parents.
- p. 18      Thus, it can be said that parents have the right to name their children without arbitrary interference from the State. This right not only involves choosing the personal name of their children but establishing the order of their surnames.
- p. 21      The First Chamber of the Supreme Court developed the content of the right to a name in Direct Injunction Under Review (*Amparo Directo en Revision*) 2424/2011. The Court pointed out that the name constitutes a basic and essential element of the identity of each person, without which they cannot

be recognized by society. It also stressed that the choice of name is governed by the principle of free will and, consequently, must be freely chosen by the person themselves or their parents or guardians, according to the time of registration. This choice cannot be subject to any kind of illegal or illegitimate restriction. However, it may be subject to State regulation, provided that the essential content of the right is not infringed.

- p. 21 Having established that the decision of parents to decide the order of their children's surnames is protected by the right to private and family life regarding the right to a name, the Supreme Court examines whether and to what extent the State can limit it.

#### - Analysis of proportionality in the broad sense of the challenged law

- p. 22 At this stage of the analysis, the Supreme Court examines whether in this specific case there is a constitutional justification for the rule to limit the *prima facie* content of the right. This exercise involves establishing whether the legislative intervention pursues a constitutionally valid purpose and, if this stage of scrutiny is overcome, whether the measure then overcomes a strict analysis of suitability, necessity, and proportionality.

- p. 22 It should be kept in mind that the norm whose constitutionality is analyzed in this case requires parents to register their children with the paternal surname first and the maternal surname second. Thus, it is analyzed whether the purpose pursued by the rule is constitutionally valid.

#### The constitutionality of the aims pursued by the law

- p. 22 At this stage, it is necessary to identify the purposes pursued with the challenged law in order to determine whether they are constitutionally valid. This presumes that not just any purpose can justify the limitation of a fundamental right. Indeed, the aims that may justify legislative intervention in the exercise of fundamental rights are very diverse in nature: values, interests, assets, or principles that the State can legitimately pursue. Thus, it must be determined what purpose is pursued by establishing that the

paternal surname of the person who is registered must be stated first, followed by the maternal one.

- p. 23 To identify the aims pursued by the measure, it is useful to look to the statement of purpose and other documents that inform the legislative process. However, the purpose of a provision is not limited to the so-called “intention of the legislator” but can be deduced from the relevant legal and factual circumstances in each specific case.

### VII. Purpose of the challenged law

- p. 23-24 The statement of purpose of the reform to Article 58 of Mexico City’s Civil Code indicated that the intention was to modernize and simplify the regulatory framework of the Civil Registry, in order to provide greater legal certainty in the registration and proof of the various facts and registration acts. Thus, the rule was changed from not specifying a certain order of surnames to establishing that the surnames would be in the order of paternal and then followed by the maternal. Indeed, the previous provision established that: the birth certificate shall be drawn up with the assistance of two witnesses. It will contain the day, time and place of birth, the sex of the person presented, the name and surnames that correspond to that person. The current provision indicates that: The birth certificate will contain the day, time and place of birth, the sex of the person presented, the proper name or names and the paternal and maternal surnames that correspond to that person.
- p. 24 From the above it can be seen that establishing the order of the surnames was intended to give greater legal certainty to family relations. This alone could be a constitutionally valid aim. However, the legislator did not establish either order, but the order in which the position of the male in the family is privileged.
- p. 24 Indeed, historically, the maintenance or prevalence of certain surnames has sought to perpetuate power relations.

- p. 26 This practice endorses a tradition that sought to grant greater status to the man, since it was understood that he was the head of the family and that his surname was the one that should be transmitted from generation to generation. Such a purpose is not only not protected by the Constitution but is constitutionally prohibited.

### VIII. Unconstitutionality of the purposes pursued by the law

- p. 26-27 As the Supreme Court explained, traditionally the order and use of surnames has denoted a position of power and status. Thus, it can be argued that the privilege of the paternal surname seeks to maintain discriminatory conceptions and practices against women. This purpose is unacceptable from the point of view of the right to gender equality, which is recognized in Article 4 of the Constitution, and Articles 1 of the Convention on the Elimination of All Forms of Discrimination Against Women; 3 of the International Covenant on Civil and Political Rights; 1 of the American Convention on Human Rights, in general, and specifically, in 6 of the Belem do Pará Convention.
- p. 27 The constitutional recognition of this right was aimed at reaffirming the equal value and dignity of women with respect to men and therefore they have the right to participate in all social, labor and family relations in conditions of equality. Thus, roles, customs and prejudices should not serve as a pretext to deny the exercise of any right. On the contrary, the right to equal treatment requires that appropriate measures be taken to eliminate stereotypes and practices regarding the roles of men and women, which arise from models of inferiority of one sex regarding the other or from gender roles which are not necessarily defined by sex.
- p. 27 The Supreme Court specifies that a gender stereotype refers to a preconception of attributes or characteristics possessed or roles that are or should be performed by men and women respectively.
- p. 28 The naming system is an institution through which members of a family are named and given identity. Thus, the impossibility of registering the maternal

surname in the first place implies considering that women have a secondary position in relation to the fathers of their children. Such a conception is contrary to the right to equal treatment since family relations must take place on an equal footing. Thus, the naming system currently in force reiterates a tradition based on a discriminatory practice, in which women were conceived as a member of the man's family, since it was the man who preserved the property and surname of the family.

- p. 28 In this regard, the prohibition established in Article 58 of Mexico City's Civil Code perpetuates a purpose that is unconstitutional, since it seeks to reinforce a prejudice that discriminates against and diminishes the role of women in the family.
- p. 28 On this basis, it is unnecessary to carry out the following steps of the proportionality test, since the suitability, necessity and proportionality of a measure that pursues an unconstitutional purpose cannot be analyzed. It does not matter that the measure achieves its purpose to some degree, or that there is no less harmful means to achieve that end if it is contrary to the Constitution.
- p. 29 Thus, the Supreme Court determines that it is not justified to limit the right of parents to decide the order of the surnames of their children based on prejudices or measures that seek to perpetuate the situation of superiority of men in family relations. Consequently, the "paternal and maternal" text of Article 58 of Mexico City's Civil Code is unconstitutional.
- p. 29-30 Finally, the Supreme Court considers that the unconstitutionality of the article cannot be reconciled with the values protected by the Constitution through a consistent interpretation, this is because the discriminatory message transmitted by the rule will continue to emanate from the text as long as it is not altered, as the Court warned in the Injunction Under Review (*Amparo en Revision*) 152/2013. Therefore, the "paternal and maternal" normative portion contained in the first paragraph of Article 58 of Mexico City's Civil Code must be declared unconstitutional.

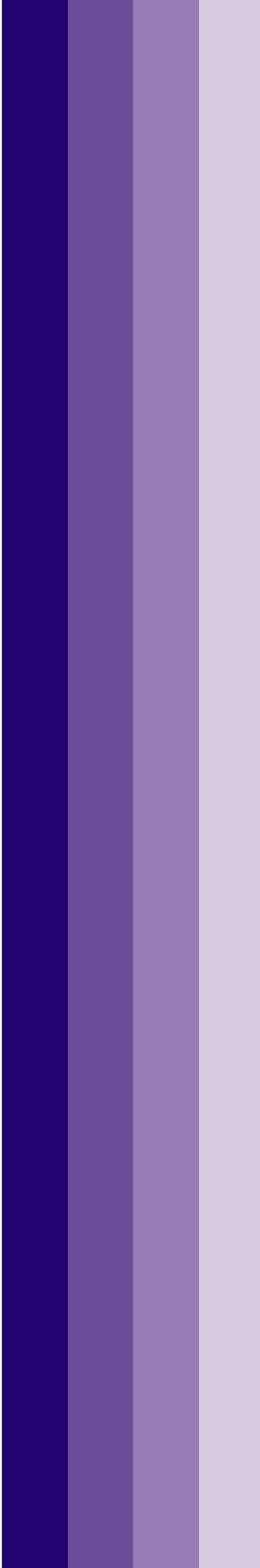
### IX. Unconstitutionality of the act being challenged

- p. 30 Since the part of Article 58 of Mexico City's Civil Code that supports the act is unconstitutional, the refusal of the responsible authorities to register children with the surnames in the order desired by their parents also becomes unconstitutional. This is in accordance with the provisions of Article 78 of the current Legally Protective Law.
- p. 30-31 Consequently, pursuant to Article 77 of the same Law, it is concluded that the authorities of the Civil Registry must issue new birth certificates to children A and B, so that the surnames appear in the order desired by the parents, i.e., the paternal surname of the mother first and the paternal surname of the father second.
- p. 31 On the other hand, the Supreme Court considers it unnecessary to leave open the right of the girls to choose the order of their surnames, as determined by the District Judge, because as explained throughout this decision, it is a right of parents to determine the name of their children in light of the right to private and family life. In this regard, a newborn's right to a name is protected through their parents. However, this does not mean that the children cannot take legal action with regard to their right to a name in the future.

### Decision

- p. 31 Since Article 58 of Mexico City's Civil Code is considered unconstitutional, the Supreme Court modifies the challenged decision and, consequently, grants the injunction (*amparo*) to Ms. X and Mr. Y, as well as their daughters A and B, against the authorities and acts specified in the decision.





## V. GENDER



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## GENDER PARITY AND FREEDOM OF EXPRESSION IN ELECTORAL MATTERS

### *Acción de Inconstitucionalidad 35/2014<sup>14</sup>*

**Keywords:** *political-electoral rights, right to equality and non-discrimination, right to freedom of expression, gender parity, affirmative action, voting abroad.*

#### **Summary**

The Democratic Revolutionary Party [*Partido de la Revolución Democrática*] (PRD), the Labor Party [*Partido del Trabajo*] (PT) and the National Action Party [*Partido Acción Nacional*] (PAN), filed actions of unconstitutionality against Decree number 514 establishing the Eighteenth Reform of the Constitution of the State of Chiapas (Chiapas Constitution), and Decree number 521 amending the Elections and Citizen Participation Code of the State of Chiapas (CEPCEC). The mentioned political parties argued that the decrees violated Articles 1, 4, 6, 7, 35, section I, II and III, 41, and 116 of the Federal Constitution.

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<sup>14</sup> Decision issued by the First Chamber of Mexico's Supreme Court of Justice (October 2, 2014). Reporting Justice: Arturo Zaldívar. *Action Of Unconstitutionality (Acción De Inconstitucionalidad) 35/2014*

### Issue presented to the Supreme Court

Whether the reforms were constitutional, particularly those related to the gender parity rules for the election, the freedom of expression of the political parties and the possibilities of voting abroad.

### Holding

Articles 24, 35 bis and 40, section iv of the CEPCEC were declared valid for the following reasons. It was considered that those norms establish affirmative measures to guarantee the principle of gender parity contemplated in the Federal Constitution. By establishing that the candidate lists for deputies and the assignment slates of city council members are beholden to the principle of proportional representation of women. It was considered constitutional that citizens of Chiapas residing abroad may not vote for city council members since a decisive element is that they represent those who live in the community. In contrast, Articles 69, sections XI and XXIII and 234, including the sixth paragraph were declared invalid. It was reasoned that the exception to the obligation of observing parity requirements in the case of candidacies obtained through internal selection processes of the parties is contrary to the principle of parity, since it subjects them to processes in which the inertias toward men can prevail. Finally, the prohibition on the expressions that denigrate institutions was invalidated, given that Article 41 of the Federal Constitution only protects persons from the political or electoral propaganda that slanders or denigrates them, not institutions; in addition, the restrictions on the freedom of expression cannot be given in advance, without analyzing a specific case.

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### EXTRACT OF THE DECISION

p. 1 Mexico City. The Plenary of the Mexico's Supreme Court of Justice (this Court), in session of October 2, 2014, issues the following decision.

#### Background

p. 1-3 On July 20 and 30, 2014, the political parties Democratic Revolution Party [*Partido de la Revolución Democrática*] (PRD), Labor Party [*Partido del Trabajo*]

(PT) and National Action Party [*Partido Acción Nacional*] (PAN), filed an action of unconstitutionality against the Decree number 514 establishing the Eighteenth Reform of the Constitution of the State of Chiapas (Chiapas Constitution), published on June 25, 2014; and the Decree number 521, amending the Elections and Citizen Participation Code of the State of Chiapas (CEPCEC), published on the 30<sup>th</sup> of the same month and year.

- p. 3-8 The political parties specified that constitutional provisions were violated. These provisions included Articles 1; 4; 6; 7; 35, sections I, II and III; 41; and 116 of the Federal Constitution, with respect to the obligation of establishing gender rules, the restrictions permitted on the freedom of expression, and the right of citizens of Chiapas living abroad to vote in the town council elections.
- p. 18-19 On July 31, 2014, it was declared that they were joined into the same case file. By resolution of August 4, 2014 it was ordered to send the case to Justice Arturo Zaldívar Lelo de Larrea.

### Study of the merits

#### I. Principle of gender parity

- p. 157-158 The PT challenges Articles 24, section II and 40, section IV last paragraph of the CEPCEC, since it considers they discriminate based on gender by requiring that women must head the list of candidates for deputies by proportional representation with men and that the slates of candidates for town council also conform to proportional representation. They argued that those rules give preferential treatment and disproportionate protection to the female gender, excessively protecting their right to stand for election, in detriment of the male gender. It was argued that these provisions contradict the principle of equality between men and women while also violating the right of self-determination and the internal management of the parties by not permitting them to decide in what order to present their lists of candidates.

- p. 158 For its part, the PRD considers that the sixth paragraph of Article 234 violates the principles of equality and non-discrimination, as well as the human right to equality between men and women before the law. The establishment of an exception to the obligation that the candidacies for deputies of the relative majority population and the members of the town councils have gender parity could result in legal conflict. They also argue that it could become a method to try to avoid the obligation that there be gender parity in spite of the fact that the apparent end of the rule is to privilege the democratic processes inside the parties.
- p. 159 Finally, the petitioning party argues that there is a partial omission in the Chiapas Constitution with respect to the obligation to establish gender rules, since they are only established with respect to the deputies and not for the members of the town councils.

### **Constitutional framework on gender parity in electoral matters**

- p. 160 The principle of gender parity contained in the second paragraph of section I of Article 41 of the Constitution establishes as a principle of substantive equality in electoral matters, a human right that the legislator should take into account when designing the rules for the presentation of candidacies for both federal and local legislators.

Equality is a concept prior to parity. Equality has two aspects, one formal that implies equality in the law and before the law; and one substantive, that can become an indirect discrimination or of consequences. The first refers to the general rules that should guarantee equality and the possibility of revising those that are considered discriminatory; the second tries to approach the actual impacts of the rule.

- p. 161 This Court has held that the right to substantive equality or de facto equality lies in reaching a parity of opportunities in the real and effective enjoyment and exercise of the human rights of all persons, which means that in some cases it is necessary to remove and/or diminish the social, political, cultural,

economic or any other kind of obstacles that prevent the members of certain vulnerable social groups from enjoying and exercising those rights.

- p. 161-162 The official data of the National Institute on Statistics and Geography [Instituto Nacional de Estadística y Geografía] (INEGI) show conditions of structural discrimination that have affected women in the political and public sphere. It was the lack of female candidacies that led to the incorporation of those constitutional obligations, which leads to the need to implement actions and design formulas that generate conditions that allow the equal enjoyment and exercise of the political-electoral rights of women, with which the principles of equality set forth in Articles 1 and 4 of the Constitution are made effective.
- p. 162-163 In this way, the State is obligated to ensure representation as a political dimension of justice that makes participation possible, under conditions of equality, in the public deliberation through which the frame of reference of justice is defined, and the form in which the rights will be guaranteed and protected.
- p. 163 For the proper fulfillment of the right to substantive equality, the establishment of affirmative action is feasible. This involves administrative and/or legislative measures that imply preferential treatment to a certain group or sector that has a disadvantage or is discriminated against. This treatment, by its nature should be temporary, until the situation it is intended to correct is repaired, since once the objective of equality has been reached, the differential treatment should disappear.
- p. 165 This right constitutes a mandate of optimization, and therefore to the extent that it is not displaced by an opposing reason (another guiding principle in electoral matters, such as the democratic principle or effectiveness of suffrage), the principle of parity will be the measure to guarantee substantive equality between genders, in both candidacies and the membership of the representative bodies.

**Preference for the female gender in the formation of the candidate lists for deputies and the slates for the assignment of town council members by the principle of proportional representation**

- p. 168 The rules in question establish a differentiation between the candidates depending on their gender, with respect to the determination of the place on the candidate list by the principle of relative majority, as well as the candidacies for town council with proportional representation in the slates.
- p. 168-169 When Article 24 of the CEPCEC says that the order of priority of the candidate lists will be that odd numbers are assigned to candidates of the female gender, and the even numbers will be allocated for candidates of male gender. In Article 40 section IV second paragraph it is stated that in the event that the number of town council seats assigned by this principle is uneven, the majority must correspond to the female gender and must be headed by a person of that gender. The article establishes a distinction based on the gender of the candidates.
- p. 169 In this regard, the standard for reviewing the constitutionality of these rules should be, in principle, the prohibition on making distinctions based on any of the suspect categories contained in the non-discrimination clause of the last paragraph of Article One of the Constitution. However, sometimes it is not only permitted to make distinctions based on those criteria, it is constitutionally required.
- p. 169-170 This Court has stated that the strict analysis of the legislative classifications based on the criteria expressly enumerated in the first article must be applied with full awareness of the purposes that the legislator pursues through that explicit mention. It is clear that its purpose is to protect persons or groups that have a history of disadvantage or victimization, such that according to Article I, the legislative classifications based on suspect categories should not be submitted to intense scrutiny when they are intended to fight against permanent and structural causes of disadvantage for certain groups. In effect, there are certain pro-equality measures that would

be difficult to implement or apply without making use of the identification criteria of the groups traditionally discriminated against, whose opportunities the law tries to increase. It would be absurd in these cases for the constitutional judge to contemplate such measures with special suspicion.

- p. 170 Similarly, this Court has stated that in cases where the legislator includes groups historically discriminated against in the sphere of the rule, whether expanding or equalizing their rights (and it does not involve their restriction), this is a relevant distinction that must be analyzed under the principle of reasonability. The analysis of reasonability will consist of the verification of whether or not the legislative measure subverts constitutionally protected legal interests. This is the case of the provisions analyzed here.
- p. 170-171 In the statement of purpose for the reform of Article 24, the Chiapas legislator reasoned that it was necessary to introduce a gender quota to promote and ensure greater participation of women in the bodies of popular representation and of the municipal government. For its part, it was explained that it was essential to correct the referenced omission in order to grant women the opportunity to access membership in the town councils under the principle of proportional representation.
- p. 171 This shows that the purpose of the measure is to comply with the principle of equality between men and women in the political arena, but primarily, this measure addresses the principle of gender parity of the candidacies for federal and local legislators established in Article 41 of the Constitution.
- p. 172 Thus, the local legislator pursues an end not only constitutionally valid but constitutionally required, which is the principle of parity, and the justification for the introduction of this specific measure is found in the structural discrimination that women have suffered in electoral politics.
- p. 174 Based on the arguments put forth here, this Court considers that the challenged measures contained in Articles 24, section II, and 40, section IV, second paragraph, are reasonable since they comply with an end not only constitutionally valid but constitutionally required and they do not involve an excessive violation of the rights of the male gender.

The affirmative action consisting of preferring women in cases of uneven membership does not constitute an arbitrary treatment since it is constitutionally justified having a purpose in accordance with the principles of a democratic State under the rule of law and it is adequate for achieving that end.

**Exception to the obligation to observe parity requirements, in the case of candidacies obtained through internal selection processes of parties**

- p. 176 The portion of the challenged rule establishes that, of all the requests for registration for proprietary candidates for deputies of the relative majority for the Congress of the State, as well as for members of the Town Councils, that the political parties present, the common coalitions and candidacies before the Institute of National Elections must be composed with parity between the two genders and that when the number of candidacies is uneven, the majority must be female. Candidacies that are a result of a democratic election process, according to the bylaws of each party, are exempt from the above.

In the judgment of this Court, such exception is contrary to the constitutional mandate contained in the second paragraph of section I of Article 41.

Permitting that the candidacies that result from internal election processes not observe the principle of parity, would practically speaking make the requirement of parity meaningless, by conditioning it to democratic processes in which the inertias that historically favor candidates of the male gender can prevail.

- p. 176-177 The above implies the risk that the number of women that obtain candidacies would be very low, or non-existent, affecting the participation of that gender in democratic processes and harming their possibility of participating in public representation bodies, which violates Article 41 of the Constitution requiring that the political parties guarantee parity in the candidacies for legislatures, as well as obligations derived from international human rights norms applicable through Article 1 of the Constitution.

- p. 177 Therefore, the invalidity of the sixth paragraph of Article 234 of the CEPCEC must be declared in the portion that exempts the candidacies that result from an election process according to the bylaws of each party.

### **Failure to establish gender rules for the composition of the town councils**

- p. 188 It is indicated that there is a partial omission in the Chiapas Constitution with respect to the obligation to establish gender rules, since they are only established with respect to the deputies and not for the members of the town councils, when constitutionally and conventionally there must be equity of gender in all the pluri-personal positions. This argument is unfounded.

- p.189 The partial omission indicated does not exist, because while the Chiapas Constitution does not establish the parity rules in question, the secondary legislation does, without there being a constitutional mandate that they be contemplated in the local constitutions; in other words, the Federal Constitution does not establish that parity matters must be addressed in the local constitution.

### **II. Restriction on the freedom of expression with the duty to refrain from denigrating institutions, other parties or persons**

- p. 196-197 The PT indicates that Article 69, section XXIII of the CEPCEC violates Articles 1, 6, 7 and 41, Base III, Part C of the Federal Constitution and 19, paragraph 3, subsection a) of the International Covenant on Civil and Political Rights, 11 and 13, paragraph 1, subsection a), of the American Convention on Human Rights. This is because it strongly prohibits any expression that denigrates institutions, given that the Federal Constitution expressly establishes the restrictions permitted on the freedom of expression, which do not prohibit or sanction the expressions that denigrate institutions.
- p. 199-200 There are grounds for the concept of invalidity. The starting point for the analysis of the provision challenged is the modification that the legislature made to Article 41, base III, part C of the General Constitution through the reform of February 10, 2014. From the reform, the article only protects

people from political or electoral propaganda that slander them, but not institutions from expressions that may denigrate them.

- p. 200 The question is, if under this premise, the legislative branch of the State of Chiapas could maintain the obligation that the political parties must refrain in their political or electoral propaganda from any expression that denigrates institutions and the parties, whose violation is sanctioned with measures that may go from a public warning to the reduction of public financing and even the cancellation of the registration of the political party.
- p. 201 The freedom of expression of the political parties has special relevance since through its exercise they provide information to citizens so they can participate in the public debate, which is to say democratic life. In fact, through the information they provide they contribute to ensuring that the vote is free and that citizens have the information necessary to evaluate their representatives.
- p. 201-203 The importance of protecting the freedom of expression of the political parties has already been recognized by this Court in Action of Unconstitutionality (*Acción de Inconstitucionalidad*) 61/2008 and in Action of Unconstitutionality (*Acción de Inconstitucionalidad*) 45/2006. Those precedents emphasize the fact that the exercise of the freedom of expression has not only an individual dimension but also a social one. It implies a collective right to receive any information; hear the expression of the thoughts of others and points to the need for the restrictive measures to be submitted to a strict proportionality test.
- p. 203 Furthermore, it must be kept in mind that according to the precedent of the Inter-American Court of Human Rights, the freedom of expression protects not only the information or ideas that are favorably received or considered as inoffensive or indifferent, but also those that clash with, disturb or offend the State or a part of the population.
- p. 203-204 Thus, the obligation imposed by Article 69, section XXIII on the political parties consisting of refraining from disseminating in their political or electoral

propaganda any expression that denigrates institutions and the parties, constitutes a restriction on the freedom of expression of the political parties. This Court considers that the obligation imposed on the political parties does not pass a strict scrutiny test and, therefore, is unconstitutional.

p. 204 The Constitution does not have an end imperative that justifies excluding expressions that denigrate institutions and political parties from political and electoral propaganda. First, because as already stated, such restriction was eliminated through the constitutional reform of February 10, 2014 to Article 41, base I, part C. Such elimination of the constitutional text may even be interpreted to mean that the limitation of the political discourse that denigrates institutions is no longer a valid restriction of the freedom of expression.

In addition, the measure has no place within Article 6 of the Constitution, since the political or electoral propaganda that denigrates institutions or political parties does not attack *per se* morals, privacy or the rights of others, provoke any crime, or disturb the peace.

p. 205 To be able to determine that this is the case, it is necessary to analyze specific political or electoral propaganda; otherwise, it would be like censoring in advance. In the case analyzed here, that conclusion cannot be reached in advance.

p. 206 This conclusion is reinforced because the obligation imposed by Article 69, section XXIII protects institutions and the political parties, which given their public nature, must have a greater tolerance threshold than any private individual.

This is also the case because the purpose of the restriction is not to promote the participation of the people in democratic life or the exercise of the free and informed vote, but the contrary. On the one hand, it limits the information that the political parties can provide to the citizens on matters of public interest, which information is essential for public debate and for

citizens to exercise their vote freely. In addition, by restricting the expression of the political parties, it limits the public debate, since this requires that the political parties freely choose the most effective form to transmit their message and question the existing order, for which they may consider it necessary to use expressions that denigrate institutions. Furthermore, the consequence of the violation is the imposition of the established sanctions, which leads to an inhibitory effect for the expression of the political parties.

- p. 207-208 Therefore, since it is a measure that restricts the freedom of expression of the political parties that does not overcome the first degree of strict scrutiny, it must be declared unconstitutional, with no need to carry out the other steps of the proportionality test.

### III. Limitation on the right to vote from abroad in the elections for town councils

- p. 234 The PT indicates that Article 35 Bis of the CEPCEC is contrary to Articles 1 and 35, section I, of the Federal Constitution, since such rule unduly limits and restricts the right of citizens of Chiapas abroad to vote in the town council elections, because it only authorizes them to vote in the elections for Governor and for the formula of migrant Deputies.
- p. 235 According to the criteria of this Court, the rights to vote and be voted for are fundamental in nature, and they enjoy constitutional protection through the control processes established in the Constitution, but they are not absolute; rather they must be subject to the limits and terms established in the electoral laws issued by the corresponding legislature, according to the principles protected in the Constitution.

Article 116, section IV, of the Federal Constitution establishes that, according to the rules established therein, and in the general laws on the matter, the electoral legislation of the states must guarantee, among other aspects, that the elections of the governors, members of the local legislatures, and members of the city councils be carried out through universal, free, secret and direct suffrage.

p. 238 The challenged provision establishes that the representation of Chiapas citizens residing abroad must be guaranteed. They may vote for the candidates that the political parties and coalitions put forward in the elections for Governor of the State and the formula of migrant Deputies.

The states are free to regulate the vote of their citizens abroad, provided they do not violate what is established in the Electoral Institutions and Procedures Law, and therefore the states may establish the voting model abroad that best fits their needs and interests. For this reason, it is not unconstitutional that the rule establishes the possibility that those who are in this situation do not vote for members of town councils.

Furthermore, it is a reasonable measure given that a decisive element in the election of town councils is that their members represent the interests of the community that elects them, as the first level of government with which the community interacts, which justifies that they be voted for only by those who immediately, within the specific community, want certain persons to work for their specific and actual interests.

p. 238-239 Under this logic, it is reasonable that only those who reside regularly in the municipality vote for the members of the corresponding town council and, under this logic, there is no vice of unconstitutionality in the challenged provision that prevent residents living abroad from participating in the respective voting processes.

### Decision

p. 241-243 The validity of Articles 24, 35 Bis and 40, section IV of the CEPCEC is recognized; and the invalidity is declared of Articles 69, sections XI and XXIII and 234, sixth paragraph. In addition, the omission in the Chiapas Constitution relative to the establishment of gender rules is unfounded.



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## DOUBLE SHIFT WITH A GENDER-BASED PERSPECTIVE

### *Amparo Directo en Revision 4883/2017*<sup>15</sup>

**Keywords:** *Double shift, compensation, housework, domestic activities, professional work, equality, retroactive application, indemnification, compensatory mechanism, conspicuously inferior assets, unpaid work.*

#### **Summary**

L (wife) and J (husband) divorced in 2010. L sued J for payment of compensation of 50% of the value of two pieces of real estate. This is considering that during the 40 years of their marriage, L devoted herself predominantly to domestic work and the care of their three daughters. The judge decided that the compensation had no grounds because the plaintiff did not meet the conditions for compensation established in Article 267 of the Civil Code in force until June 24, 2011 (the Civil Code). L appealed the trial court decision. She pointed out that the judge should have retroactively applied section VI of Article 267 of the current Civil Code, which establishes more favorable premises. The Appellate Chamber upheld the

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<sup>15</sup> Decision issued by the First Chamber of Mexico's Supreme Court of Justice (February 28, 2018). Reporting Justice: Arturo Zaldívar. *Action For Constitutional Relief Through Direct Injunction (Amparo Directo En Revision) 4883/2017*

judge's decision. L filed a direct injunction (*amparo directo*) against this decision. She argued that the article was disproportionate and discriminatory. The Collegiate Circuit Court denied the injunction (*amparo*) because it considered that the provision did not impose disproportionate requirements, nor any arbitrary and unjustified element. L filed an appeal (*recurso de revisión*) against the decision denying her the injunction (*amparo*), which was heard by the First Chamber of the Supreme Court (the Court).

### Issue presented to the Supreme Court

Whether in order to access the compensatory mechanism, the spouse requesting it must provide proof that he/she was exclusively dedicated to the care of the household and children throughout the term of the marriage. The Supreme Court studied the constitutionality of the requirements of the challenged article, i.e., whether that provision implies discriminatory treatment and imposes disproportionate requirements.

### Holding and vote

The decision was overturned essentially for the following reasons. The interpretation of the challenged article is contrary to the principles of equality and equity pursued by the institution of compensation. The Supreme Court ruled that the article is constitutional if it is interpreted that the wording of the provision “*has been dedicated to carrying out the housework of the household and the care of any children*” does not imply requiring the petitioning spouse to prove that he/she was dedicated “exclusively” to domestic work, since this would distort, on the one hand, the nature of the compensation mechanism and, on the other, the recognition of the double shift.

The First Chamber decided the case with the unanimous vote of the four Justices Norma Lucía Piña Hernández, Arturo Zaldívar Lelo de Larrea, José Ramón Cossío Díaz and Jorge Mario Pardo Rebolledo. Justice Alfredo Gutiérrez Ortiz Mena was absent.

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### EXTRACT OF THE DECISION

p. 1 Mexico City. The First Chamber of Mexico's Supreme Court of Justice (the Supreme Court), in session of February 28, 2018, issues the following decision.

## Background

- p. 2 J (husband) sued L (wife) for the dissolution of their marriage. On January 8, 2010, the divorce was declared valid and, with the failure to reach a settlement agreement, the rights of the parties were reserved to be asserted in an ancillary proceeding.
- p. 2 On February 10, 2015, L filed an ancillary proceeding for payment of compensation in which she demanded from J the payment of 50% of the value of two pieces of real estate. She supported her claim arguing that for 40 years she devoted herself predominantly to the work of the household and the care of their three daughters.
- p. 2-3 The trial judge issued a decision on August 12, 2016, in which she determined that the compensation claimed had no grounds. She considered that the premises of the compensation referred to under Article 267 of the Civil Code, applicable to the case, were not proven given that the divorce was declared in 2010.
- p. 3 L appealed the decision of the trial court. She pointed out that the decision was confusing and ambiguous and that it did not address the principles of progressivity, effective judicial protection, and *pro homine*.
- p. 4 The Appellate Chamber issued a ruling on February 2, 2017, in which it upheld the first decision.
- p. 4-5 L filed an injunction (*amparo*) lawsuit against the Appellate Chamber decision. She argued that section VI of Article 267 of the Civil Code, in force until the June 2011 reforms, was disproportionate and discriminatory.
- p. 5 The Collegiate Circuit Court hearing the case issued a decision on June 22, 2017, in which it denied the injunction (*amparo*).
- p. 7 L filed an appeal (*recurso de revisión*) before the Supreme Court against the decision denying her the injunction (*amparo*). In her brief she stated that the collegiate body failed to rule on the issue of constitutionality.

p. 8 The Collegiate Circuit Court interpreted section VI of Article 267 of the Civil Code. It decided that the premises established by the provision for access to the compensatory mechanism do not violate the principles of equality and equity that govern the institution of compensation. This is a constitutionality issue.

The Supreme Court took the case and turned the case file over to Justice Arturo Zaldívar Lelo de Larrea.

### **Study of the merits**

p. 9 A question of constitutionality was raised in the case. The problem resolved by the Supreme Court was whether the interpretation of the Collegiate Circuit Court of section VI of Article 267 of the Civil Code addresses the principle of equity that governs the institution of compensation.

This issue, moreover, was important because it allowed the Supreme Court to establish criteria on the principle of equity with respect to the institution of compensation between spouses who, in addition to the care of the household and children, carried out remunerated activities (double shift).

### **Purpose of the compensatory mechanism and its connection with the recognition of the double shift**

The institution of compensation is an inequality mitigating mechanism that can be requested when one of the spouses, for different reasons, assumes certain domestic and family burdens in greater proportion without receiving financial remuneration in return.

p. 10 Indemnification is an instrument that aims to correct the situations of unjust enrichment and impoverishment perceptible at the time of the dissolution of a certain patrimonial economic regime.

p. 11 This mechanism vindicates the value of domestic and care work, long visible in our society, ensuring the equality of rights and responsibilities of

both spouses regarding the marriage, during the marriage and in case of its dissolution.

The purpose of the institution of compensation is to ensure the equality of rights of the spouse who, upon assuming the domestic and family responsibilities, failed to develop professionally in the conventional labor market with the same time, intensity, and diligence as the other spouse.

The characteristics that govern this institution are: (i) it is restorative in nature; (ii) it can be requested and stipulated for either spouse who has reported an economic imbalance due to having engaged in domestic and care work; (iii) it only operates with respect to property acquired during the marriage; (iv) the burden of proof lies with the requesting party and, when in doubt, the judge should assume an active role in the process.

- p. 14 The modality of housework may consist of: (i) material execution of household tasks; (ii) material execution of tasks outside the home but linked to the organization of the household and obtaining goods and services for the family; (iii) performance of functions of direction and management of the household economy, and (iv) care, upbringing, and education of the children.

After the analysis of section VI of Article 267 in force until June 2011, it is necessary to conclude that, in order to evaluate the premise of access to compensation, it is not decisive that the applicant spouse dedicates him or herself exclusively to domestic tasks, since there is a multiplicity of activities that are the parameter for calibrating the material execution and the time dedicated to family work.

- p. 14-15 The “double shift” consists precisely of the recognition that some women, in addition to having a job or profession, also carry out work activities within the home and of childcare. Normally, this domestic work is unpaid and represents an opportunity cost for women.

- p. 16 Some women spend more time than their partners in domestic work and were not paid for it, were unable to develop professionally on an equal footing with their former spouses and thus were unable to acquire the same amount of assets. Failure to recognize this situation and the costs to women would mean, precisely, making invisible the value of domestic work without considering the effort for time devoted to unpaid work (domestic work).

### Constitutionality of section VI of Article 267 of the Civil Code of Mexico City

- p. 16 The Supreme Court rules on the constitutionality of section VI of Article 267 of the Civil Code.
- p. 17 The article is constitutional if it is construed that the wording of the provision “*has been dedicated to carrying out the work of the household and, if applicable, the care of the children*” does not imply requiring the applicant spouse to prove that she or he was dedicated “exclusively” to domestic work, since this would distort, on the one hand, the nature of the compensation mechanism and, on the other, the recognition of the double shift.

The compensatory mechanism may be accessed when applicant spouses prove that they have dedicated themselves to domestic work and, when applicable, to the care of children, even when they have devoted some proportion of their time to paid work outside the home. The applicants only have to prove that for some time they devoted themselves to domestic tasks and that this made it impossible for them to acquire their own assets or that those assets are conspicuously inferior to those of their spouse, regardless of whether they have carried out other types of work outside the household.

The judge must evaluate the modality of domestic work and the time used for these tasks, whether it was full-time, double shift or both spouses shared the domestic work in the same intensity.

### Analysis of this case

- p. 17-18 The Collegiate Circuit Court that decided the case indicated that the provision did not contain discriminatory treatment; that, on the contrary, the legislator sought to adapt the provision to the social reality that has prevailed in Mexican society in order to balance the economic regime of marriage.

The Collegiate Court explained that it was essential to prove having been dedicated to the household and children for the entire duration of the marriage and that, in this regard, it was not feasible to separate or divide that period into two stages, since the legislator's intention was to protect the balance of the matrimonial economic regime for the entire time it lasted.

It is seen from the foregoing that the collegiate body interpreted section VI of Article 267 of the Civil Code contrary to the constitutional purposes pursued by the institution of compensation.

- p. 18-19 The purpose of the compensation is to equalize the rights of the spouse who, when assuming the domestic and family burdens, did not manage to develop professionally in the labor market with the same time, intensity, and diligence as the other spouse, causing a detriment to his or her assets. The premise "has been dedicated to carrying out the work of the household and, if applicable, the care of the children" is applicable in those cases in which a situation of inequality between the spouses persists that has to be mitigated through the compensatory mechanism, either because the applicant spouse was dedicated exclusively to the household or because he or she worked a double shift.

### Decision

- p. 19 Based on the foregoing, the decision of the Collegiate Circuit Court is overturned so it may issue another one in which the institution of compensation and the recognition of the double shift are applied. It must: (i) determine whether the applicant predominantly dedicated herself to the

household, even if she had performed other professional activities; (ii) determine whether devoting herself to domestic activities to a greater extent than her ex-spouse generated some opportunity cost for her; and (iii) with free jurisdiction establish the percentage of compensation, if any, that corresponds to the plaintiff.

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## PROCEDURES FOR FULL REPARATIONS WITH DOMESTIC VIOLENCE (COMPENSATORY MECHANISM IN DIVORCE AND REPARATION OF DAMAGES RESULTING FROM DOMESTIC VIOLENCE)

### *Amparo Directo en Revisión 5490/2016*<sup>16</sup>

**Keywords:** *Institution of compensation and double shift, reparation of damages, wrongful act, domestic violence, fair compensation, moral damages, compensation amount for domestic violence.*

#### **Summary**

Luisa sued Juan for: the dissolution of their marriage, compensation of 50% of the assets and payment of fair compensation for the domestic violence suffered by Luisa and her son Carlos. A judge in Guanajuato declared the dissolution of the marriage, compensation of 50% of the assets in favor of Luisa and ordered Juan to pay compensation for moral damages resulting from the domestic violence, the amount of which should consider: the standard of living and actual situation of the victims, the environment in which they live and their development, as well as

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<sup>16</sup> Decision issued by the First Chamber of Mexico's Supreme Court of Justice (March 7, 2018). Reporting Justice: Arturo Zaldívar. *Action For Constitutional Relief Through Direct Injunction (Amparo Directo En Revisión 5490/2016)*

Juan's economic possibilities. Luisa and Juan appealed the judge's decision and the Chamber hearing the case affirmed the trial court decision.

Juan and Luisa filed an injunction (*amparo*) lawsuit. The Collegiate Circuit Court granted the injunction (*amparo*) to Luisa so the judge could evaluate whether certain real estate could be included in the compensation. The Collegiate Circuit Court also granted the injunction (*amparo*) to Juan so that the chamber would evaluate the percentage of 50% of the compensation and determined that, even though the acts of domestic violence had been proven, it was not feasible to order Juan to pay compensation for moral damages given that Article 63.1 of the American Convention on Human Rights (ACHR) was not applicable.

Luisa and Carlos filed an appeal (*recurso de revisión*) which was heard by the First Chamber of the Supreme Court.

### Issue presented to the Supreme Court

Whether the Collegiate Circuit Court adequately interpreted the use of the compensatory mechanism in divorce and whether the interpretation by the Collegiate Circuit Court on the reparation of the damages resulting from the domestic violence is in accordance with the doctrine of the First Chamber regarding the right to fair compensation and the right to a life free of violence.

### Holding and vote

The decision of the Collegiate Circuit Court was overturned for essentially the following reasons. The interpretation by the Collegiate Circuit Court of the compensatory mechanism in divorce is in line with the constitutional principles the institution pursues. However, with respect to the reparation of the damages resulting from domestic violence, it was concluded that the Collegiate Circuit Court's interpretation was contrary to the doctrine of the First Chamber regarding the right to fair compensation and the right to a life free of violence. In the view of the Supreme Court, the patrimonial and moral impacts on victims of violence should be economically remedied fairly and proportionally to the damages suffered.

The First Chamber decided this case with the unanimous vote of the five Justices Norma Lucía Piña Hernández, Arturo Zaldívar Lelo de Larrea, José Ramón Cossío Díaz, Jorge Mario Pardo Rebolledo and Alfredo Gutiérrez Ortiz Mena.

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### EXTRACT OF THE DECISION

p. 1 Mexico City. The First Chamber of Mexico's Supreme Court of Justice (the Supreme Court), in session of March 7, 2018, issues the following decision.

#### Background

p. 2 Luisa sued Juan for: (a) the dissolution of their marriage, (b) compensation of 50% of the assets and (c) the payment of fair compensation for the domestic violence she and her son Carlos suffered.

p. 2-3 The trial court judge declared the dissolution of the marriage; approved the compensation of 50% of the assets in favor of Luisa; and ordered Juan to pay compensation for moral damages, considering that because of the domestic violence, the fundamental rights to health and dignity of Luisa and Carlos were violated. The judge also specified that the amount should be calculated in the ancillary proceeding enforcing the decision, taking into consideration: the standard of living and the actual situation of the victims, the environment in which they live and their development, as well as the economic possibilities of Juan.

p. 3 Luisa and Juan appealed the decision of the trial court. The chamber that heard the appeals confirmed: (a) the dissolution of the marriage; (b) the appropriateness of the compensation of 50% of the assets in favor of Luisa – but changed the assets that should be included in this; (c) the acts of domestic violence; and, (d) the appropriateness of compensation for moral damages.

p. 4-5 Both parties filed injunctions (*amparo*). In her claim, Luisa essentially challenged the exclusion of some assets in the compensation. Juan stated

that the compensation should not be granted because his ex-wife did not prove that she had dedicated herself exclusively to the home and care of the children. He also indicated that the order to pay moral damages should not be applicable because the acts of domestic violence were not proven.

- p. 5-6 The Collegiate Circuit Court issued a decision in both injunction (*amparo*) trials. The Collegiate Circuit Court granted the injunction (*amparo*) to Luisa so that the chamber would evaluate whether certain real estate can be included in the compensation. Juan was granted the injunction (*amparo*) so that the chamber would again evaluate the appropriateness of 50% determined for the compensation and determine that in spite of the proven acts of domestic violence it was not feasible to order Juan to pay compensation for moral damages given that Article 63.1 of the American Convention on Human Rights (ACHR) was not applicable.
- p. 7 Luisa and her son Carlos filed an appeal (*recurso de revisión*) before the Supreme Court. The arguments set forth in the case centered on two themes: compensation considering the right to equal treatment and economic compensation for moral damages resulting from domestic violence.

### Study of the merits

- p. 12 In the Action for Constitutional Relief (*Amparo Directo en Revisión*) 1340/2015, the Supreme Court decided that in disputes where a situation of violence or vulnerability is raised and where gender issues impede imparting justice completely and equally, the judicial bodies must verify, applying the tool of gendered perspective, whether there are possible disadvantages due to that condition.
- p. 13 This tool requires: (i) verifying the existence of situations of power or contexts of structural inequality based on sex, gender roles or sexual preferences; (ii) that the judges consider, when interpreting the rule applicable to the specific case, whether that rule provokes a direct violation of the right to equal treatment by introducing impacts differentiated by gender. If it does,

then the judge must prefer the interpretation that eliminates that discrimination, or choose not to apply the rule; and, (iii) that when applying the gender perspective method, if the judge considers that the evidence is insufficient to clarify the situation due to gender inequalities, then the judge must request the presentation of the evidence relevant to analyze the gender violence situations or the circumstances of inequality provoked by gender stereotypes, for which the judge, at the moment or assessing the evidence, must read and interpret the facts and evaluate the evidence avoiding discriminatory stereotypes.

### **- Institution of compensation and double shift**

p. 14 In different precedents, it has been established that the institution of compensation is a mechanism to redress the economic harm suffered by the spouse who, in the interest of the marriage, assumed certain domestic and family burdens without receiving economic remuneration in exchange. Its purpose is to try to compensate the opportunity cost associated with not having been able to participate in the conventional labor market with the same time, intensity and diligence as the other spouse.

p. 15 Among the principal characteristics of the compensation are the following: its nature is to retribute, not sanction; it can be requested and resolved in favor of either of the spouses that has reported an economic imbalance due to having worked primarily in domestic work; the burden of proof corresponds to the petitioning party; the compensation mechanism only operates with respect to the assets acquired during the marriage, because presumably that is the period during which situations of impoverishment and enrichment were created that would be unjust at the time of dissolving a separate property regime; and the compensation does not imply equalizing the patrimony of the spouses, but redressing the opportunity costs generated in the patrimony of one of them.

It was also established that domestic work may consist of the material execution of tasks in the home; in the material execution of tasks outside of the home but related to the organization of the house and obtaining of goods and services for the family; and in carrying out functions of direction

and management of the economy of the home and the care, upbringing and education of the children. It was also indicated that to determine the amount of the compensation, the period that the petitioner engaged in those tasks should be observed.

- p. 17 The Supreme Court considers that the interpretation of the institution of compensation and the elements that were used to evaluate its percentage are correct and according to the doctrine of the Supreme Court. The collegiate body did not ignore that the purpose of the institution of compensation is to repair the opportunity cost assumed by the spouse who was dedicated to some degree to the care of the home, since it did not consider the double shift as an obstacle to the validity of the compensation, but rather as an element for determining the duration and degree of dedication to housework by Luisa. Therefore, it determined the opportunity cost faced by Luisa and, consequently, the amount of compensation.

#### **- Reparation of the damages for domestic violence**

- p. 17-18 The Supreme Court considers this grievance to be justified, since while the Collegiate Circuit Court was right in pointing out that Article 63.1 of the ACHR as applied by the Inter-American Court of Human Rights to the States that are parties to the Convention and not to private parties, in the national sphere the First Chamber has interpreted the concept of “fair compensation” as a human right that governs the relations between private parties. The compensation resulting from civil liability cases must be in accordance with the doctrine of the Supreme Court and it is considered that domestic violence constitutes a wrongful act that can be tried in a civil proceeding when the claim consists of receiving a monetary compensation from the aggressor.

#### **i. Scope of Article 63.1 of the American Convention on Human Rights in the international sphere**

- p. 18 The doctrine on reparations of the Inter-American Court of Human Rights is based on Article 63.1 of the ACHR, which establishes that in the case of

a violation of a right or freedom protected in the ACHR, the Inter-American Court of Human Rights “shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated” and, if appropriate, that the consequences of the measure or situation be remedied and a fair compensation paid.

p. 19 The Inter-American Court of Human Rights has established that in the case of a violation of a human right attributable to a State signatory of the ACHR, the restitution of the right must always be declared, if possible, which consists of returning a person to the enjoyment of the right violated by the acting State. Thus, an obligation is generated for the responsible party to guarantee the enjoyment of the right or remedy the consequences of such violation.

p. 19-20 The reparation measures used in the Inter-American case law may be grouped under three headings: (i) the restitution of the violated right (*restitutio in integrum*); (ii) economic compensation for the material and intangible damages caused; and (iii) other non-pecuniary measures, called “reconstruction measures”, and among which are the measures of satisfaction and the guarantees of non-repetition.

Nevertheless, in International Law reparation measures have not been understood as a human right but as a legal consequence of the existence of State liability.

p. 21 The subjects of liability for the violations of the rights protected by these conventions are the defendant States. In that regard, the primary concern of the international human rights law is to protect citizens (and other persons in their territory) from the abuses of the State, its bodies and officials. That relationship has been conceptualized as the vertical effect of human rights.

**ii. Scope of the concept “fair compensation” in the national sphere. Characterization as a human right that governs the relations between private parties.**

p. 21 The concept of “fair compensation” established in Article 63.1 of the ACHR is not a human right when applied in the international sphere, since it has

been conceived as a legal consequence resulting from the violation of the ACHR. Nevertheless, in Mexico that concept has been given its own content and scope. In the proceedings that give rise to economic reparations, a “fair compensation” has been understood as a fundamental right that governs the relations between private parties.

- p. 22 This First Chamber has understood that the fundamental task of the interpreter consists of analyzing, in a singular manner, the legal relationship of the fundamental rights with other constitutionally protected interests or rights; at the same time, the structure and content of each right will make it possible to determine what rights can only be enforced against the State and what rights enjoy the intended multi-directionality.
- p. 22-23 When considering fair compensation in damages lawsuits as a human right, it has been established that the provisions that establish fixed compensation formulas that do not pursue full reparations are unconstitutional. In relation to legality, various parameters have been established to quantify the amount of the reparations.
- p. 23 In Action for Constitutional Relief (*Amparo en Revisión*) 1068/2011, the First Chamber indicated that “fair compensation” or “full compensation” implies returning things to the state in which they were found, the reestablishment of the prior situation and if that is not possible, establishing the payment of a compensation for the damages caused when the duty to redress arises. From that conception, it was specified that the right to a fair compensation is applicable in the relations between private parties.
- p. 25-26 In various precedents, this First Chamber has analyzed the legality of the amount of the reparations; establishing various parameters to determine that a reparation is fair. In Direct Injunction (*Amparo Directo*) 50/2015, it was established that the amount of compensation must be calculated based on two principles: full reparation of the damages and individualization of the payment according to the particularities of each case. Compensation for moral damages must be individualized and based on: (i) the nature and extent of the damages caused, that is, whether they are physical, mental or

psycho-emotional; (ii) the possibility of rehabilitation of the person affected; (iii) the loss of opportunities, in particular those of employment, education and social benefits; (iv) the material damages, including income and lost profit; (v) the intangible losses; (vi) the expenses of legal assistance or of experts, medications and medical, psychological and social services; (vii) the level or degree of liability of the parties; (viii) their economic situation; and (ix) other particular characteristics.

- p. 26 In Direct Injunction (*Amparo Directo*) 30/2013 and *Direct Injunction (Amparo Directo)* 21/2013 and Action for Constitutional Relief Under an Injunction (*Amparo Directo en Revisión*) 4646/2014, the First Chamber determined that to establish the economic compensation resulting from the moral damages, the following must be analyzed: i) the type of right or interest injured, ii) the seriousness of the damages, iii) the expenses accrued or to accrue as a result of the moral damages, iv) the degree of liability of the person responsible, and v) the economic capacity of the latter; emphasizing that the elements of quantification are merely indicative.

In Summary, the right to fair compensation is configured as a human right that governs the relations between private parties, seeking that the reparations of the damages are fair.

### iii. The right to fair compensation in damages lawsuits

- p. 27-28 The claim for “a fair compensation” should be processed and carried out according to the rules and procedures of the lawsuits in which it is invoked, whether civil or administrative. The primary purpose of civil liability and State civil liability lawsuits is the economic reparation of the pecuniary or non-pecuniary impacts resulting from an unlawful act or from the irregular activity of the State. To demand fair compensation, the elements of the liability must be proven, which are: a wrongful act (or irregular administrative activity), damages and a causal link between the act and the damages. It should also be kept in mind that the objective of these lawsuits is essentially economic, since the intention is to mitigate the consequences of the wrongful act through a sum of money and to reproach the guilty party.

p. 28 In Direct Injunction (*Amparo Directo*) 30/2013 and Direct Injunction (*Amparo Directo*) 31/2013, the First Chamber indicated that fundamental objectives are reached in matters of social retribution through compensation, since by requiring the liable party to pay compensation, the victims obtain the satisfaction of seeing their desire for justice met. Through compensation, the victims can see that the damages caused to them also have adverse consequences for the person responsible.

In addition, compensation has a dissuasive effect on harmful conduct, which will prevent future wrongful conduct. Such measure has a double function: people will avoid causing damages to avoid having to pay compensation and, on the other hand, it becomes economically convenient to cover all necessary expenses to avoid causing damages to other people.

#### iv. Constitutional wrongful acts

p. 28-29 Occasionally the wrongful acts or the irregular activity of the State may imply the violation of human rights. In effect, a civil wrongful act occurs when a rule of public order or the *lex artis* is violated. Such duty may constitute a human right when the duty violated is fully identified with a right recognized internationally or nationally, such as the prohibition on discrimination, or the protection of honor or the freedom of expression. The economic reparation for violations of human rights can be tried through special procedures, created specifically for that (constitutional torts or human right torts) or, in some cases, through civil claims for reparations in which the elements of the liability must be proven: wrongful act, damages, and causal link between the act and the damages.

p. 29-30 Nevertheless, in the absence of specific procedures, the economic reparation derived from the patrimonial or moral damages generated by the violation of human rights may be claimed through a civil lawsuit, when the person responsible is a private party, or an administrative lawsuit when the person responsible is the State. The claims through these proceedings must prove that the violation generated patrimonial or moral damages, and that

their only purpose is the economic compensation of the impacts suffered and not the generation of non-pecuniary measures of reparation (of satisfaction and non-repetition).

- p. 30 The activity or omission that gives rise to a wrongful act must be clearly identifiable. Thus, the acts or omissions are only a source of liability when they are wrongful, that is, when they are contrary to public order provisions and custom. Therefore, the conduct of the responsible party will be wrongful when that party fails to fulfill a legal obligation it has.
- p. 32 In this regard, the reparation of the violation of human rights may be tried in a civil lawsuit, and the compensation that is established must be based on the criteria that this Supreme Court has established regarding the right to fair compensation. Thus, Luisa is right in indicating that fair compensation is a fundamental right that governs relations between private parties.

**v. Domestic violence constitutes a wrongful act that can be tried in non-contractual civil liability suits.**

- p. 32-33 In this case, the issue is raised specifically of whether domestic violence can be tried as a case of non-contractual liability governed by the right to fair compensation. The Supreme Court considers that domestic violence constitutes a wrongful act that takes place in relations between private parties, whose patrimonial and non-patrimonial consequences must be remedied fairly and according to the level of the impact.
- p. 33 The elements that compose civil liability must be shown. These are: the existence of a wrongful act, damages, and the causal link between that act and the damages. Only when these elements have been proven can an economic compensation arise.

**vi. Wrongful act.**

- p. 33 A wrongful act is one that is contrary to public order provisions and custom. Therefore, the conduct of the person responsible will be wrongful when

that person violates a legal obligation he/she has. This obligation may arise directly from a duty established constitutionally or through an agreement. The conduct will also be wrongful when the responsible party is negligent (which presumes a duty of care violated).

- p. 33 The First Chamber has recognized that the right to live in a family environment free of violence is a human right that results from the protection merited by the rights to life, health, dignity of persons, equal treatment and the establishment of conditions for personal development, recognized in Articles 1, 4 and 29 of the Constitution.
- p. 35-36 According to Article 7 of the Law to Prevent, Address and Eradicate Violence in the State of Guanajuato and Article 6 of the Law for Women's Access to a Life Free of Violence of the State of Guanajuato, domestic violence is any act or omission that is directed toward causing a psychological, physical, patrimonial, economic or sexual impact on or harm to any member of the family. The characteristics of each type of violence that occurs in the family environment were described: (i) psychological: any act or omission that harms the psychological or emotional stability of the woman; (ii) physical: any material act, not accidental, that inflicts harm to the woman through use of physical force, substances, weapons or objects, that may or may not cause wounds, whether internal, external or both; (iii) patrimonial: any act or omission that affects the subsistence of the victim; (iv) economic: any action or omission of the aggressor that affects the finances of the victim; and (v) sexual: any act of sexual content that threatens, degrades or harms the body or the sexuality of the victim, or both, that threatens her freedom, dignity, sexual security or physical integrity, that implies the abuse of power and supremacy over the victim, by denigrating her and conceiving of her as an object.
- p. 36 The acts or omissions that constitute harmful conduct in the physical, emotional or psychological sphere of a member of the family constitute a wrongful act since carrying them out violates public order provisions; including those established at the constitutional and international level.

### vii. Damages.

- p. 37 A wrongful act may generate both patrimonial and non-patrimonial (moral) damages and both must be compensated. Patrimonial damages consist of all the economic losses suffered and the disbursements incurred to address the damages. They also include lost profits, understood as the benefits that the affected party would have received if it had not suffered the wrongful act. Thus, patrimonial damage may have present and future consequences.
- p. 38 The conceptualization of moral damages centers on the non-patrimonial or spiritual interests that may have been affected. In this regard, anguish, afflictions, humiliations, suffering or pain constitute moral damages because they are impacts on non-patrimonial interests.
- p. 38-39 Patrimonial and moral damages, in the broad sense, have present and future projections, and the judge must always weigh the current and future consequences. The damage is current when it is already produced at the time of issuing the ruling. This damage includes all the losses suffered. The future damages are those that have not yet been produced when the decision is issued but are the predictable prolongation or aggravation of a current damage, or a new future harm, resulting from a current fact. For the future damage to result in a reparation, the probability that that benefit would have occurred must be real and not just an illusion of the victim.
- p. 39 The moral damages resulting from domestic violence are generated by the gamut of physical or psychological pain and suffering that the affected party has suffered or continues to suffer because of the acts or omissions of the generator of violence. The patrimonial damages are generated by all the economic costs that the affected party had to assume because of the actions or negligence of the aggressor.

Various studies show that domestic violence has consequences that compromise the fundamental freedoms of those who are its victims, such as the rights to life and personal security, the highest possible level of physical and mental

health, to education, to work and housing, as well as participation in public life.

The women that suffer domestic violence have a variety of physical and emotional health problems, affecting their capacity to earn a living and participate in public life. Their children run a significantly greater risk of having health problems, low academic achievement and behavioral problems.

### **viii. Causal link**

p. 41 To prove the civil liability that is claimed, the causal link between the conduct of the aggressor and the harm caused to the plaintiff must be demonstrated. The damages experienced must be a consequence of the conduct of the agent. Otherwise, liability could be imposed on a person that did not have anything to do with the harm caused.

The causal link between the conduct attributable to the defendant and the adverse effect derived from it for the plaintiff must be duly proven because the origin of the liability gravitates precisely on the attribution of the harmful act to the defendant. Thus, the liability presumes the attribution of conduct that has sufficient causal effectiveness to generate the result.

In cases of domestic violence, it must be shown that the psychological harm suffered or that will be suffered by the victim, and the economic costs the victim assumed or will assume in the future, result precisely from the domestic violence exercised by the aggressor. It must be proven that the patrimonial and non-patrimonial impacts are a consequence of the unlawful act that is claimed.

### **ix. Elements to determine the amount of compensation.**

p. 42-43 The reparation of the patrimonial damages may include, according to Article 1405 of the Civil Code of the State of Guanajuato, the reestablishment of the prior situation, when that is possible, or the payment of damages and losses. When the damages caused to persons result in death, total permanent

disability, partial permanent disability, total or partial temporary disability, their degree will be determined based on the provisions of the Federal Labor Law, and in case of death, the compensation will correspond to the legitimate heirs of the victim.

- p. 43 The moral damages resulting from domestic violence may also be compensated (both damages must be paid). The translation of the economic reparation resulting from moral damages is more complex than the reparation derived from patrimonial damages. The First Chamber has determined that the following should be analyzed to set the economic compensation resulting from moral damages: i) the type of right or interest harmed, ii) the seriousness of the damages, iii) the expenses accrued or to be accrued because of the moral damages, iv) the degree of liability of the responsible party, and v) the economic capacity of the latter.

#### **x. Determination of the existence of civil liability in this case**

- p. 44 In this case, the wrongful act generating the civil liability was proven: the psychological and emotional violence that Luisa and her son suffered, since the case files show that in each proceeding it was concluded that there were sufficient elements of evidence and indications to prove the domestic violence.
- p. 46 The Supreme Court considers that harmful conduct in the emotional or psychological sphere has occurred, which under the guidelines explained constitutes a wrongful act. Engaging in such conduct violates public order rules, including those established at the constitutional and international level.

In addition to the wrongful conduct, the harm must be verified, which must be certain quantitatively and qualitatively, even when its exact amount cannot be determined.

- p. 47 It can be affirmed that the harm did occur and that it is attributable to Juan's conduct. However, the level of the damages that Luisa and her son suffered was not established. From the evidence provided it is not possible to determine

the importance of the value or interest affected, as quantifier of this aspect of the damages, which is to say, the degree of impact produced: minor, medium or severe.

In that regard, it is important to collect more evidence so that, applying the guidelines to determine the amount of compensation, the amount in this case can be established.

**- Effects of the Injunction in light of the above doctrine.**

- p. 47-48 It is considered that Luisa and her son are right to indicate that their claim of domestic violence should have been analyzed as a wrongful act that can be remedied through a “fair compensation” in a civil liability lawsuit. The Collegiate Circuit Court should have stated that, although Article 63.1 of the ACHR is applied only for finding States party to the Convention liable in the international sphere, it has different scope and purposes in the national sphere. Thus, the collegiate body should have looked to the ample doctrine that the Supreme Court has developed regarding the concept of fair compensation.
- p. 48

**Decision**

The decision of the Collegiate Circuit Court is overturned so that it may, leaving the matter of compensation for divorce untouched, order the chamber to reinstate the lower court proceeding, allowing the judge to collect more evidence to determine the degree of impact on the affected parties of the domestic violence suffered by Luisa and Carlos. Thus, once the level of the damages is determined, the amount of the compensation corresponding to them shall be established based on the parameters the Supreme Court has established to reach a fair compensation.

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## OBLIGATION TO PROSECUTE THE DEFENDANT WITH A GENDER PERSPECTIVE

### *Amparo Directo en Revision 6181/2016*<sup>17</sup>

**Keywords:** *Gender perspective, gender violence, family violence, structural discrimination, criminal procedure, Article 84 of the Federal Criminal Code, Article 89 of the Federal Criminal Code.*

#### **Summary**

A woman was found criminally liable for the aggravated homicide of her romantic partner, for which she was sentenced to 27 years and 6 months in prison. The woman filed an appeal. The criminal court chamber that heard the case amended the decision with regard to compensation for death and moral damages for her children. The woman filed an injunction (*amparo*) lawsuit against this decision, in which she noted that the criminal court chamber had failed to judge her with a gender perspective and to consider the violence she suffered from her romantic partner. The Collegiate Circuit Court that heard the injunction determined the

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<sup>17</sup> Decision issued by the First Chamber of Mexico's Supreme Court of Justice (March 7, 2018). Reporting Justice: Arturo Zaldívar. *Action For Constitutional Relief Through Direct Injunction 6181/2016*

woman's detention was illegal and granted the injunction so that the criminal court chamber could reclassify it and annul the evidence with a direct and immediate link to the detention. The woman filed an appeal against the injunction decision, again claiming that she was not tried with a gender perspective and that Articles 84 and 89 of Mexico City's Criminal Code (MCC) were unconstitutional. Mexico's Supreme Court (this Court) heard the appeal.

### **Issue presented to the Supreme Court**

Whether the woman should have been judged with a gender perspective; what are the guidelines for judging with a gender perspective; and whether Articles 84 and 89 of MCC are constitutional.

### **Holding and vote**

It was decided that Articles 84 and 89 of MCC are constitutional, and the injunction was granted to the woman, essentially, for the following reasons. Articles 84 and 89 of the Code are in accordance with the postulates of the Constitution, since they do not violate the right of the parents not to be separated from their children neither to interrupt the bond with their children. Likewise, the substitution of the prison sentence fulfills a constitutionally legitimate purpose, it respects the dignity of the person and does not allude to stigmatizing concepts. These articles are neither discriminatory nor unconstitutional because they do not make distinctions based on suspicious categories such as ethnic or national origin, gender, age, different capacities, social status or health condition. Regarding the duty to judge from a gender perspective, the human right of women to a life free of violence and discrimination entails the duty of the State to ensure that in all jurisdictional disputes where a situation of violence or discrimination for gender reasons is denounced, has to be taken into account in order to make visible whether or not the situation of violence or gender discrimination affects the way of applying the law to the specific case. If the special situations that entails a circumstance of this nature are not taken into account, then it may be validated a discriminatory treatment based on gender. Thus, the right of women to a life free of discrimination and violence implies the obligation of all authorities to act with a gender perspective. For this reason, the jurisdictional authorities are obliged to impart justice with a vision in accordance with the gender

circumstances and eliminate the barriers and obstacles preconceived in the law regarding the functions of both genders, which can materially change the way of perceiving, assess the facts and circumstances of the case, as in the current dispute. The incorporation of the gender perspective in the legal analysis aims to combat stereotyped and indifferent arguments to achieve the full and effective exercise of the right to equality. Therefore, the collegiate circuit court must order the reinstatement of the procedure, so that the judge applies the method of judging with a gender perspective.

The First Chamber of the Supreme Court decided this case unanimously by the five votes of Justices Norma Lucía Piña Hernández, Arturo Zaldívar Lelo de Larrea, José Ramón Cossío Díaz (reserved the right to issue a concurrent opinion), Jorge Mario Pardo Rebolledo (reserved the right to issue a concurrent opinion) and Alfredo Gutiérrez Ortiz Mena.

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### EXTRACT OF THE DECISION

p. 1 Mexico City. The First Chamber of Mexico's Supreme Court of Justice (the Supreme Court), in session of March 7, 2018, issued the following decision.

#### Background

On August 12, 2011, a Criminal Judge in Mexico City held a woman criminally liable for the crime of aggravated homicide. She was sentenced to 27 years and 6 months in prison.

p. 2 The defendant filed an appeal. On November 25, 2011, a criminal court chamber issued a decision to modify the decision of the trial court judge.

On March 7, 2016, the woman filed an injunction. On September 22, 2016, a Collegiate Circuit Court found that the complainant's detention was unlawful. For this reason, it granted an injunction for the criminal court chamber to classify the detention as illegal and to annul evidence that had a direct and immediate link to the detention as illegal evidence.

On October 6, 2016, the criminal court chamber issued a decision in compliance with the injunction.

On October 17, 2016, the woman's representative filed an appeal against the decision handed down by the collegiate circuit court.

On October 26, 2016, this Court issued a resolution admitting the appeal.

p. 4 In her claim, the woman indicates that she was not tried with a gender perspective. She believes that her case should have been analyzed in light of the violence she experienced when she lived with her husband and six children, which escaped the attention of the judge. She adds that in order to understand the actions of a woman responsible for the homicide of her partner, it is necessary to understand the problem of family violence, its cyclical nature and – in particular – the physical and pathological effects it produces.

p. 5 She argues that in cases where a woman takes the life of her aggressor, pushed by an intolerable situation, the judicial practice often ignores the violence suffered by the woman and the context in which the acts occurred. She adds that the Criminal Court Chamber failed to comply with the obligation to respect and guarantee the rights to equality and non-discrimination by deciding the case without a gender perspective.

p. 10 In addition, the defendant maintains that Articles 84 and 89 of Mexico City's Criminal Code (hereinafter referred to as the Code) are unconstitutional because they are discriminatory, since the application of alternative penalties in Mexico is conditioned by the temporality of the penalty without considering the type of crime, the context and the special circumstances of the case.

In this case, the prison sentence should be replaced in accordance with the principles applicable to gender and childhood, since it must be acknowledged that the petitioner is a woman who is a victim of violence and mother of 7

children. In addition, the prison sentence violates the right of parents not to be separated from their children; the principle of the best interests of the child; the right to health; and the right of children to grow and develop under the care of their parents. The petitioner's imprisonment interrupts the bond with her children and violates the principle that the criminal law should not affect any one other than the offender because a child cannot be forced to accompany his or her mother in prison.

### Study of the merits

#### I. Gender perspective

p. 19 The Supreme Court emphasized that this case clearly deserves to be judged with a gender perspective since, in her statement at prosecution, the woman indicated that since 2007 (the year her mother-in-law died), she began to suffer family violence from her husband. She claimed that he told her she was ugly and fat, threw food at her, beat her and raped her because she no longer wanted to have sex with him. In the same vein, the criminological study issued on March 17, 2011, indicated that the woman and her children suffered family violence perpetrated by her husband.

p. 20 In addition, the psychiatric assessment of March 15, 2011, concluded that the woman presented an adaptive disorder with prolonged depressive reaction. Therefore, psychological support was requested and constant surveillance was recommended due to risk of self-harm.

Based on the above, the Supreme Court maintained that in this case the criteria for judging with a gender perspective should have been applied in order to verify that the defendant suffered from family violence and consider the effects on her generated by such violence .

#### A. The effects of violence perpetrated in the family against women

p. 21 Article 1 of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, known as the Belém do Pará

Convention, states that violence against women is “any action or conduct, based on their gender, that causes death, harm, or physical, sexual, or psychological suffering, both in the public and private spheres.” Article 2 of the same treaty adds that violence against women includes physical, sexual and psychological violence and takes place within the family or domestic unit or in any other interpersonal relationship, whether the aggressor shares or has shared the same domicile as the woman, and that it includes, among other things, rape, mistreatment, and sexual abuse.

p. 23 Women who are in violent relationships find themselves caught up in the cycle of violence which is also known as battered woman syndrome. According to Elena Larrauri, this is characterized by three phases:

a) Phase 1: abusive episodes (*tension building*) in which acts of minor violence and verbal abuse occur.

b) Phase 2: exercise of greater physical force (*acute battering incident*), product of tension, rage or fear triggers the violent attack.

c) Phase 3: calm, acts of repentance (*loving contrition*), demands for forgiveness and promises to seek outside help.

Women living in contexts of family violence constantly repeat the cycle of violence described, in a way that they believe they lose control of the abusive situation. They believe it is impossible to escape, even when they could.

p. 24 In abusive relationships, aggressive men can come to completely control the women they abuse; they control their money, their clothes, their food. They systematically cut off contact with their family and friends. Battered women know that if they try to escape, they and their children are in danger and face a risk of death when they try to get out of the abusive relationship.

p. 25 On the other hand, the effects of violence are diverse since battered women can experience depression, low self-esteem, insecurity and life in isolation,

which implies that they themselves, or because of their difficulty in communicating with others, have broken their social networks, which causes them to feel lonely and helpless.

- p. 25-26 Victims of violence are also ashamed of what is happening to them, so they remain silent about their situation. They also have feelings of guilt, as they assume the situation they live in is their responsibility and think they deserve to be mistreated. In addition, a high percentage of women living in contexts of violence have post-traumatic stress disorder, which explains the feeling of terror and constant threat, even without an episode of aggression.
- p. 26 Because of these particularities, in trials in which battered women face criminal charges for assaulting their aggressors, judges must take into account the context of women facing domestic violence by their partners.
- p. 27 The expert opinions help to understand whether the battered woman attacking her abuser felt in danger or acted reasonably in accordance with her own context. Thus, the judges take into account the social reality faced by the perpetrator and why she responded in that way, from her own situation and perspective.

### **B. Judging with a gender perspective**

- p. 29 The issue of gender perspective has already been addressed by the Supreme Court in a number of cases. In Action for Constitutional Relief Through Direct Injunciton (*Amparo Directo en Revision*) 2655/2013, the First Chamber of this Court indicated that the human right of women to a life free from violence and discrimination is recognized in the Federal Constitution and in various international instruments, particularly in the Convention on the Elimination of All Forms of Discrimination against Women, as well as in the Convention on the Rights of the Child and the Belém do Pará Convention. These international treaties recognize women's equality before the law and the duty of any authority to avoid discriminatory treatment on the basis of gender.

p. 29-30 The human rights of women were born out of the need to establish a specific protection regime when it was found that the general international human rights law was not sufficient to guarantee the defense and protection of the human rights of certain vulnerable groups such as women who, due to their gender-linked status, require a special approach in the international human rights law as well as different types of mechanisms to ensure effective compliance with and respect for their rights, such as imparting justice with a gender perspective.

p. 34 In the same case –the Action for Constitutional Relief Through Direct Injunction (*Amparo Directo in Revision*) 2655/2013–, the Supreme Court determined that as a result of national and international regulations, the human right of women to a life free of violence and discrimination entails the duty of the State to ensure that in any dispute before the courts, where a situation of violence or discrimination for reasons of gender is reported, that the situation be considered, with the aim of determining if violence or gender discrimination affects the way the law is applied to the specific case. Failure to consider the special conditions that a situation of this nature entails may lead to the validation of discrimination in treatment on the grounds of gender.

This approach makes it possible to achieve substantive or de facto equality, which is configured as a facet or dimension of the human right to legal equality, derived from Article 1 of the Constitution. The purpose of this provision is to remove and/or reduce social, political, cultural, economic or other obstacles that prevent certain persons or social groups from genuinely and effectively enjoying or exercising their human rights in conditions of parity with another set of persons or social groups.

p. 35 For these reasons, the right of women to a life free from discrimination and violence implies the obligation of every authority to act with a gender perspective. Therefore, the judicial authorities must dispense justice with an awareness of the circumstances of gender and eliminate the barriers and obstacles preconceived in the legislation regarding the functions of one or

another gender, which can materially change the way of perceiving and assessing the facts and circumstances of the case, as occurs in this dispute.

This means that -the introduction of the gender perspective into legal analysis aims to combat stereotypical and indifferent arguments to achieve the full and effective exercise of the right to equality. If this is not done, women's access to justice could be conditioned because their particular situation is not seen.

p. 35-36 Thus, in order to eradicate inequality between men and women, states undertake to adopt the gender perspective in all their policies and actions, which is a method of detecting and eliminating the barriers that discriminate against people because of their gender. The gender perspective is a category of analysis that:

- Illuminates the differentiated social assignment of roles and tasks by sex, gender or sexual orientation;
- Reveals the differences in opportunities and rights that follow this assignment;
- Evidences the power relations originated in these differences; Acknowledges the link between gender issues, race, religion, age, political beliefs, etc.;
- Questions the differentiated impacts of laws and public policies based on these assignments, differences and power relations and;
- Determines in which cases differential treatment is arbitrary and in which cases it is necessary.

p. 36 Similarly, in Action for Constitutional Relief Through Direct Injunction (*Amparo Directo en Revision*) 1754/2015, the First Chamber of this Court indicated that the gender perspective refers to the method of analysis that is based on the differences that are assigned between men and women through

the construction of gender; of what is appropriate or what can be “expected” of each sex. It is therefore a methodological tool that serves to analyze the roles that men and women play or are expected to play in political, social and cultural contexts. The objective of this method is the identification and correction of the discrimination that stereotyping generates, especially in norms, policies and institutional practices.

- p. 40 The First Chamber of this Court, in Statement of Dissent (*Recurso de Inconformidad*) 411/2016, emphasized that the judicial authority must analyze all the facts of the case and, if necessary, gather evidence *ex officio* to determine the violence suffered by the woman, as well as the conditions in which the criminal conduct was carried out. As a result of the international treaties to which Mexico is a party, there is an obligation to judge with a gender perspective.

## II. Constitutionality of Articles 84 and 89 of the Code

- p. 41-42 The articles claimed as unconstitutional by the petitioner state the following:

Article 84 (Substitution of imprisonment). The judge, in regard to the provisions of Article 72 of this Code, may replace the penalty of imprisonment, in the following terms:

X. For a fine or work for the benefit of the victim or for the benefit of the community, when not exceeding three years; and

XI. For treatment in liberty or semi-liberty, when not exceeding five years.

The equivalence of the fine replacing the prison sentence will be due to one day's fine for one day's imprisonment, in accordance with the economic possibilities of the sentenced person.

Article 89 (Requirements for the appropriateness of the suspension). The judge or the Court, as the case may be, when sentencing, at the request of

a party or *ex officio*, will suspend the execution of sentences on a reasoned basis if the following conditions are met:

- The duration of the sentence imposed does not exceed five years imprisonment;
- When, in view of the sentenced person's conditions, there is no need to substitute the penalties, for the purpose for which they were imposed; and

The sentenced person has a positive personal record and an honest way of life. The judge will also consider the nature, modalities and motives of the crime.

- p. 42-43 – The requirements for such a benefit presumes that a person's responsibility has been validly established through a process governed by rules, both substantive and procedural, previously established in a secondary law. Thus, the condition restricting access to a benefit is strictly linked to the principle of legality.
- p. 44 The petitioner maintained that Articles 84 and 89 of the Code are unconstitutional because the application of alternative penalties in Mexico is conditioned by the temporality of the penalty without taking into account the type of crime. However, Action for Constitutional Relief Through Direct Injunction (*Amparo Directo en Revision*) 3980/2013 studied the requirements contemplated in Article 89 of the Code and the Supreme Court concluded that they were constitutional and in accordance with the Tokyo Rules.
- p. 47 The establishment by the State of the instrumental measures necessary to achieve social reintegration, such as the benefits provided for by law, is a fundamental right. Consequently, judges cannot refuse to grant benefits on grounds other than those provided for in the law, i.e., they must be granted to the extent that the parameters governing their granting are met. This makes it possible to argue that, although the instrumental measures necessary to achieve social reintegration, such as the benefits provided for

in the law, have the nature of a human right, the parameters that condition their granting still must be met.

The petitioner also stated that Articles 84 and 89 of the Code are unconstitutional because they are discriminatory. However, this Court has already determined that the requirements for substituting the prison sentence with other measures, and the requirements to take advantage of a sentence suspension do not violate the constitutional principle of equality. The requirements constitute institutions and measures that guide the criminal and penitentiary policy of the State toward the objective of the social rehabilitation of the offender; so this is in an area in which there is no direct impact on the human rights of individuals.

- p. 48 The provisions are constitutional because they are not “norms that establish classifications among citizens on the basis of the criteria mentioned in Article 1 of the Constitution as prohibited grounds for discrimination between persons (ethnic or national origin, gender, age, different abilities, social status, state of health, etc.); rather they are legal provisions issued in compliance with the mandate of Article 18 of the Constitution.

Finally, the petitioner argues that the challenged provisions threaten family rights because they violate the right of parents not to be separated from their children, the principle of the best interests of the child, the right to health and the right of children to grow and develop under the care of their parents. The petitioner’s imprisonment disrupts the bond with her children and violates the principle of criminal law that only the offender should be affected.

- p. 49 The provisions governing the substitution of sentences are not contrary to the family rights of convicted persons or to the best interests of children, because the proper safeguarding of these principles does not depend on the granting of the mentioned benefits, but on ensuring that such rights are not affected by provisions that prevent the prisoner from contacting the members of his or her family.

In other words, the articles regulating the substitution of the penalty do not affect family rights because the prison sentence does not prevent the appellant from having contact with her children, since they can visit her. It should be borne in mind that the prison system is organized on the basis of respect for human rights, which makes it easier for the sentenced person to continue to interact with the outside world during the execution of his or her sentence, for example, through family visits. This will enable the persons serving a prison sentence to have a positive influence on the education of their children, which is also a means for them to achieve the expected constitutional goal of their reintegration.

- p. 49-50 In conclusion, for all the reasons explained, Articles 84 and 89 of the Code are in compliance with the Constitution since they do not separate parents from their children or interrupt the bond with their children. Furthermore, the substitution of the prison sentence serves a constitutionally legitimate purpose, respects the dignity of the person, and does not refer to stigmatizing concepts. The above-mentioned provisions are also not discriminatory or unconstitutional because they make no distinctions based on suspect classifications such as ethnic or national origin, gender, age, different abilities, social status, or state of health.

### Decision

- p. 50 The Supreme Court overturns the appealed sentence and returns the case to the Collegiate Circuit Court so that it may order the reinstatement of the procedure so that the criminal judge may apply the method of judging with a gender perspective.
- p. 52 The criminal judge is required by the precedent of the Supreme Court to draw on sufficient evidentiary material to clarify the situation of violence, vulnerability, or discrimination on the basis of gender.
- p. 52-53 It will therefore order the relevant tests for the detection of violence, which may include – without limitation – psychological and physical expert testimony or a psychosocial expert report which “focuses on the experience

of persons affected by human rights violations, through which the psychosocial environment [of the woman] as well as the circumstances and the environment she was surrounded by will be analyzed”.

- p. 53-54 Finally, the criminal judge will consider that the method of judging with a gender perspective requires that, at all times, the human rights of the complainant and of all the persons involved, especially the children, be respected. The judge will also avoid the use of language based on stereotypes or prejudices and avoid making sentencing arguments that are based on such stereotypes. This item is particularly relevant in this case since the specialized literature indicates that it is quite common to assume that a battered woman must appear defenseless or helpless, passive and without any history of having committed violent acts.

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## WOMEN'S RIGHT TO A LIFE FREE OF VIOLENCE AND DISCRIMINATION (GENDER PERSPECTIVE IN THE INVESTIGATION OF FEMICIDE)

### *Amparo en Revisión 554/2013*<sup>18</sup>

**Keywords:** *women's right to a life free from violence and discrimination, right to access to justice, right to truth, femicide, gender perspective, gender violence, investigation of violent deaths of women.*

#### **Summary**

An agent (husband) of the Attorney General's Office of the State of Mexico (Public Prosecutor Office) reported the death of his wife, MLB, after allegedly finding her hanged. He argued that it was the result of a suicide. IBC, MLB's mother, along with people close to them, reported that she was a victim of abuse. Testimonies regarding the husband's treatment of MLB indicated physical, psychological, economic, and even sexual violence. However, the Public Prosecutor's Office only followed the line of inquiry into the alleged suicide. In the end it was determined

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<sup>18</sup> Decision issued by the First Chamber of Mexico's Supreme Court of Justice (March 25, 2015). Reporting Justice: Alfredo Gutiérrez Ortiz Mena. *Action For Constitutional Relief Through Injunction 554/2013*

not to prosecute criminal action, which was contested by IBC and subsequently she filed injunction proceedings (*juicio de amparo*). The *injunction proceedings (juicio de amparo)* were granted to further the investigations; nonetheless, IBC considered that the analysis of various approaches had been omitted, and therefore brought an appeal (*recurso de revisión*). The First Chamber of the Mexico's Supreme Court of Justice (this Court) heard through the exercise of its power to assert jurisdiction.

### Issue presented to the Supreme Court

To determine whether irregularities existed at the preliminary investigation stage with respect to MLB's death and, therefore, whether there has been a failure to effectively administer justice. Also, to determine the guidelines to be followed and the obligations that the authorities have when they are investigating the violent death of a woman.

### Holding and vote

The injunction (*amparo*) was granted, essentially, for the following reasons. This Court studied the course of the investigation and noted several irregularities and omissions, among which are the following: lack of due diligence in the preservation of the crime scene; deficiencies in evidence handling and analysis; and the failure to investigate whether it could be a case of gender-based violence. It also emphasized the suspicion of bias or complicity between the husband and the investigating authorities because of their employment and/or friendship relationship. Thus, the purpose of granting IBC the injunction (*amparo*) and the protection of justice was to continue the investigation with a gender perspective and to issue guidelines for resuming it since, especially in the case of MLB, the context of violence suggested, in principle, opening a line of inquiry against her husband; in addition, it was ordered to investigate the authorities that were responsible for the various omissions.

The First Chamber unanimously decided this case with five votes by Justices Olga Sánchez Cordero de García Villegas, Arturo Zaldívar Lelo de Larrea, José Ramón Cossío Díaz, Jorge Mario Pardo Rebolledo (reserved the right to prepare a concurring opinion) and Alfredo Gutiérrez Ortiz Mena.

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### EXTRACT OF THE DECISION

p. 1 Mexico City. First Chamber of Mexico's Supreme Court of Justice (this Court), in session of March 25, 2015, issues the following decision.

#### Background

p. 1-3 On June 29, 2010, an Investigative Agent (husband), who claimed to be commander of the Assistant Attorney General's Office group, appeared at the office of the Attorney General of the State of Mexico (Public Prosecutor Office). He stated that he had found his wife MLB hanging in her bedroom. In light of this report, a preliminary investigation began, in which he stated that he did not know what led his wife to take her own life and that he did not wish to report a homicide.

p. 3-4 On the same day, IBC, MLB's mother, appeared before the Public Prosecutor's Office. She stated that since the beginning of her marriage, MLB had had problems, as her husband was very jealous, he was very controlling, he did not let her out of the house, he beat her and constantly humiliated her.

p. 4-5 She added that on June 28, 2010, she and her daughter had agreed that the latter would go to the Public Prosecutor's Office to file a complaint, then she would leave the marital home and move to her parents' house. She indicated that, with that intention, her daughter left her home, and she did not know her whereabouts after that. She concluded her deposition stating that her daughter had not committed suicide and filed a criminal complaint for her daughter's murder.

p. 6 On September 30, 2010, IBC added that when she proposed to MLB to file a complaint before the Public Prosecutor's Office, she refused because they "wouldn't do anything to him because he is an investigative policeman and he would beat her to death." IBC reiterated the criminal complaint against whoever was responsible and/or against MLB's husband.

- p. 8-9 On December 30, 2010, MLB's half-sister rendered a deposition. She stated that within four weeks of marriage, the husband had beaten her sister because he had not liked his breakfast. She proposed to her sister to report him, but she told her that "they wouldn't do anything to him." She also stated that her sister had told her that her husband had "threatened to throw her into the cistern" and had told her "that he had already put several women there."
- p. 9 In June 2009, MLB told her that her husband had "raped" her, threatening her "with a gun in her mouth to force her to give him oral sex" and punching her. In October 2009 and April 2010, it happened again. She added that the husband had forced her sister to tattoo his surname on her back, because that proved that she was his property.
- p. 9-10 The day her sister died, she went to her house, she saw her body lying on the bed and observed that she "had a blow on her forehead, on the left side at the level of the temple she had two blows, as well as two scratches at the height of her clavicle, "without noticing anything in the central part of her neck", in addition to scratches on the knuckles and knees and that on the inside of the leg she had two intense reddish bruises, as well as on the right thigh. Finally, she stressed that there were indications that the husband was in the house prior to her sister's death; she added that her sister's hair was "wet as if freshly washed," in addition that on one side of the bed there was "a wet towel." She said that she found it strange that in the other room she "found her sister's clothes on the bed, as well as two suitcases" and "her sister's sandals in front of her husband's sandals."
- p. 10 On the same date, MLB's best friend appeared, who stated that on several occasions she let her stay in her home after being beaten by her husband. She added that on June 28, 2010, MLB called her cell phone and told her she was packing her things before her husband arrived.
- p. 15 Subsequently, the Public Prosecutor's Office determined not to exercise a criminal action, since it was apparent from the analysis of the evidence

that: the cause of death had been “mechanical asphyxiation in the form of hanging”; that such injuries corresponded to suicide maneuvers; and that there were no injuries typical of a fight or struggle and that there was also no indication whatsoever to imply another person’s involvement in the events. On October 6, 2011, the determination not to exercise a criminal action was authorized.

- p. 15-16 On November 19, 2011, IBD requested reconsidering the determination not to exercise criminal action.
- p. 18 On March 14, 2012, IBC filed injunction proceedings (*juicio de amparo*) against the failure to issue a determination. On March 16, 2012, a District Judge in the State of Mexico admitted it for processing.
- p. 20-22 On December 17, 2012, a decision was issued in the injunction proceedings (*juicio de amparo*), which overrode it and covered IBC. On January 4, 2013, an appeal (*recurso de revisión*) was filed which was sent to a Collegiate Court in the State of Mexico. On September 4, 2013, this Court decided to exercise its power to assert jurisdiction over the injunction under review (*amparo en revisión*) and on October 22, 2013 it sent it to the First Chamber.

### Study of the merits

- p. 45,50 This Court considers that there is a failure to administer justice effectively on the part of the authorities, which is linked, among other things, to the irregularities and flaws during the preliminary investigation, the discrimination suffered by IBC by the various authorities of the Public Prosecutor’s Office, as well as the lack of access to the right to investigate the facts with a gender perspective.
- p. 52-53 The human right of women to a life free from violence and discrimination derives expressly from the constitutional and conventional obligations of the State. In various instruments the equality of women before the law and the duty of any authority to avoid discriminatory treatment on the basis of gender are recognized.

p. 56 The standards are clear in establishing that state authorities must not only condemn all forms of gender-based discrimination but they are also required to take concrete action. They must adopt, in all of their policies and acts, a tool as a method of detecting and removing barriers or obstacles that discriminate against people on the status of gender. This is called a gender perspective, whose purpose is to seek the approach or conceptual content according to gender which must be granted to analyze reality and various phenomena such as the law and its application, so that reality can be evaluated with an inclusive view of the needs of gender, that contributes to the design and proposal of solutions without discrimination.

p. 57 Thus, the right of women to a life free from discrimination and violence results in the obligation of every authority to act with a gender perspective, which seeks to combat stereotypical and indifferent arguments for the full and effective exercise of the right to equality.

This Court recalls that the Inter-American Court of Human Rights (I/A Court HR) has emphasized that, in cases of violence against women, state authorities must take comprehensive measures to comply with due diligence. These measures include an adequate legal framework for protection, an effective application thereof and prevention policies and practices to act effectively in the face of complaints. Failure to comply with this obligation on the part of investigating bodies and those that administer justice can condition women's access to justice by making their particular situation invisible.

p. 61,63 This Court emphasizes that any murder of a woman must be investigated with a gender perspective; that is, as a possible femicide. This is in accordance with the different protocols for investigating violent deaths of women, although these deaths have multiple expressions and contexts, a large part of them are committed in the woman's home, at the hands of people known to them – such as partners or family members – and one of the common forms of such death is suffocation and trauma.

In principle, MLB's death fit into the pattern registered in these protocols of action, for the sex (female) of the deceased, apparent form of death

(suffocation), place where her body was found (her home), the person who allegedly found the body (her husband; all coupled with allegations of an alleged relationship of violence MLB lived in with respect to her partner).

- p. 64 This Court considers that investigating authorities should explore all possible investigative lines to determine the historical truth of what happened. The duty to investigate becomes more relevant in relation to the death of a woman in a context of violence against women, since the fact that the deceased woman has been the victim of gender-based violence must be taken as a possible line of inquiry. In this sense, any case of death of women, including those that *prima facie* would appear to have been caused by criminal motives, suicide and certain accidents, must be analyzed with a gender perspective, in order to determine whether or not there were gender reasons in the cause of death and in order to confirm or rule out the reason for death.
- p. 65-66 In cases of death of women, the behaviors that caused the death must be identified and the presence or absence of gender reasons or reasons that cause or explain the violent death should be identified. In addition, such deaths should preserve specific evidence to determine whether there was sexual violence and appropriate expert analyses should be carried out to determine whether the victim was immersed in a context of violence. In addition, police and ministerial investigations into alleged femicides should analyze the connection between violence against women and the violation of other human rights, as well as establish possible case hypotheses, based on preliminary findings identifying discrimination or gender-based reasons such as potential motives explaining such deaths. In this regard, possible gender-discriminatory connotations in an act of violence perpetrated against a woman should be investigated *ex officio* when that act is framed in a context of violence against women in a given region.
- p. 71 This Court concludes that there was no proper protection of the crime scene to determine how MLB was found and the evidence that would have served the investigation of her death; it is unclear which experts were

present; not only was the inspection not carried out with the required attention to detail, but it omitted basic procedures and showed serious irregularities such as allowing a person for whom a line of inquiry should have been opened – because, according to his own words, he had found and moved his wife’s body minutes earlier – was present and moved – in the presence of the investigating team – elements of the crime scene.

- p. 75-76 With regard to the chain of custody, this Court concludes that, except for some photographs that do not cover the entire crime scene, no physical evidence was protected or collected on the day of the events, not even the elements with which MLB would have died – cord and eyebolt – the cell phone found beside her or that an alleged suicide note had been sought. In relation to the above, the subsequent statement by the photography expert is highlighted, who stated that during the diligence of the multidisciplinary team on the day of the events “the corresponding chain of custody was not carried out”. This Court considers that such flaws are not limited to mere omissions or negligent actions on the part of the multidisciplinary team, but could be the result of deliberate actions in order not to gather the minimum information necessary to clarify the facts, which is considered to be extremely serious and a violation of due diligence.
- p. 80 With reference to the protection of the corpse there are official photos of the body where MLB was found on the bed and not where she would allegedly have died from suffocation, since she would have already been moved by her husband by the time the multidisciplinary team arrived. There is no information on the record to determine how the body was lifted, protected, and moved to such facilities.
- p. 84-85 While the fact of a woman’s violent death was sufficient to require expert analysis to determine whether the woman was the victim of physical or sexual violence, it is clear that in view of the statement by IBC, MLB’s mother, on the very same day of the events, in which she points out that there was a situation of violence between her daughter and her husband, expert analysis should have done to determine whether the body had

any other signs of violence and to preserve evidence for conducting, if appropriate, an expert analysis of sexual violence. However, no tests whatsoever were done.

- p. 85 Nor was there an expert assessment in forensic medicine, for the purpose of determining whether the deceased exhibited criminalistic signs or indications of chronic abuse prior to her death.
- p. 85-86 No psychology expert analysis was conducted to study psychological necropsy and determine retrospectively the victim's personality type, her behavior and environment, to identify whether the deceased presented the syndrome of learned helplessness or the abused woman syndrome. In addition, a complementary psychosocial expert analysis could have been carried out, which focuses on the experience of people affected by human rights violations, through which the psychosocial environment would have been analyzed.
- p. 86 Furthermore, while there are some opinions that determine the cause of death of MLB as suicide by suffocation, this Court notes that there are several inconsistencies within and between them.
- p. 90-91 This Court notes that the opinions given are inexplicably omissive in describing the way or reasons why, while the body was found by the investigating team on a bed, the death would have been by suffocation elsewhere in the same room. Such omissions in all opinions – which this Court cannot simply consider negligent or inexplicably coincidental – lead to contradictions in the expert analyses when they establish, on the one hand, that the place where the body was found was “that of the facts” and, on the other hand, that the deceased hung herself in the same room. The opinions also do not clarify how, because of the weight and height of the deceased, the resistance of the cord and the eyebolt height, a suicide would have been possible, nor do they refer to the fact that – according to the photos provided by the husband – she would have been found sitting on a bureau. The expert analyses also do not provide information about the

movement of furniture in the room with the mentioned photos and the way the body was found on the bed.

p. 91 Thus, this Court concludes that the expert analyses were not only omissive in essential data for the determination of the truth of what happened, but that irregularities in them and the inexplicable coincidence in the same omissions – such as the alteration or contamination of the place expressly recognized by an expert later on – that cause this Court to consider that they intended to conceal important facts, breaching the right to due diligence and access to justice, and must therefore be considered invalid.

p. 91-92 Hence, it is for this Court to refer to the way in which the investigation must be conducted with respect to persons who might be involved. In specific cases of women's deaths, an expert analysis in social anthropology should be carried out on the person likely responsible, which determines whether that person presents cultural patterns oriented towards misogynist or discriminating behavior or disdain towards women.

p. 93 This Court considers it important to note that violent deaths of women are often the result of various manifestations of prior violence by their aggressors (physical, sexual, psychological and/or economic). Therefore, in the investigation into these forms of violence it is fundamental in the design of the investigation. It is not a question of explaining death by the characteristics of the aggressor, but of finding the aggressor by the characteristics of the death.

MLB's death and the alleged way in which she was found by her husband is within the frame of the pattern referred to, even more so considering that it was the latter who found her and – according to his own words – had moved her from the position in which he found her.

p. 97-98 In such a way, this Court observes that according to the rules of criminalistics and criminology, and based on the fact that the husband was the one who – according to his own words – had found and moved his wife's body, a line of inquiry should have been opened on him as one of the likely perpetrators

of her death. The direct allegations that he was physically, emotionally, economically and sexually violent should be added to that, as well as the fact that the mother of the deceased pointed to him directly as responsible for the death of MLB. Despite all of the above, they failed to carry out a minimal investigation with respect to him, they failed to ask him why he moved his wife's body thereby contaminating the scene or where he had left the cord from his wife's neck, they allowed him to be present at the two proceedings in which the investigating authorities came to gather evidence, to move pieces from the crime scene, to provide material evidence later on without questioning why he did not do it before, which is clearly contrary to the rules of investigation and could even constitute offenses of obstruction in the investigation.

p. 98 The aforementioned does not imply a pronouncement by this Court on the likelihood or not of his responsibility for the events. What is noticeable is that a line of inquiry into the husband was not opened, as should have been done, given the existing elements in the case that could be compatible with gender-based violence and to advance the investigation without ruling out that hypothesis to locate and integrate the rest of the evidence. On the contrary, in the present case, there are serious irregularities, omissions and flaws which, far from being considered negligent, are aimed not only at not seriously investigating the husband, but even allowing him access to crime scenes and various expert analyses, as if he were any other agent and without taking into account that the investigation should be protected from possible contamination.

It is also noted that there are more omissions and irregularities during the investigation: those relating to direct expressions of gender-based violence and for which there is no information that they have been assessed or have impacted the investigation in any way.

p. 100 This Court concludes that the authorities had to comply with constitutional and conventional obligations, since it was a case of the violent death of a woman, in an alleged personal context of being the victim of violence on

the part of her partner, and an express criminal complaint from the victim's mother who considered that her daughter did not commit suicide, but that it was a homicide. Nonetheless, the investigative authorities did not demonstrate having taken reasonable steps to objectively elucidate the truth of the facts during the early stages of the investigation which, in cases of violence against women, is crucial. On the contrary, this Court notes that there were several omissions, inconsistencies, and flaws that, beyond negligence, constitute an attempt to conceal the truth of the facts, in a clear violation of access to justice.

- p. 101 The lack of minimally reasonable measures on the part of the investigating body fits with the invisibility and dissimulating elements of violence against women, and specifically with respect to the deaths of women.

In addition, when investigating the violent death of a woman, the investigating bodies should conduct their investigation with a gender perspective, for which a method should be implemented to verify whether there was a gender-based situation of violence or vulnerability in the victim. This requires particular procedures be carried out and they should involve the application of criminalistic concepts applied with a vision of gender, which did not exist in this case.

- p. 101-102 Irregularities and omissions by the authorities in the investigation of this case, such as the absolute lack of due diligence in the preservation of the crime scene; deficiencies in the management and analysis of the evidence collected; the omission of call tracking on the cell phone of the deceased's husband between the time he allegedly found her dead and when he made a statement; the lack of assessment of inconsistencies and contradictions in the different statements of the husband, the lack of assessment of the employment relationship and/or friendship of the latter with the persons in charge of the investigation, the unjustified delay in the investigation, constitute a violation of the constitutional and conventional obligations of the authorities. Moreover, the record does not show that the authorities had investigated as one hypothesis that MLB's death could be a case of gender-based violence.

- p. 102-103 Taking up what was said by the IACHR, this Court highlights that impunity for crimes against women sends the message that violence against women is tolerated, which favors its perpetuation and the social acceptance of this phenomenon, the feeling and sense of insecurity by women, as well as women's persistent distrust in the administration of justice. Moreover, state inaction and indifference to allegations of gender-based violence reproduce the violence that it is intended to combat and it implies discrimination in the right of access to justice. That is why it is particularly important that the authorities responsible for investigating acts of violence against women carry them out with determination and effectiveness, taking into account society's duty to reject such violence and the state obligations to eradicate it and to give confidence to victims of violence in state institutions for their protection.
- p. 103-104 Thus, the granting of the injunction (*amparo*) must result in the confirmation of the lifting of the determination not to pursue a criminal action and the instruction to immediately take all necessary measures to investigate with a gender perspective and in accordance with valid evidentiary collection. The collection of evidence must comply with the national legal framework and the guidelines highlighted in this decision, the violent death of MLB, because such a decision constitutes the broadest and most favorable protection for the person.
- p. 104 This Court considers that the special obligation to prevent, investigate and, where appropriate, to punish violence against women, as well as the corresponding right for women and their families, that the investigation be conducted with a gender perspective and with particular diligence. This places the dignity of women beyond mere restorative effects and articulates an understanding of dignity that is fundamentally transformative and substantive. In that understanding, the obligation to repair IBC when it has been concluded that there is a violation of the human rights of IBC is one of the essential phases in access to justice. Thus, on the one hand, it is for this case to grant the injunction (*amparo*) for the above mentioned acts and to order the investigative authority to, in compliance with the obligation

to investigate and sanction, remove all obstacles that have persisted in the prior preliminary investigation, and use all measures at its disposal to diligently carry out the process.

p. 104-105 The Public Prosecutor's Office must complete the investigation of this case in a timely, immediate, serious and impartial manner in order to clarify MLB's death, so that the competent body can subsequently judge and, where appropriate, punish whoever is responsible. It must carry out all the above acts and measures with a gender perspective, after which the investigating body, with freedom from jurisdiction, will reach its conclusions.

p. 105 The obligation to prevent, investigate and, where appropriate, punish violence against women, as well as to ensure access to appropriate and effective judicial and administrative mechanisms to combat violations of women's human rights and non-discrimination, is not only the responsibility of the investigating officer, but also creates obligations for all authorities. In this sense, both the State Attorney and the agents of the public prosecutor are obliged to comply, guaranteeing at all times the right of access to justice for IBC. In addition, in the case of the State Prosecutor, this obligation extends to his/her duty to monitor, enforce and, where appropriate, punish his/her subordinates for their obligation to act with due diligence, not to discriminate and to guarantee access to justice, in compliance with the national legal framework and the international guidelines previously developed.

In this way, this Court considers that the irregularities in the investigation of the case that have been committed by state agents must be investigated and punished if they are found responsible.

p. 106 On the other hand, the justice system must be able to repair the damage done by the authorities and drive cultural change. Therefore, the judicial authority's response to such violations must not only point to the specific violation by an authority and change it, but should also seek to deter a change in behavior in society and potential actors, improving socially established relationships.

**Decision**

- p. 107      The injunction (*amparo*) is granted so that, immediately, all necessary measures are carried out to investigate, with a gender perspective, the violent death of MLB, complying with the constitutional and legal framework, and the guidelines highlighted in this decision.



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## LEGAL TERMINATION OF PREGNANCY

### *Amparo en Revisión 1388/2015*<sup>19</sup>

**Keywords:** *right to health, right to equality and non-discrimination, right to life, right to termination of pregnancy, life plan, full reparation of the harm caused, effects of the injunction (amparo), discriminatory practices, women.*

#### **Summary**

Marisa (beneficiary of the ISSSTE) who requested the termination of her pregnancy because it was considered high risk, filed for the injunction (*amparo*) and protection of the federal justice system. In the claim she challenged the constitutionality of Articles 333 and 334 of the Federal Criminal Code [Código Penal Federal] (CPF) and the official notice through which the health staff denied her request for the termination of her pregnancy, arguing that the refusal to terminate the pregnancy violated her right to health. A district judge in Mexico City heard the matter who determined she did not have subject matter jurisdiction, and therefore a district

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<sup>19</sup> Decision issued by the First Chamber of Mexico's Supreme Court of Justice (May 15, 2019). Reporting Justice: Alfredo Gutiérrez Ortiz Mena. *Action For Constitutional Relief Through Injunction 1388/2015*

judge of that same city heard it and decided that the claim was inadmissible. Given this decision, Marisa filed an appeal (*recurso de revisión*) which at her request was heard by the First Chamber of Mexico's Supreme Court of Justice (this Court) through its authority to assert jurisdiction.

### Issue presented to the Supreme Court

Whether the dismissal decision declared by the judge in the appealed decision was correct and, secondly, to determine if the authorities indicated as responsible violated their constitutional obligations to protect health when they refused to terminate Marisa's pregnancy for health reasons.

### Holding and vote

It was determined to grant the injunction (*amparo*), essentially, for the following reason: The responsible authorities breached the obligations the constitutional parameter of the right to health imposed on them by denying Marisa access to the termination of her pregnancy in spite of the fact that this action could be counterproductive to her physical and emotional well-being. Therefore, it was ordered that Marisa be reestablished in the enjoyment of her right to health and that the responsible authority take charge of providing her the medical and psychological care necessary to restore the harm caused to her in that sphere by the refusal to provide her a service she was entitled to.

**Vote:** The First Chamber decided this matter unanimously with five votes of the judges Norma Lucía Piña Hernández (reserved the right to draft a concurring opinion), Luis María Aguilar Morales (reserved the right to draft a concurring opinion), Jorge Mario Pardo Rebolledo, Alfredo Gutiérrez Ortiz Mena and Juan Luis González Alcántara Carrancá (reserved the right to draft a concurring opinion).

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### EXTRACT OF THE DECISION

p. 1 Mexico City. The First Chamber of Mexico's Supreme Court of Justice (this Court), in session of May 15, 2019, issues the following decision.

## Background

p. 1-2 On September 24, 2013, Marisa was informed that she was pregnant by personnel of the National Medical Center 20th of November [Centro Médico Nacional 20 de Noviembre] (CMN20). In turn, the doctors that attended her informed her that her pregnancy was considered high risk since she had had gastric bypass surgery a few months before; she was 41 years old and was overweight.

p. 2 Subsequently, at 15.5 weeks of gestation, Marisa was submitted to a genetic amniocentesis test in order to know if the fetus showed any hereditary problem, running the risk of injuring the sac in which the fetus is found since the procedure implied the introduction of a needle to obtain amniotic liquid.

On October 30, 2013, Marisa received the results of the genetic amniocentesis, which showed that the male fetus had Klinefelter syndrome. This would mean that the fetus would not develop his genitals in puberty, but it would not prevent him from being a self-sufficient person.

Given all these complications that cause a risk to her physical and emotional health, Marisa verbally requested the doctors of the hospital to terminate the pregnancy a couple of times.

p. 2-3 Given the repeated denials, on November 6, 2013, Marisa requested the termination of her pregnancy in writing, in exercise of her right to health and based on the high risk characteristics of her pregnancy, which put at risk her health and life. In this respect Marisa annexed the technical opinion of a doctor specialized in gynecology and obstetrics. In that opinion, the doctor specified that Marisa was experiencing a high risk pregnancy due to grade III obesity, which caused a greater risk of maternal diabetes, thromboembolism and preeclampsia. In turn, due to the gastric bypass surgery, he specified that Marisa faced the risk of suffering malnutrition and the obstruction of the small intestine by an internal hernia. The issuer of the medical opinion recommended the termination of the pregnancy.

- p. 3 As a result of the care given by the hospital that terminated her pregnancy, on November 19, 2013 she was hospitalized in an emergency medical unit Dr. Fernando Quiroz Gutiérrez with middle post abortion puerperium. She was released on November 21, 2013.
- p. 3-4 Finally, Marisa received the response of the responsible authorities by mail. In it her petition was denied since the fetus could be self-sufficient even though it had Klinefelter syndrome. It was also indicated that the Instituto de Seguridad y Servicios Sociales de los Trabajadores del Estado (ISSSTE) is a federal health institution, which is governed by the General Health Law [Ley General de Salud] (LGS), which does not contemplate the legal termination of pregnancy. Marisa filed the injunction (*amparo*) and protection of the federal justice system against that denial.
- p. 5 The matter was assigned to a district judge of Mexico City who, in a ruling of December 13, 2013, registered the injunction proceedings through a two-stage judicial review relieving an unremediated breach of rights (*juicio de amparo indirecto*) with the number 1358/2013. After requesting the complainant to state more clearly the challenged act attributed to the responsible authorities; on December 20, 2013 she issued a ruling deciding she lacked competency to hear the matter because she considered it to be criminal in nature.
- p. 6 On December 30, 2013, a district judge of Mexico City, who heard the matter, dismissed the constitutional claim, considering that the cause for invalidity established in section XXIII of Article 61 of the Amparo Law [Ley de Amparo] (LA), in relation to Article 107, section II, first paragraph of the constitution applied. Marisa filed a remedy of complaint (*recurso de queja*) against that decision.
- p. 6-7 The district judge hearing the matter issued a decision dismissing the proceeding with respect to the challenged acts consisting of the unconstitutionality of Articles 333 and 334 of the Federal Criminal Code [Código Penal Federal] (CPF), considering the cause for invalidity contained in section XII, of Article 61 of the LA to be applicable, and for the act consisting of the official

notice 96.201.1.2.2.2/208/2013 (the official notice), from which the illegal denial of performing an abortion on Marisa arose, considering the cause of invalidity established in section XXII, of Article 61 of the LA to apply. Marisa then filed an appeal (*recurso de revisión*) and requested this Court to exercise its authority to assert jurisdiction to hear the appeal (*recurso de revisión*).

### Study of the merits

#### Evaluation of the determination of dismissal declared by the district judge

- p. 23-24 The Court identifies the following as challenged acts and responsible authorities in this matter: a) The official notice through which the responsible authority denies the request for termination of pregnancy for reasons of health, attributed to the Gynecology-Obstetrics coordinator and the head of the Fetal Maternal Medicine services, both of CMN20 of the ISSSTE and; b) Articles 333 and 334 of the CPF which tacitly prohibit the termination of pregnancy for reasons of health, attributed to the President of the United Mexican States.
- p. 24 Having specified the acts and responsible authorities, this Court proceeds to evaluate the determination of dismissal declared in the appealed decision.

#### XII. Invalidity of the challenged act relative to Articles 333 and 334 of the CPF

- p. 26 This Court considers that it was correct for the district judge to consider the cause for dismissal established in section XII of Article 61 of the LA to be present since in this case there is no specific act of application of Articles 333 and 334 of the CPF that affects her legal sphere, nor is the challenged act a consequence of the inhibitory effects of the criminal provision. In any case, as is seen from the mere reading of the denial notice, it constitutes an act of application of the LGS, from the understanding of the responsible authorities that this law prevents them from providing Marisa abortion services for reasons of health.

p. 28 Thus, since the attitude of the authority is not expressly based on the federal criminal prohibition nor can be understood as caused by its inhibitory effect, the argument of the unconstitutionality of Articles 333 and 334 of the CPF referred to by Marisa is discarded, since there is no act of application of that law.

**XIII. Invalidity of the challenged act relative to the refusal to terminate the pregnancy of the complainant for reasons of health, set forth in the official notice**

p. 29 In the appealed decision, the district judge considered the cause of invalidity contained in section XXII of Article 61 of the LA to be present. It would be legally impossible for the eventual granting of the injunction (*amparo*) to have any effect in view of the fact that the object or material of such act ceased to exist. Marisa expressly stated in her injunction (*amparo*) claim that on November 11, 2013 her pregnancy was terminated in a private hospital.

p. 31 This Court considers that the grievances of Marisa are essentially well-founded and sufficient to assert that the district judge should not have declared the injunction (*amparo*) invalid with respect to the challenged act consisting of the refusal to terminate the pregnancy for reasons of health as expressed in the official notice.

p. 31-32 First of all, Marisa is right when she argues the constitutional judge should determine whether the challenged administrative act issued by the competent authority affected substantive rights. It involved a direct violation of the obligations that the constitutional right to health imposes on such authority. The constitutionality of the reasons given for denying the service requested must also be established as well as whether they satisfy the constitutional requirement of being duly grounded in law and fact, and respond, in its terms, to the request made.

p. 32-33 Marisa is also partially right when she asserts that the authorization for the termination of pregnancy that was requested is not the only effect that can be granted to the (*amparo*). This is especially significant when what is

alleged is not only the denial, but also, the impact on Marisa's right to health caused by that denial. In this respect, it must be said that health is a process that presumes a series of behaviors to ensure it is adequately preserved and that implies that health problems that are not adequately and timely addressed provoke consequences that, in turn, harm the right to health. In addition, this Court has held that the presumed initial impossibility of assigning effects to the constitutional decision does not mean in itself that the injunction proceedings (*juicio de amparo*) are invalid nor does it deprive the constitutional proceeding to protect and restore human rights that have been violated of efficacy.

- p. 33-34 The essential purpose of an abortion for health reasons is to restore and protect the health of the pregnant person. That health is being affected not only by the pregnancy, but also by the physical or mental illness that appears or worsens with its continuation, as such may also complicate the development of the pregnancy. Thus, the termination of pregnancy caused by a health complication is the initiation of a process of recovery of health and not its culmination. This makes any denial or deliberate delay in the services of medical care for resolving those issues critical and presumably in violation of human rights. Thus, if what is attributed to the responsible authorities is a refusal to provide a health service, then it can be verified if this attitude involved a violation of Marisa's right to health and its protection and a relevant form of restitution may be indicated. The necessary protection of health does not cease because the abortion has been performed in a private hospital; rather her state of health should be monitored, especially because her history shows the complications Marisa suffered as a result of the denial.
- p. 34 Marisa is also right when she argues that the rigid concept of the procedural rules complicates access to justice for women in the case of a termination of pregnancy. In fact, this Court has already determined repeatedly that the inquiry and decision processes in different matters - civil, family and criminal - must incorporate the gender perspective in order to prevent historic disadvantages

based on sex-gender reasons from adversely affecting the legitimate claims for justice, especially of women and persons of sexual diversity.

p. 35-36 In this respect it is important to recall that this Court has already determined that the standard of constitutional review of the right to equality and nondiscrimination recognizes that the latter occurs not only when the rules, policies, practices and programs explicitly invoke a prohibited factor of discrimination, but also when they are apparently neutral. The result of their content or application generates a disproportionate impact on persons or groups in a situation of historic disadvantage without there being an objective and reasonable justification for this.

p. 36 This means that the interpretations of the rules may be discriminatory when they do not reasonably respond to the differences, whether inherent to the persons or created by the social order. This is particularly appropriate when those differences are associated with social, political or economic marginalization, as occurs with the differences of sex-gender identity that tend to place women and persons of sexual diversity at a disadvantage.

Thus, as Marisa argues, if the cause of cessation of effects or cessation of existence of the object or material of the challenged act was strictly applied in all the cases where this appeal is used to challenge violations of human rights committed by the authorities in questions related to pregnancy, then the result would be that the institution of the injunction (*amparo*) and the restitution of rights it facilitates, would be inaccessible to women when the authorities obstruct or deny them access to a health service that only they need.

p. 37 With these actions of the responsible authority, presumptively arbitrary and in violation of human rights, respecting, protecting and guaranteeing those rights would most likely remain outside of constitutional scrutiny by virtue of an uncontrollable event that, in addition, significantly increases a person's vulnerability. This in spite of the fact that the rights at play in these cases can obviously be restored. Above all if it is taken into account that health

is a process and that the termination of pregnancy for health reasons is only part of the process by which a woman initiates the road to recover her health given a complication that appears or is exacerbated with the pregnancy.

Marisa is also right when she argues that in the cases of denial of abortion services, these matters would soon become moot, whether because the pregnancy completes its natural course, or because the woman decides not to submit herself heroically to the risk or the physical and mental suffering of a pregnancy with congenital deformities for the sole purpose of preserving the subject matter of the proceeding. This means that the injunction (*amparo*) and the restoration of rights pursued in it would be inaccessible for women by reason of a biological difference, unless they choose heroic behavior, which does not even guarantee that the subject matter of the proceeding is preserved, since the pregnancy will terminate anyway and this will occur before a decision on the merits.

p. 37-38 In this case, if the judge is considered correct with respect to the dismissal declared in the terms already described, the institution of the injunction (*amparo*) and the remedies it proposes would be inevitably unavailable to the women who attempt to overcome arbitrary actions of the health authorities consisting of the denial of medical care services to terminate risky pregnancies, unless they agree to submit heroically to the risk of the continuation of the pregnancy.

p. 38 Thus, a presumed violation of the constitutional and conventional right to health and its protection would remain outside the scrutiny of the constitutional proceeding when the authorities responsible for guaranteeing that constitutional right refuse to provide pregnancy termination services for health reasons, even though there is an affiliation that grants a preference for its guarantee and effective fulfillment.

Therefore, this Court considers in this case that a possible violation of constitutional rights by the responsible authorities should not be discarded with the argument that the sole restorative effect of the injunction (*amparo*)

would be to order the termination of the pregnancy. The injunction (*amparo*) can have effects other than that sole possibility, without altering its restorative purpose.

- p. 39 First of all, it is incorrect to determine that the refusal of the responsible authorities to carry out the abortion medically indicated for health reasons that was requested of them only constitutes a violation of the possible right of Marisa to terminate a pregnancy when it means a risk to her health, and that authorizing that the procedure be carried out is the only effect that can be imposed as restitution for the violation consisting of the denial.

If the indicated authorities were found responsible for a violation of the right to health of Marisa, the effect of the injunction (*amparo*) could consist of ordering the restoration of that right and the providing of medical care services to combat the repercussions of the denial on the health of Marisa. This would be possible to the extent she was obligated to postpone the termination of a pregnancy that risked her health and that required, for that fact, a prompt resolution. Although the pregnancy has been terminated, it cannot be ignored that the denial had dilatory effects that increased the health risk suffered by Marisa, and that provoked various repercussions and complications in that regard.

### Study of constitutional validity of the challenged act

#### - The right to health and its protection

- p. 42-43 In different precedents this Court has considered that the right to health must be interpreted in light of Article 4 of the Constitution and various international instruments, to allow for a normative unity. In those precedents, this Court has determined that the right to health is the right every person has to enjoy the highest level possible of physical and mental health and is justifiable in different dimensions of activity.
- p. 46 Article 1 of the Constitution establishes that all authorities have the obligation to respect, guarantee and protect human rights. Specifically, this Court has

concluded that the State has three types of obligations arising from the right to health: respect, protection and compliance (guarantee). Those obligations guarantee benefits in terms of availability, accessibility, nondiscrimination, acceptability and quality of the health services. Additionally, by virtue of Article 1 of the Constitution, it should be recalled that the State has the obligation to promote, prevent, investigate violations, sanction and repair the violations of human rights.

- p. 47 Furthermore, this Court has established that health is a public good whose protection is the responsibility of the State. From this affirmation, this Court has established that this imposes, on the one hand, complex duties on all the public powers inside the State, from the lawmaker and the administration, public hospitals and your personal doctor, to the courts and, on the other hand, imposes duties on private parties, such as doctors, private hospitals, employers and administrators of pension and retirement funds.

**- The right to health and the termination of pregnancy for health reasons**

- p. 50 As stated above, every person has the right to health, understood as the enjoyment of the highest level possible of physical, mental and social well-being. The highest level possible of health refers to i) a level of health that permits a person to live with dignity; ii) the socioeconomic factors that make it possible to live a healthy life, including the basic determinants of health, meaning that it is not limited to health care, and iii) access to health services and health protection.
- p. 51-52 Thus, it can be argued that every woman has the right to benefit from as many measures as permit her to enjoy the best state of health she can reach, among them universal access to the broadest services possible of sexual and reproductive health, including those associated with pregnancy in all its stages and all its vicissitudes, without any type of coercion or discrimination. This covers the obligation of the State to reasonably prevent the risks associated with pregnancy and with unsafe abortion, which in turn covers

both an adequate, timely and exhaustive evaluation of the risks that the pregnancy represents for the restoration and protection of the health of each person, and the prompt access to abortion services that may be necessary to preserve the health of the pregnant woman.

- p. 52 Therefore, and given that health is a right that protects both physical and emotional well-being as well as social aspects, its adequate guarantee implies the adoption of measures so that the termination of pregnancy is possible, available, safe and accessible when the continuation of the pregnancy puts the health of women in its broadest sense at risk. This implies that the public health institutions must provide and facilitate these services, and refrain from impeding or obstructing timely access to them.

The exercise of the right to health presumes the elimination of all forms of discrimination and the recognition that the enjoyment of that right implies the emotional, social and physical well-being of people during their entire life cycle and, in the specific case of women, the right to sexual and reproductive health.

- p. 53 Thus, to eliminate discrimination against women it is important that the State applies policies intended to provide women with access to a complete range of high quality health care within their reach, including sexual and reproductive services, which includes the services of medical care that the State provides and has the purpose of promoting, restoring and protecting the health of pregnant persons and the risks associated with pregnancies, particularly those that compromise the preservation or achievement of the physical, mental or social health of women.

- p. 53-54 Therefore, the access for women to the health services they need must be guaranteed, especially for those located in vulnerable groups. Nondiscrimination in health services requires that the health services guarantee the conditions that ensure women can effectively attend their health needs and that the services that are only required by women, such as the termination of a pregnancy for risks associated with it, will be provided in safe conditions.

p. 54 This Court considers, then, that when women request specific services that only they require, such as the termination of pregnancy for health reasons, the denial of such services and the barriers that restrict or limit access to them, constitute acts of discrimination and a violation to the right of equality before the law.

p. 55 With respect to sexual and reproductive rights, based on the principle of dignity of persons and their rights to autonomy and intimacy, one of their essential components is the right of women to reproductive self-determination, protected essentially by Article 4 of our Constitution. The decision whether or not to be a mother has to be made in an informed manner, cannot be imposed externally, and cannot provoke a disproportionate burden.

p. 56 According to the standard of constitutional review of the right to health and its protection, it is not enough to have the freedom to adopt, autonomously, the decisions regarding your own health; it is fundamental to be able to execute them adequately. In other words, the decision regarding one's own health, such as terminating a pregnancy, cannot be interfered arbitrarily and, in addition, all of the infrastructure should exist to be able to carry it out: safe, available, accessible, acceptable, affordable, respectful and quality medical services.

From the interpretations of the right to life, States have positive obligations to preserve life and generate conditions of a dignified life. This notion exceeds the biological sense of life and includes elements of well-being and subjective elements related to the determination of an individual life plan.

p. 57-58 The concept of life plan demonstrates the importance of the expectations each person has for his or her life according to their conditions and their context, as well as their basis in the self-determination of how each person wants to live their life. The life plan can be affected with the continuation of a pregnancy that represents a health risk by actually harming health or life or simply by resulting incompatible with that plan. Therefore, denying access to the termination of a pregnancy when there is a risk to health for a

woman, not only may cause different types of harm, but also may disrupt her expectations for her future well-being. In addition, the distortions of the individual life plan may have an impact on the health of women.

- p. 59-60 Based on the above considerations, this Court concludes that abortion motivated by health risks, and its adequate and timely provision, fall under the normative scope of the right to health and its protection, since it involves an action whose primary objective is to promote, preserve or restore the health of the pregnant person, including the achievement of a state of physical, mental and social well-being. This is also considered to involve the fulfillment and effective guarantee of the rights to live free from discrimination, enjoy a life of dignity and freedom and be free of arbitrary interferences in private life. These are rights that, in their interrelationship with the right to health and to its protection, imply that women must have access without arbitrary distinctions, to health services that only they need with respect and guaranteeing their decisions with regard to their own health, life plan and individual understanding of well-being.

**- The act challenged and the obligations of the responsible authorities toward the right to health and its protection in the scope of abortion as motivated by health causes**

- p. 69 In the criterion of this Court, to obligate women to adopt, against their will, decisions on their reproductive health, which happens when, among other things, women are impeded from accessing certain medical services or when the necessary conditions do not exist for those decisions to be effective, violates human dignity. In the health system, primarily responsible for providing medical care, women are placed in a situation of dependency and vulnerability, which means that their health objectives can only be achieved if this system facilitates those services to them. Therefore, the providers of health services have the final decision on the personal integrity of women; especially in the case of therapeutic abortion where forcing her to continue a pregnancy generates in itself harm to the health of the woman, independently from the moment it is terminated.

- p. 72-73 In the specific case of the termination of pregnancy for health reasons, the State has the obligation to provide health services and appropriate medical treatment to ensure that women who continue a risky pregnancy do not have health effects. This access should be guaranteed as medical care to which women are entitled in cases when the termination of the pregnancy is necessary to resolve a health problem. Access to a termination of pregnancy because of a health risk, as a medical care service, includes both access to an appropriate evaluation of the risks associated with the pregnancy as well as the adequate procedures for terminating risky pregnancies if the woman requests it.
- p. 73 According to this Court, the provisions of the LGS can be interpreted to guarantee access to services of pregnancy termination for health reasons, given that they can clearly be understood as priority medical care services and as therapeutic actions adequate for preserving, restoring and protecting the health of women in all its dimensions.
- p. 74-75 The refusal of the responsible authorities to grant the termination of the pregnancy of Marisa meant that they would deprive her of a medical care service that forms part of the normative scope of the right to health protection. The responsible authorities ignored the fact that abortion for health reasons has the essential purpose of restoring and protecting the health of the pregnant person. Health that is being affected not only by the pregnancy, but by the physical or mental illness that appears or worsens with its continuation.

### Decision

- p. 76 For the above explanations, it is decided, on the one hand, to revoke the determination of ineffectiveness declared by the district judge. Therefore, to resume jurisdiction to analyze the merits of the matter, finally, to declare the grievance of Marisa well-founded taking into account the standard of constitutional review relative to the right to health, developed throughout the extract and therefore, to grant the injunction (*amparo*) for the effect of

reestablishing the enjoyment of her right to health and that the responsible authority take charge of providing her the medical and psychological care necessary to restore the harm that the refusal to provide her a service she was entitled to caused her in that sphere.

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## LEGAL TERMINATION OF PREGNANCY

### *Acción de Inconstitucionalidad 148/2017*<sup>20</sup>

**Keywords:** *abortion, criminalization, right to decide, human dignity, autonomy, free development of one's personality, right to health, reproductive freedom, nasciturus, marital rape*

#### **Summary**

Mexico's Attorney General's Office (MAG) filed an action against several articles of the Criminal Code of the State of Coahuila de Zaragoza (CCSCZ) on the grounds of unconstitutionality (*acción de inconstitucionalidad*). MAG argued that the Article 13, section A, violates the constitutional order in criminal procedures by addressing a topic (preventive detention) that is the exclusive competence of Mexico's General Congress. In relation to Articles 195 and 196, MAG stated that they violate the rights of autonomy and reproductive freedom of women by establishing a criminal offense that prevents the interruption of pregnancy in the first stage of gestation. Regarding Article 224, section II, they argued an incorrect evaluation of the legal

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<sup>20</sup> Decision issued by the First Chamber of Mexico's Supreme Court of Justice (7 de septiembre de 2021). Reporting Justice: Luis María Aguilar Morales. Action Of Unconstitutionality 148/2017

right consisting of the sexual well-being of the spouse who may suffer the crime of rape, since the state legislator established a lower penalty for this conduct in relation to that established for the crime of rape in general.

### Issue presented to the Supreme Court

The validity of Articles 13, section A, 196, 198, 199 and 224, section II, first and second paragraph of the CCSCZ.

### Holding

The Court: (a) dismissed the arguments regarding Article 13, section A of the CCSCZ; (b) recognized the validity of Article 195 of the CCSCZ that defines abortion; (c) recognized the invalidity of Article 196 of the CCSCZ and, by extension, the invalidity of both Article 198, first paragraph, in its normative portion “either or”, and 199, in its subheading and first paragraph, in its normative portion “shall be excused from punishment for abortion and”, and section I, first paragraph, in its normative portion “within twelve weeks following conception”; and (d) declared the invalidity of Article 224, section II, first paragraph, of the CCSCZ, and, by extension, the invalidity of Article 224, section II, second paragraph, which considers and prevents rape between spouses.

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### EXTRACT OF THE DECISION

- p. 1 Mexico City. The Plenary of Mexico’s Supreme Court of Justice (this Court), in session of September 7, 2021, issues the following sentence.

#### Background

- p. 1-2 México’s Attorney General (MAG) filed an action against Articles 13, section A, 195, 196 and 224, section II, of the Criminal Code of the State of Coahuila de Zaragoza (CCSCZ) on the grounds of unconstitutionality (*acción de inconstitucionalidad*). MAG argued that Article 13, section A, violates the constitutional order in criminal procedures by addressing a topic (preventive detention) that is the exclusive competence of Mexico’s

General Congress. Regarding Articles 195 and 196, MAG affirmed that these articles violate the rights of autonomy and reproductive freedom of women by establishing a crime that prevents the interruption of pregnancy in the first stage of gestation. As regards to Article 224, section II, MAG argued an incorrect assessment of the sexual well-being of the spouse who may suffer marital rape, since the legislator established a lesser penalty for that conduct in relation to that provided, in general, for rape.

### Study of the merits

#### - Causes of inadmissibility

- p. 9-12 MAG contravenes the validity of Article 13, section A, of the CCSCZ. This rule has already been invalidated by this Court. Consequently, it should be dismissed.

#### - Analysis of the constitutionality of Articles 195 and 196 of the CCSCZ

- p. 15-16 The challenged regulations establish that “a person who causes death to the product of conception commits the crime of abortion at any time during the pregnancy “ (Article 195, Abortion for criminal purposes); and “one to three years in prison will be imposed on the woman who voluntarily performs an abortion or on the person who makes her have an abortion with her consent” (Article 196, self-procured or consented abortion).
- p. 16 In this context, this Action of Unconstitutionality (*acción de inconstitucionalidad*) imposes –as a central issue– to review whether it is constitutional to punish the woman who voluntarily decides to interrupt her pregnancy (and, where appropriate, the person who, with her consent, executes that act) with a prison sentence.
- p. 21 **- Women’s right to decide. Content and limits against the protection of the Nasciturus**
- p. 21 The woman’s right to decide (and whose exercise of that right extends, of course, to all persons with gestational capacity) is the result of a particular

combination of different rights and principles associated with an essential notion. This notion is that it is intrinsic to each person to have the freedom to self-determine and freely choose the options and circumstances that give meaning to his or her existence, in accordance with his or her own convictions. The substratum of this prerogative is constituted by human dignity, autonomy, free development of one's personality, legal equality, the right to health (psychological and physical) and reproductive freedom.

- p. 21 In accordance with Articles 1 and 4 of the Constitution, the exclusive right of women and people with the capacity to gestate to self-determination in matters of motherhood (reproductive autonomy) is recognized.
- p. 23-24 In order to establish the content that is sought in the current context regarding the right to decide, it is essential to address the constitutional principles and rights involved with the intimate decision of being or not being a mother.

#### **A. Human dignity**

- p. 24-26 Human dignity is the origin, essence and purpose of all human rights. Human dignity rests on two pillars, conscience and freedom, as a starting point towards the maximum realization of the development of a free and unique personality. Human dignity recognizes the specificity of these unique conditions and is based on the central idea that women and people with the capacity to gestate can freely dispose of their bodies. They can build their identity and destiny autonomously, free of impositions or transgressions, this conception cannot be otherwise, since it starts from recognizing the elements that define them and the deployment of the minimum freedoms for the development of full lives.

#### **B. Autonomy and free development of one's personality**

- p. 26 Human dignity is the source and origin of personal autonomy, the free development of one's personality and the protection of people's intimate environments. It consists of the ability to freely choose and materialize

life plans and ideals of human excellence without the unjustified intervention of third parties or the state power itself. Each person has the right to freely and autonomously choose their life project, as well as the way in which they will achieve the goals and objectives that, on their point of view, are relevant.

- p. 27-28 In the specific case of women and people with the ability to gestate and the exercise of their dignity in the decision to become a mother or not; the component of the freedom they enjoy to establish their life project must be included. Autonomy and the free development of one's personality cover the "freedom of action" that allows carrying out any activity that the individual considers necessary for the development of his/her personality, as well as providing protection to a "sphere of intimacy" against external incursions that limit the ability to make certain decisions through which personal autonomy is exercised. The decision of women and people with the ability to gestate to be a mother or not is protected by this right, since they are the only ones who, due to their intrinsic dignity, can decide the course that their lives will take, such that the existence of a minimum margin of intimate decision to interrupt or continue her pregnancy must be recognized.
- p. 29-30 The Inter-American Court of Human Rights (IACHR) maintains that the decision to be a mother or not is part of the right to private life, emphasizing that the effectiveness of the exercise of that right is decisive for the possibility of exercising autonomy about the future course of relevant events to the person's quality of life. In the judicial control over the constitutionality of laws and acts of the State, it is necessary to be particularly scrupulous in identifying cases that represent interference in the intimate lives of women and people with the capacity to gestate.
- p. 30-31 The integration of personal autonomy, the free development of one's personality and the protection of privacy must be understood as an interdependent prerogative of the principle of a dignified life, specifically in the possibility of building a *life project*. The right to decide serves as an instrument to exercise the free development of one's personality, personal autonomy and

the protection of privacy, in a way that allows the woman or the person with the capacity to gestate, to choose who she/he wants to be, because we cannot lose sight of the fact that, from this appreciation, it is recognized that maternity underlies the notion of will, of desire that personal life go through such facet.

- p. 32-34 In order to nullify the right to decide, there is no room for a paternalistic position that supports the idea that women or people with the capacity to gestate need to be “protected” from making certain decisions about their life plan or sexual and reproductive health. In addition, the secularism of the Mexican State is one of the central axes of this decision. Secularism entails the state duty to protect the rights of religious, ideological, conscience and ethical freedom of people, for which it must maintain a neutrally active position. The secular state cannot identify itself with a certain ethic or moral, nor use state controls to limit, repress or inhibit individual freedoms that are identified as part of personal convictions.
- p. 34 The constitutionalization of the right to decide recognizes the existence of a multiplicity of ethical, conscience-based and religious profiles. It is defined as a presupposition for the harmonious coexistence of any conviction in the sense that its design avoids the imposition of any vision above another; understanding the human being as rational and responsible for their own decisions in full respect of their own self-determination.
- p. 34-35 Secularism is presented as a guarantee for the rights of women and people with the capacity to gestate. Secularism and autonomy mutually strengthen each other by leaving individuals a broad sphere of sovereignty in determining their beliefs, models of human virtue and the means to achieve them, as well as freely deciding on the fundamental aspects of their existence, including matters related to their sexuality and reproduction, without the interference of the State or any institution.

### C. Legal equality

- p. 36-39 The right to equality is also a fundamental piece in the construction of the right to decide. With the recognition of the right to choose it is intended

to eliminate the possibility of discrimination based on gender in terms of maternity and reproductive rights. The intention is to recognize that women and people with the capacity to gestate can deploy these rights from their own criteria. Gender equality privileges the female capacity (and those corresponding to any other gender identity) to make responsible decisions about their life plan and bodily integrity. A different consideration of the way in which women and people with the capacity to gestate exercise this right would necessarily imply affirming that they can only display their sexuality by procreating or that they must completely refrain from this type of act. Moreover, in the freedom of decision in reproductive matters, it has to dissociate the traditional social construct tied to the concepts of woman and motherhood. Within the framework of these considerations, the punitive legal rules or assumptions whose only natural recipient is women (and people with the capacity to gestate) is suspect.

- p. 39      The absence of recognition of the elements that define women (and people with the capacity to gestate), as well as the lack of instruments, such as the right to decide, would suppose a correlative injury to gender equality. In other words, discrimination based on practices or customs that is anchored in conceptions that assign a social role to women (or to people with the capacity to gestate) annuls their dignity and the possibility of choosing an autonomous and individual life plan (which includes the obligation to be a mother). This type of burden imposed by the construction of stereotypes results in and translates into mechanisms that perpetuate the exercise of violence against women, girls, adolescents and people with the capacity to gestate.
- p. 40-42    The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) establishes that the States Parties condemn all forms of discrimination based on gender and agree to take concrete measures to achieve it, such as enshrining gender and sex equality in its Magna Carta, as well as to abolish all those laws, customs and practices that result in discriminatory actions against women. Based on this Convention, the recommendations and observations issued by the Committee for the

Elimination of Discrimination Against Women (Committee) stand out. For instance, General Recommendation 35 recognizes that violations of women's sexual and reproductive rights, such as the absolute criminalization of abortion, are forms of gender-based violence that in some circumstances can contribute to cruel, inhuman and degrading treatment. Therefore, it was exhorted to repeal all provisions that tolerate violence against women; among them, those that criminalize voluntary abortion.

- p. 44-45 Consequently, unless the intention is to annul the legal equality of women (and of people with the capacity to gestate) through the imposition of measures that completely eliminate their right to decide, it is essential to recognize their autonomy to have a minimum margin of choice in relation to maintaining the life process in gestation or interrupting it. The mandate of legal equality of men and women before the law translates into the fact that, in the face of assumptions that guarantee that women will be subject to a life that they have not chosen – and that imply that they will not be able to perform in the same way as men – compared to another in which she can count on greater opportunities, the latter should be preferred. International and national normative texts agree on the importance of including, as a pillar and foundation of the right to decide, the prerogative of women to not be a victim of gender discrimination.

#### **D. Right to (psychological and physical) health and reproductive freedom**

- p. 45-47 1. The health of women and of people with the capacity to gestate, as an essential link to be able to choose whether to continue or annul the gestation process, must be assessed as the right to maintain an optimal psycho-emotional state. The presence of the right to health is associated with the minimum freedom to be able to reflect on a decision, which constitutes a primary step to the rest of the impact of the right to health on the right to choose. The right to health is the prerogative of every person to enjoy the highest possible level of physical and mental health and is justifiable in different dimensions of activity.

- p. 52-54 The possibility of the interruption of pregnancy entails, by definition, access to natural health care (psychological and physical) where the right to health and the freedoms associated with it are essential conditions of the right to choose the course of reproductive life. It is not enough to have the freedom to autonomously make decisions about one's own health and reproductive freedom, since it is essential to have the correlative assistance to be able to execute them properly. A decision about one's own health, such as ending a pregnancy, cannot be arbitrarily interfered and, furthermore, all of the infrastructure must exist to be able to carry it out: that being safe, available, accessible, acceptable, affordable, respectful and quality medical services.

### **E. The right to decide and its specific implications**

- p. 56-57 The constitutionalization of the right to decide makes it possible to argue that there is no place for a scenario in which women and people with capacity to gestate cannot consider the dilemma of continuing or interrupting their pregnancy for a short period of time at the beginning of their pregnancy. This would be equivalent to assuming that their dignity and personal autonomy can be modulated and restricted founded on assumptions that are based on a social construct that, rather than being independent persons, configures them as instruments of procreation.
- p. 57 Reproductive freedom, in its specific aspect of the right to decide, implies that it is not up to the State to know or evaluate the reasons for continuing or interrupting pregnancies. These reasons belong to the sphere of intimacy of women and persons with the capacity to gestate. That can be of the most diverse nature, which includes medical (physical and psychological), economic, family and social reasons, among others.
- p. 67-75 The internal and external borders of the right to choose are translated into the following seven essential implications: (1) sexual education as a pillar of public policy on reproductive health; (2) access to information and advice on family planning and birth control methods; (3) the recognition of women and people with the capacity to gestate as holders of the right to decide the

continuation or interruption of their pregnancy; (4) the guarantee that the pregnant woman or person makes an informed decision regarding the interruption or continuation of her pregnancy; (5) the right to decide comprises two areas of protection of equal relevance, clearly differentiated and that find their trigger in the choice of the pregnant woman or person; (6) the guarantee that pregnant women or persons can interrupt their pregnancy in public health institutions in an accessible, free, confidential, safe, expeditious and non-discriminatory manner; and, (7) the right of the pregnant woman or person to decide can only include the termination of pregnancy procedure within a short period close to the beginning of the gestation process.

#### F. The nasciturus as a constitutional asset and its scope of protection in the Mexican legal system

- p. 75 Fundamental rights are not absolute. In this way, the relationship established between the right to decide and the protection of the unborn are not exceptions to this rule.
- p. 76 For purposes of delimiting the protection that the unborn has in the Mexican legal system, the moment in which human life begins will not be discussed.
- p. 79 The Constitution considers born people as holders of human rights, as is clear from Article 1, which establishes that, “*all persons shall enjoy the human rights recognized in this Constitution and in the international treaties of which the Mexican State be a part*”. The secondary framework distinguishes between the legal protection of the unborn, from that which corresponds to the formal recognition of an individual as a holder of rights. Although Article 22 of the Federal Civil Code (CCF) recognizes that the conceived “*enters under the protection of the law*”, said precept also establishes that the legal capacity of a person is acquired exclusively by birth. Therefore, the unborn lacks the legal capacity of a person. For their part, international legal systems adhere to the same understanding.

- p. 80-81 The nasciturus escapes the notion of person as holder of human rights so that the exercise of these are determined from birth. The right to life does not escape the ownership rule described in these lines, so that, although it is a prerogative contained tacitly in the constitutional text and explicitly in conventional legal systems, it is intentionally associated with the person born and not so with the product of human conception.
- p. 81 Discarding the scenario that the embryo or fetus (depending on the moment of gestation) is the holder of fundamental rights because it is not a person in the legal sense allows room to mention that the legal regime does not establish the protection of the right to life from conception.
- p. 81-82 In the conventional sphere, it is also not possible to find coverage of the right to life from the moment of conception. For example, the Convention on the Rights of the Child establishes that the protection of the life of the child includes from its conception.
- p. 85 2. The above in no way means that the embryo or fetus lacks a defined scope of protection, on the contrary, this Court recognizes an intrinsic quality in the nasciturus, with a value that is associated with its own characteristics insofar as it is the expectation of a being –regardless of the biological process in which it finds itself– and whose development is constant as the gestation process progresses. The embryo or fetus has an inherent value as it constitutes the possibility of the birth of a human being for which there is a fundamental interest in its preservation and development. Although the embryo or fetus is not entitled to human rights, the interest in providing a spectrum of protection is limited to the expectation itself; only the person who is born alive can be considered holder of fundamental rights and this can only exist if the State seeks a scope of protection in its natural previous step: the gestation process.
- p. 87 3. The gestation process contains a constitutionally relevant value linked to the expectation of the birth of a human being from the existence of a fetus or embryo, a category that implies its recognition as a good that deserves

the protection of the public powers of the State. In addition, the prenatal period also merits the corresponding guardianship associated with the joint protection that corresponds to women who, in their exercise of the right to choose, opt for the path of motherhood as a life plan and project.

The unborn are assisted by measures of protection of public order that are intensified in accordance with the progress of the pregnancy itself. This is associated with the fact that the passing of the weeks of gestation means the development of the characteristics that can be included in any debate about what defines a human being. These biological features translate legally.

- p. 94 Each step of the process of perfecting the development of gestation leads to the undeniable truth that it increases the capacity of the organism to feel pain, experience pleasure, react to its environment and survive outside the womb, as well as its viability to be a person. Consequently, the priority within the obligation of the State to protect it increases as such events occur.

The integral appreciation of the gestation process allows for a better integration when it is observed in relation to the constitutional right of women and pregnant people to decide, since it legally allows to establish a space so that both can function and have a certain place.

- p. 95 The protection of life in gestation cannot be presented as antagonistic to that of women and pregnant persons. They are not only holders of rights and enjoy immunity from interference by the State in decisions that correspond to their private life, but also protecting them and through them the State can protect, in turn, that constitutionally relevant good. The scenario that best allows safeguarding its inherent value is the joint work of the State with the pregnant woman or pregnant person through the deployment of a government policy whose foundations are the broadest protection of all the rights and assets involved.

- p. 96 The base and trigger point of the most comprehensive guardianship lies in the execution of the tasks that must be extended indirectly and primarily

through education, outreach, counseling and support services in family planning and, in general, in the implementation of actions to overcome the conditions of inequality, marginalization and precariousness that may put at risk the effective protection of the rights and goods involved.

- p. 96-97 The right to decide, in relation to the woman or pregnant person who opts for the interruption of pregnancy, only has a place within a short period of time close to conception, as a mechanism to balance the elements that coexist and provide protection both to the conceived and to reproductive autonomy, a space where the guardianship of both is possible. The proposed solution is the one that is considered more balanced and guided by the principle of human dignity that addresses both the rights of women and people with the capacity to gestate as well as the inherent value of the unborn.
- p. 98 In relation to the determination of the temporality in which a pregnancy termination procedure can be carried out, it must be reasonable. Its legislative design must not annul or render the aforementioned prerogative unenforceable. It must also consider the gradual increase in the value of the gestation process. For this determination, the legislator can resort to the available scientific information, as well as to the public policy considerations in health matters that seem applicable to the extent that they are compatible with the reasons stated here, as well as being guided by the parameters set in other entities where the right to choose has been implemented in their legislation (Mexico City, Oaxaca and Hidalgo).

**- Validity of Article 195 of the Penal Code for the state of Coahuila de Zaragoza (CCSCZ)**

- p. 100-104 Article 195 of the CCSCZ establishes that an abortion is committed by anyone who causes death to the product of conception at any time during pregnancy. This provision has no connection to the right of women and people with the capacity to gestate to decide in such a way that its constitutionality cannot be questioned. The primary concept of what should

be understood as abortion is essential to the entire chapter on Abortion. It is a common denominator whose objective does not reiterate specific conduct in each norm individually. This provision, devoid of the rest of the components that fully integrate each type of individual criminal behavior, still has a place within the arena of constitutional protection around the right to decide. The usefulness of this norm –by its nature– is of such generality that its application is included in cases focused on the protection of a constitutional good for the product of conception and against acts that are contrary to the will of the woman.

- p. 104 The suppression of this normative portion would result in the impossibility of integrating the typical conduct present in cases of forced abortion. Those cases constitute acts that harm both the physical and psychological integrity of the woman and denies her the right to decide in cases where the woman voluntarily wishes to include motherhood in her life plan as well as life in gestation as a constitutional good.
- p. 105 Consequently, it is necessary to recognize the constitutional validity of that provision.

### - Validity of Article 196 of the CCSCZ

- p. 106 Article 196 of the CCSCZ establishes that “one to three years in prison will be imposed on the woman who voluntarily performs her abortion or on the person who makes her abort with her consent”. The criminalization of self-procured or consented abortion has an immediate direct impact on the reproductive freedom of women and people with the capacity to gestate in the decision to be a mother or not. This is a constitutional right that has its roots and sustenance in dignity, reproductive autonomy, free development of one's personality, gender equality, and the full exercise of the right to health.
- p. 106-107 The consideration that the action of interrupting the pregnancy is contrary to morality and, to that extent, that the assessment becomes translated into the establishment of criminal measures cannot be considered a legitimate purpose that supports the rationality of the norm. The debate on morality

or immorality should be reserved to the intimate sphere of each person and in no way should it become the content of criminal policy.

- p. 107 Criminal prohibition is not suited for the purpose of preventing maternal mortality. Current medical science guarantees that an interruption of pregnancy carried out by specialists and during the early period of the gestation process represents the least possible risk for the woman or pregnant person.
- p. 107-108 The objective of the criminalization of the voluntary interruption of pregnancy, is to inhibit the total practice through the penal norms with the purpose of protecting the legal interest of potential life is noted. This Court does consider that the norms that seek to protect human life in gestation and create a culture of respect for dignity are linked to this process and are pursuant of legitimate objectives. However, considering that the rule pursues a purpose associated with the protection of an asset whose protection is in the public interest, does not mean that for that reason its validity should be recognized within the Mexican legal system. This Court warns that the punitive procedure designed by the state legislature does not reconcile the right of women and persons with gestational capacity to decide. Rather, it annuls it completely through a mechanism that does not achieve the intended purposes (inhibit the practice of abortions) and correlatively, produces harmful effects such as: putting the life and integrity of women and people with the capacity to gestate at risk, criminalizing poverty, while ruling out other protection options of a lesser harmful nature that start from the joint work with the pregnant woman or pregnant person and that recognizes the private sphere in which the unique bond that exists between her and the product of conception develops.
- p. 109-110 The typical description of self-procured or consented abortion is harmful to the reproductive rights of women and people with the capacity to gestate because it does not include a formulation that allows pregnancy to be interrupted in the first stage of gestation. The legislative formula that contains the criminalization of the voluntary interruption of pregnancy at all times

supposes the total suppression of the constitutional right to choose for women and people with the capacity to gestate. The normative construction destroys the constitutional balance that must be proportionally kept within the right to choose and the good that constitutes the product of conception.

- p. 111-112 The most notable legislative error in the construction of the provision is not that it does not always allow the pregnancy to be interrupted, but rather that it does not allow it to be interrupted in the initial phase of pregnancy without ceasing to classify it as a crime. The legislator must regulate in such a way that the protection of the life of the conceived does not prevail over the rights of women and people with the capacity to gestate.
  
- p. 112-113 Therefore, this Court warns that Article 196 of the CCSCZ must be invalidated in its entirety. The Congress of that entity will maintain at all times its freedom of configuration to classify the behaviors that it considers illegal, but it must bear in mind the considerations contained in this resolution. The establishment of local formulas does not mean that they can be created in the shadow or outside of general constitutional mandates, which in the present case means that there are no absolute constitutional rights or goods that can be considered more valuable than others.
  
- p. 121-123 The vast majority of criminalities require people to refrain from injuring third parties on their person and/or their property, but in the case of abortion, the imposition is so serious that women put themselves at high risk of harming themselves or injuring themselves, before facing motherhood, whatever the reasons that, from their intimacy, placed them in that situation. The inclusion in the criminal type of the behavior that occurs in the first period of pregnancy, by virtue of the superlatively serious consequences that it produces, must be expelled from the normative system.
  
- p. 127 The absolute court prohibition (supported by the penal sanction) is equivalent to establishing an obligation for the woman who, once pregnant, must necessarily bear it and become a mother.
  
- p. 127 Consequently, it is appropriate to declare the invalidity of Article 196 of the CCSCZ.

**- Extensive invalidity of normative portions contained in Articles 198 and 199 of the CCSCZ.**

**a) Extensive unconstitutionality of the normative assumption that sanctions assistance in cases of voluntary abortion.**

- p. 128 The first paragraph of Article 198 establishes that “if the intentional abortion, whether or not consented or forced, is committed by a doctor, midwife or midwife, male or female nurse, or medical or nursing practitioner, in addition to the penalties that correspond to him in accordance with this chapter, he will be suspended from two to six years in the exercise of his profession, trade or practice indicated.”
- p. 129 The rule is understood to be applicable both in the case of consented abortion (declared unconstitutional) and forced abortion. It is highlighted that the portion that is associated with the impossibility for the pregnant woman or pregnant person, in the first stage of gestation, to be fully assisted by trained personnel for the interruption of pregnancy, is that expression that is indicated by the words “either or”. Otherwise, even having invalidated the criminal offense related to both self-procured and consented abortion, the truth is that keeping this normative portion alive would make it impossible for the woman who opts for the interruption to be assisted by health personnel, since the sanction consisting of the temporary suspension of the person who committed the health procedure or assisted in it would remain in force.
- p. 129 Consequently, it is necessary to determine the invalidity of the normative portion “either or” contained in the first paragraph of Article 198 of the CCSCZ. The invalidity of said fragment, generates that the rule results in the following terms: “Article 198 (Suspension of rights to certain people who cause abortion). If the intentional, non-consensual or forced abortion is committed by a doctor, midwife or midwife, male or female nurse, or medical or nursing practitioner, in addition to the corresponding penalties in accordance with this chapter, it will be suspended for two to six years in the exercise of their profession, trade or practice indicated.

**b) Extensive unconstitutionality of the normative assumption that sanctions assistance in cases of voluntary abortion.**

p. 130-131 Article 199 of the CCSCZ entitled “abortion not punishable”, states in its first paragraph that “the following will be excused from punishment and will not be prosecuted: (a) abortion due to rape, or due to improper insemination or implantation; (b) abortion due to danger of the pregnant woman; (c) abortion due to serious genetic or congenital alterations; and, (d) abortion caused by the pregnant woman.

p. 131 The constitutional vice associated with this provision revolves around its design as acquittal excuses in the way in which its title “abortion not punishable” is written and the portion “they will be excused from punishment for abortion”, since these expressions constitute an affectation to the right to decide, since it cannot be restricted through normative portions that, although they rule out the application of punishment, do conceive such conduct as a crime.

The differences between the concepts that exclude the crime and excuse for acquittal, establishing that the first implies that the crime in question cannot be updated, while the second means that there was typical conduct, but the application of the penalty established for that crime is excluded.

p. 133 Therefore, the norm will only be composed of the expression “they will not be prosecuted”, which clearly communicates the notion that it is an exclusionary crime to the extent that the state apparatus of prosecution as well as the administration of justice will not investigate or judge the decision of the woman to have interrupted her pregnancy in those cases.

**c) Extensive unconstitutionality of the normative assumption that limits the interruption of pregnancy that has its origin in the crime of rape.**

p. 134 The invalidity also reaches a fragment of section I of Article 199 that deals with abortion due to rape and improper insemination or implantation,

which establishes: “When the pregnancy is the result of rape, or artificial insemination or implantation of an ovule in any of the cases referred to in Articles 240 and 241 of this code, and the pregnant woman performs her abortion or consents to it, within the twelve weeks following conception.”

The limitation in relation to the fact that abortion can only be performed within twelve weeks of conception lacks justification and rationality. In the eventuality of a case other than the one in which the conception occurred with the mother’s will, it is necessary that there be a clear differentiation on the applicable rules for the interruption of the pregnancy if the antecedent constitutes an illicit conduct that violated the sexual and reproductive rights of the woman or person with gestational capacity.

p. 135 The norm is unconstitutional to the extent that it establishes a rule that is not related to a fact-based assumption. The problem that it involves in terms of a seriously injured person, or within the dynamics of a victim of a crime creates a situation where it is not possible for a woman or person with the capacity to gestate who is a victim of forced conception not to be assisted by special provisions that address the particularities of such a scenario. The portion under analysis has no reasonable relationship between the assumption it addresses (pregnant woman as a result of rape) and its legal consequence (legal term to carry out the legal interruption of pregnancy) since it ignores the extraordinary circumstances that occur.

p. 138 The need for the legal system, the regulations and their operators to function within the framework of a period not limited in this way is noted. The inclusion of provisions that allow for providing support (medical and psychological) in the most agile way possible are necessary. That can also be applied to the extent that a safe procedure can be carried out in relation to the woman or person with the capacity to gestate.

Consequently, as described in subsections B and C, it is appropriate to determine the invalidity of the normative portions “abortion not punishable” and “excused from punishment” that are contained in the title and in the

first paragraph of Article 199, respectively; as well as the excerpt “within the twelve weeks following conception” located at the end of the first paragraph of section I of that same article, of the CCSCZ.

**- Analysis of the constitutionality of Article 224, section II, of the CCSCZ (rape between spouses).**

- p. 149-150 The approximation made by the local Congress in the formulation of the criminal type produces two readings that are unacceptable: a) the sexual integrity of the people violated by those with whom they are united in marriage, concubinage or civil agreement has a lower value in relation to those victims of the crime of rape who do not have that specific quality; and b) the crime of rape committed by the person with whom they are linked through those civil ties is not of the same seriousness as that committed against a subject with whom they lack any type of relationship.
- p. 150 The establishment of an article in these terms supposes the creation of a subcategory of crime victim without justification or constitutional support, since assuming that the establishment of a civil relationship supposes the partial loss of sexual self-determination is an invalid reason. This norm constitutes a setback in the evolution of the rights of the victim, to the extent that it considers that in the face of the same injury there may be people whose damage is estimated to be less serious, which results in their comprehensive access to justice.
- p. 153-155 One of the implications of the human right to equality between men and women entails a prohibition for the legislator to issue provisions that translate into discriminatory measures that allow the perpetuation of mechanisms of gender violence. A provision that does not recognize on equal terms the seriousness of violating the sexuality of their female civil partner (whether by way of marriage, concubinage or social pact), supposes a tacit recognition that this bond is a space of superiority of the rights of man, which in no way finds support in the constitutional text.

- p. 156 Consequently, the normative portion must be invalidated in its entirety, that is, the first paragraph of section II of Article 224 of the CCSCZ, in relation to the validity of that provision (November 26, 2017 to April 12, 2019).

**- Extensive invalidity of the normative portion contained in Article 224, section II, second paragraph of the CCSCZ.**

- p. 156-157 The invalidity must be extended to Article 224, section II, second paragraph of the CCSCZ, which states that the crime of rape of a spouse and other persons with similar ties will be prosecuted by complaint. This legislative formula sharpens the disregard with which the state legislator observes the sexual violations that can occur within a marriage, concubinage or social pact. Consequently, the normative portion must be invalidated in its entirety: the second paragraph of section II of Article 224 of the CCSCZ.

**Decision**

- p. 160-161 This Court: (a) dismissed Article 13, section A of the CCSCZ; (b) recognized the validity of Article 195 of the CCSCZ that defines abortion; (c) the CCSCZ recognized the invalidity of Article 196 and, by extension, the invalidity of Articles 198, first paragraph, in its normative portion “either or” and 199, in its paragraph and first paragraph, in its normative portion “Shall be excused from punishment for abortion and” and section I, first paragraph, in its normative portion “within twelve weeks following conception”; and (d) declared the invalidity of Article 224, section II, first paragraph, of the CCSCZ, and, by extension, the invalidity of Article 224, section II, second paragraph, which provide for rape between spouses.



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## INVESTIGATION WITH GENDER PERSPECTIVE AND VICTIMS' RIGHTS

### *Amparo en Revisión 1284/2015*<sup>21</sup>

**Keywords:** *right to truth, right to access to justice, right to reparation, victims' rights, investigation with gender perspective, judicial guarantees, participation of victims in criminal proceedings, femicide, gender-based violence.*

#### **Summary**

On October 28, 2012, KCPL was working when she suffered a fall that caused serious injuries. KCPL was transferred to a state hospital where she died the next day due to the large amount of blood she had lost. KCPL's mother and brother reported it as a possible femicide to the public prosecutor's office of San Luis Potosi. During the investigation, they were not recognized as victims, nor were they allowed to offer evidence; for this reason they file a lawsuit for a two-stage judicial review relieving an un-remediated breach of rights (*juicio de amparo indirecto*), which had the effect of allowing them to have access to the previous

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<sup>21</sup> Decision issued by the First Chamber of Mexico's Supreme Court of Justice (November 13, 2019). Reporting Justice: Alfredo Gutiérrez Ortiz Mena. *Action for Constitutional Relief Through Injunction 1284/2015*

investigation. Subsequently, the public prosecutor's office brought criminal charges and the judge who heard the case issued an arrest warrant against KCPL's employer for the crime of culpable homicide. The victims brought a second through an injunction (*juicio de amparo*) against this determination because the context of gender-based violence suffered by KCPL was not taken into consideration, nor did they take into account that the body showed signs of sexual violence and defensive wounds in one arm, among other considerations; which if taken into account, the authority would have determined that it was femicide and not culpable homicide. A district judge in San Luis Potosi determined not to rule in favor of the victims, for which they filed an appeal (*recurso de revision*), which this Court decided to exercise its authority assert jurisdiction.

### Issue presented to the Supreme Court

Determining whether the actions of the prosecuting authority in the investigation of the violent death of KCPL met constitutional and conventional standards for gender-based violence and the obligations derived from the access of victims to justice.

### Holding and vote

The injunction (*amparo*) was granted essentially for the following reasons. This Court considered that the district judge should have studied the omissions of the public prosecutor's office in its investigative work, as the omissions are impossible to repair and transcend the rights of the victims. It considered that the victims' right to access to justice was infringed as they were not recognized as victims; which would have enabled them to actively participate in the investigation and in the criminal proceedings; they would also have been allowed to challenge the determinations made by the public prosecutor's office. Moreover, it considered that the right to truth for the victims was infringed by not allowing them to participate in the investigation and by ignoring elements that might have led the investigation to a different result; in this sense, the evidence they wished to present was critical for the clarification of the truth. Finally, the Court determined that the public prosecutor's office did not conduct a gender-sensitive investigation, mainly because it did not take into account the particular circumstance of gender-based violence that KCPL experienced in her workplace and instead dismissed it as a possible cause of death; for not following protocols in the face of possible femicide;

and for not taking into account KCPL's injuries, which were not, in themselves, the result of an accident.

The First Chamber unanimously decided this case by four votes of Justices Luis María Aguilar Morales, Jorge Mario Pardo Rebolledo (reserved the right to a concurring opinion), Alfredo Gutiérrez Ortiz Mena, and Juan Luis González Alcántara Carrancá (reserved the right to a concurring opinion). Justice Norma Lucía Piña Hernández was absent.

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### EXTRACT OF THE DECISION

p. 1 Mexico City. First Chamber of Mexico's Supreme Court of Justice (this Court), in session on November 13, 2019, issues the following decision.

#### Background

p. 1-2 From the court records, it is known that KCPL worked as a hostess in a bar in San Luis Potosí. On October 28, 2012, at approximately 03:00 hours, KCPL was working there when her coworkers heard a glass-breaking-like noise in the office of the manager, *Ricardo*. The coworkers found a broken glass door and the victim on the ground bleeding to death, so they called the emergency services. On October 29, 2012, at approximately 01:15 hours, KCPL died from an artery and femoral vein injury that caused a hypovolemic shock.

p. 2-3 On November 5, 2012, the agent of the public prosecutor's office launched an investigation into the crime of murder and ordered all necessary measures to clarify the facts.

p. 3 During the preliminary investigation, on November 9, 2012, the victim's mother and brother (the victims) requested the public prosecutor to be recognized as interveners.

On January 18, 2013, the victims filed a lawsuit for a two-stage judicial review relieving an un-remediated breach of rights (*juicio de amparo indirecto*)

against the public prosecutor's office for the reluctance to agree to various filings, the opposition to their consultation of the documentation of the preliminary investigation and the refusal to issue them certified copies of it.

- p. 4 A district judge in San Luis Potosi granted the injunction (*amparo*) ordering the public prosecutor's office to respond to the requests made by the victims and to give them access to the investigation record and issue copies of the documentation.

Following the investigation, on August 20, 2013, the public prosecutor's office filed criminal charges against *Ricardo* as presumed guilty of the crime of culpable homicide and requested an arrest warrant. On September 5, 2013, the presiding judge ordered pretrial detention of *Ricardo*.

- p. 5-10 On October 17, 2013, the victims sued for an injunction (*demanda de amparo*) against the public prosecutor's office and the Criminal Judge for: failure to recognize them as victims, informing them of the rights conferred to them by the Constitution; refusal to allow their lawyer to access and consult the investigation, especially to be present in any evidentiary procedure; refusal to interrogate witnesses, paramedics and doctors who attended KCPL, the prosecution police officers who conducted the criminal investigation, and *Ricardo*, even though he was considered the prime suspect; the non-admission and presentation of evidence from inspection of the scene; refusal to offer the forensic chemical test "luminol"; failure to keep the chain-of-custody of garments and footwear worn by KCPL; failure to conduct the requested tests in scene criminalistics; detriment to their right to know the truth; lack of effective, serious and impartial investigation into the clarification of deeds; failure to initiate a line of inquiry that considered sexual assault and labor harassment; failure to follow national and international protocols on the investigation of violent deaths of women; among others. A district judge in San Luis Potosi admitted and registered the parties suing for an injunction (*demanda de amparo*).

- p. 12-13 On February 20, 2014, a decision was issued in which the injunction (*juicio de amparo*) was dismissed, constitutional protection was denied and finally,

the injunction (*amparo*) was granted. Dissatisfied with the decision, the victims filed an appeal (*recurso de revision*). The district judge ordered the case to be referred to a collegiate circuit court, where it was admitted for processing on May 20, 2014.

- p. 13 The victims requested that this Court exercise its authority to assert jurisdiction. On July 1, 2015 it was decided to exercise it and on October 29, 2015 the filing of the case was ordered.

### Study of the dismissal declared by the district judge

- p. 38 The district judge declared the proceeding two-stage legal review relieving an unremediated breach of rights (*amparo indirecto*) to be inappropriate. He considered that the omissions attributed to the public prosecutor during the investigation and its failure to act with due diligence and within a perspective of possible gender-based violence constituted violations of procedural rights. It was determined that the way to appeal against omissions classified as procedural violations was through the mechanism of direct injunction (*amparo directo*).
- p. 39 The district judge also determined that the victim's legitimacy to resort to the mechanism of injunction (*amparo*) is limited to situations where an acquittal decision is challenged or brought to the determination that releases the accused from detention, provided his rights had not been respected. That injunction (*amparo*) was sought against those acts is only appropriate when the victim has not been provided with legal advice or when s/he has not been informed of the rights to which s/he is entitled in each procedural instance. This may also occur when s/he is not allowed to present information and evidence available to him or her, either in the investigation or during the proceedings and that s/he is not allowed to intervene in court. Moreover, it was considered that, while it has been understood that procedural violations may also be the subject of a legal review of an unremediated breach of rights (*amparo indirecto*); however, this only benefits the accused and not necessarily the victim, who may challenge them only if they transcend the outcome of the decision.

This Court does not agree that failure to investigate the death of a person belonging to a historically disadvantaged group on the basis of sex-gender (in the case of a woman) with due diligence and a perspective of possible gender-based violence is a mere procedural violation that does not involve the breach of substantive rights. As the victims argue, the conducting of a stereotypical – possibly discriminatory – negligent or careless investigation seriously compromises the rights of direct or indirect victims to access to justice, truth and non-discrimination. All of these rights are constitutional, the violation of which can be analyzed on their merits by constitutional judges, who can assign them the restoration consequences that may correspond to them regardless of their significance to the outcome of the final decision in the process.

- p. 46-47 This Court considers that, in this case, transcendent and impossible-to-repair violations are claimed. Indeed, the lack of effective investigation may involve an act impossible to repair which would leave victims in a state of defenselessness. It would be wrong to dismiss *a priori* and not to study the merits of cases questioning investigations related to the death of a woman taking place under conditions that make it plausible that it was the result of acts of gender-based violence.
- p. 47-48 It is indisputable that an investigation conducted without meeting the standards of due diligence and without meeting the enhanced obligations arising from international standards on gender-based violence, and in particular the violent death of a woman, will inevitably determine the results of the criminal process, and compromise the rights of victims to truth, justice and reparation.
- p. 48 If the shortcomings of the investigation were not remedied in a timely manner, it would be hard to obtain a conviction– if appropriate – based on the evidence entered and presented to the criminal proceedings on the basis of the discretion of the public prosecutor's office and with the intention to sustain and prove a factual scenario that is clearly removed from the claim for justice of the direct and indirect victims.

- p. 48-51 Therefore, this Court considers that the acts challenged warrant a background study which can be carried out under a two-stage legal review relieving an un-remediated breach of rights (*amparo indirecto*). Therefore, the judge's determination to deny the two-stage legal review relieving an un-remediated breach of rights (*amparo indirecto*) is incorrect, and it must revoke the dismissal issued by the district judge in respect to these acts that occurred during the preliminary investigation and carry out a thorough study of: a) failure to acknowledge the complainants as victims; b) failure to notify family members of the determinations made during the investigation; c) failure to allow the victims to participate in the investigation; d) failure to investigate the death of KCPL effectively and with a gender perspective; and e) the August 20, 2013 determination of the public prosecutor's office to bring criminal charges for the crime of culpable homicide, as well as the failure to notify the victims. From the criminal judge who heard the criminal case, the formal indictment for culpable homicide.

### Study of the merits

#### I. The victims' right to access to justice

- p. 51 All people enjoy the right to access to justice, which includes the right to due process, judicial safeguards, and effective judicial protection. In the case of victims, the fulfilment of these rights guarantees – in turn – their crucial rights to truth, justice, and reparation.
- p. 52 The right of access to justice is also a complex right that can be studied in three dimensions. From a formal point of view, it implies the universalist consecration of law and unrestricted entry into courts and other institutional means for the defense of rights. In its substantive aspect, it refers to the protective content of decisions on legitimate claims. Finally, a structural understanding examines the social and economic context that determines whether a court or other institutional means of defense can be used, and the form, conditions, and consequences of that. This three-dimensional conception requires looking at the inequalities that exist in the country and how they affect the processes of deduction of legitimate claims.

From this perspective, it would not be sufficient to obtain just *any* response from the legal system, but such response must be the product of a thorough and impartial investigation, where the guarantees of due process are unrestrictedly respected, and where the claims of justice of the victims have been admitted and are sufficiently considered within the institutional framework, particularly at the stage that gives them a greater possibility of interaction: the investigation. Finally, it will be the public prosecutor's office that more specifically represents their aspirations for justice and their interests in the successive stages of the process; nevertheless, the current legal order gives victims the most active role.

- p. 52-53 Gender-based violence is considered a violation of human rights. As such, it activates the specific duties of preventing, investigating, sanctioning, and repairing, qualified by the standard of due diligence, which requires careful behavior in the face of these violations. On the basis of due diligence, States should reasonably prevent them, investigate them thoroughly, sanction them proportionately and repair them fully. In a context where gender-based violence seems doomed to impunity, constitutionally supervising that investigations into the deaths of women presumably occurring in situations of gender-based violence are conducted with due diligence involves reviewing whether the authorities have fully complied with the constitutional duty and have satisfied – within their competencies – access to justice in its three dimensions.
- p. 53-56 The rights of victims of crime have been progressively expanded to recognize their right to some degree of participation in criminal proceedings. The rights of defense in favor of the victim and those offended by the crime include, among others, the right to be informed of the rights established by the Constitution and, at their request, of the development of criminal proceedings, to contribute to the public prosecutor's office and to provide evidence, both in the preliminary investigation and in the process, to have the appropriate procedures taken, as well as to intervene in the trial and to file for the remedies in the terms provided for in the law. For this reason, if the victim has constitutionally recognized rights from the stage of the

preliminary investigation, they must of course be respected at the time of assignment of the criminal case before the judge.

- p. 57 This Court understands that the investigation of a possibly wrongful event is a crucial time for victims and their claims for justice: if an investigation is conducted with a defect and there is no effective and available remedy for victims to assert their objections to that flawed conduct, these claims and aspirations would be thwarted. Undoubtedly, the public prosecutor office system can make the determinations conferred on it by the Constitution and in exercising its persecutory monopoly, which does not mean that they are not reviewable – especially when the person challenging them is the victim.
- p. 59 If it is understood that the primary relationship in the proceedings before the criminal court is between the accused and the State, the claims for justice of the victims become particularly relevant during the investigative phase, where the evidence that will substantiate and sustain the punitive claim in criminal proceedings is gathered. This Court understands that the participation of victims – especially in the investigation stage – does not create an intolerable tension with the rights of the accused. The presumption of innocence and due process are the institutional guarantee of the right to truth of the victims.
- p. 59-60 In this case, this Court notes that the victims were prevented from actively participating in the investigation, they were not informed of the procedural status of the evidence gathered nor of the procedures carried out for the corresponding indictment and the public prosecutor's office failed to gather evidence or carry out procedures that would actually clarify the facts.
- p. 60 Indeed, the victims were not notified of the procedures carried out, among them the assignment notice which solidified the State's punitive claim and motivated the choice of evidence made available to the judge, who – based on that – issued an arrest warrant and issued an indictment for the crime of culpable homicide.

p. 60-61 Based on the documentation that makes up the preliminary investigation, there is no proceeding in which they have been recognized as victims, nor that they would have been informed of the rights that – therefore – they are entitled to. They sought to provide means of proof and requested procedures to present evidence to clarify the facts. However, the public prosecutor's office not only did not accept the evidence offered but it did not notify the victims of other procedures during the investigation – in which the accused himself even participated. Thus, the ministerial authority denied the victims the right to participate in the investigation.

p. 61 Nor is it seen that the public prosecutor's office had reported on the progress of the investigation in a clear, precise, and timely manner to the victims. Although the first two-stage legal review relieving an un-remediated breach of rights (*amparo indirecto*) granted them constitutional protection to provide them access to the investigation and copies of the file, the victim's relatives had access to the file almost one year after the events occurred and six months after the sentence was issued. At that time, the victims found that their requests had not been met and that the public prosecutor's office had already brought criminal charges for the crime of culpable homicide without notifying them. Therefore, the victims did not have the opportunity to object to this determination.

This Court can say that the lack of information not only prevented the intervention of the victims during the investigation stage, but – given the irregular and inadequate actions by the public prosecutor's office – it left them in a state of defenselessness, which constituted an obstacle to the satisfaction of the fundamental rights they are entitled to.

## II. Truth and investigation

p. 62 Gender-based violence is a violation of human rights and therefore it triggers specific duties, which include its diligent, thorough, prompt, and impartial investigation. This investigation and its results encompass the right to truth of the victims. The claim to find the “truth” in judicial proceedings is an

essential component of the validity and legitimacy of justice. The right to truth is also a form of reparation.

- p. 64-65 Victims of human rights violations have the right to an effective remedy that implements their right to truth. The right to an effective remedy includes the right to an effective investigation and to the verification of facts. The truth will consist, more than anything, of the delivery of a corresponding account with the facts, sufficiently proven and arising from a thorough and diligently conducted investigation. The truth is not just any version; explanations for facts inconsistent with available evidence or the product of an arbitrary selection or interpretation of them do not satisfy the right to truth.
- p. 65 In this case, the victims claimed – among other things – the failure of the public prosecutor in charge of the preliminary investigation to recognize them as victims. As a result, their direct and active intervention and participation was not allowed during the investigative phase.
- p. 68 In resolving the Injunction Under Review (*Amparo en Revision*) 554/2013, this Court said that the efficient determination of truth, within the framework of the obligation to investigate a death, must be shown, with all accuracy, from the first procedures. Thus, the assessment of the opportunity and officiousness of the investigation should be made both in the urgent acts and in the development of a methodological plan or program of investigation.
- p. 68-69 This Court notes that inconsistencies and omissions existed in the investigation of death. Once the prosecutorial authority became aware of the facts through the call of one of the doctors who attended KCPL at Hospital Central, the crime scene was not preserved. The prosecutorial authority did not arrive at the site of the events until 18:30 hours on October 29, 2012; that is, almost 40 hours after the occurrence of the events. This delay could lead to the scene of the crime being altered and, consequently, valuable information for the investigation being lost, as there was no timely testimony from the witnesses and suspects involved.

- p. 69 On November 6, the public prosecutor in charge of the investigation went to the place of business where she noted that where the events had occurred had already been cleaned or washed and that only a few traces of blood and hair remained. It was not until that moment that the property was secured. Thus, it was impossible for the experts to carry out the relevant proceedings at the site of the events that would help to clarify what happened, as well as the motives that caused the death.
- p. 69-70 On April 11, 2013, the agent of the public prosecutor's office went to the property to carry out other procedures; however, she noticed that the seals that had been placed had been manipulated. Thus, the failure of the public prosecutor's office to timely and adequately preserve the place where the events occurred led to its contamination.
- p. 70-71 Failure to comply with the chain of custody prevented procedures necessary to clarify what happened: the victim's belongings – her clothing, footwear, and cell phone – were not collected by investigating authorities. Instead, it was the victim's relatives who were responsible for safeguarding and presenting them. Consequently, the expert concluded that it was impossible to study them because the garments could not be evaluated, given their advanced state of decomposition.
- p. 71 Furthermore, even though the forensic medical experts were unable to determine the causes of the injuries, the public prosecutor concluded, without any justification, that they had not been caused with the intervention of anyone or by using physical violence. The experts simply pointed out that they may have been caused while the victim received medical attention. As for the rest of the injuries – those presented by KCPL since she arrived at the hospital and reported by doctors – it was not possible to determine the mechanism that caused them.
- p. 71-72 The public prosecutor's office built a story according to which she lost her life as a result of an accident. It considered that there were a number of risk factors – bad lighting, an uneven floor with low visibility, material that was

not non-slip, a common quality glass at risk of breaking with impact, and the type of shoes she wore that day; among others. It considered that several of them were attributable to her employer, *Ricardo*, who, despite the foreseeable risks, did not comply with the regulations to ensure the safety of his employees. This determination, in this Court's view, rules out – without sufficient justification – the possible existence of an attack, despite evidence of multiple injuries.

- p. 72 This means that the authorities failed to meet their procedural obligations in the investigation. Both the prosecutorial authority and the police officers responsible for the investigation of the events, as well as the experts, carried out various tests and procedures without notifying the victims. They also failed to admit evidence and carry out procedures that would have allowed them to determine that the assault suffered by the victim did not necessarily correspond to an accident.
- p. 72-73 The right to truth is related to the investigation because that is where the construction of a story begins, which will culminate with the definitive explanation of a harmful event. This account may function as reparation to the extent that the event is granted its specific and actual importance. This will not happen in the case if the investigation is not corrected and victims are not allowed timely knowledge of the results of that investigation. This is important because it provides the option to challenge the conclusion of the public prosecutor's office; question the validity and adequacy of the evidence it took into consideration in deciding how it was done; know how the evidentiary material gathered during the preliminary investigation supports the conclusion reached and how this can be disputed; analyze how the lack of conducting a gender-sensitive investigative process conditioned the assessment of evidence and lines of inquiry; assess the degree of completeness of the investigation and the extent to which the evidence they offered – having been admitted and presented – would have been efficient in substantiating a different factual hypothesis.

### III. Gender-sensitive research

- p. 74 In Injunction Under Review (*Amparo en Revision*) 554/2013, this Court set the minimum standards – based on the right of women to a life free from violence and discrimination – that an investigation must meet for the violent death of a woman to consider that it has been carried out with due diligence and gender perspective.
- p. 77-78 The gender perspective makes it possible to illuminate the differentiated social assignment of roles and tasks by virtue of the binary attribution of sexual identity; reveals the differences in opportunities and rights that follow this attribution; demonstrates the power relations originated in these differences; and demonstrates how the combination of these levels creates a context of systematic oppression that marginalizes women – and other groups of the sexual diversity spectrum – culturally, socially, economically and politically. An indubitable expression of this oppression is gender-based violence.
- p. 80 Every case of death of women, including those that *prima facie* would appear to have been caused by criminal motives, suicide and certain accidents, should be analyzed with a gender perspective, to rule out gender reasons in the death and to finally determine its motivation. In this regard, this Court considered that the investigating authorities should explore all possible investigative lines in order to determine the historical truth of what happened. There this Court pointed out that the intention to find the truth, within the framework of the obligation to investigate a death, must be shown, with all thoroughness, from the first proceedings.
- p. 81-83 Thus, in Injunction Under Review (*Amparo en Revision*) 554/2013, this Court alluded to different investigative protocols that set out the technical requirements for the effective investigation of gender-based violence, particularly femicide. Based on them, it was established that the authorities investigating a violent death should at least attempt to: i) identify the victim; ii) protect the crime scene; iii) recover, preserve and not unnecessarily

destroy or alter evidentiary material; iv) thoroughly investigate the crime scene; v) identify potential witnesses and obtain statements; vi) perform autopsies by competent professionals and using the most appropriate procedures; vii) determine the cause, form, place and time of death, and any pattern or practice that may have caused the death.

- p.83-84 Conduct that caused the death must be identified and the presence of gender motives or reasons for that conduct ruled out or verified. During the investigation, specific evidence on sexual violence should also be gathered and preserved and relevant expert analysis be conducted to rule out that the victim was immersed in a context of violence. In this sense, any gender-discriminatory connotations in an act of violence perpetrated against a woman should be investigated *ex officio*, where that act is framed in a context of violence against women in a particular geographical demarcation or social environment or in an individual relationship or situation involving disadvantage or subordination of any kind, as in the case where there was a relationship from job supra-subordination and where the fatal wound was produced right in the space where that supra-subordination was dominant, not only because it occurs in the workplace, but specifically in the management offices.
- p. 84 Despite the indications pointed out in this regard, the authorities simply ruled out that KCPI's death was due to gender-based violence. These omissions constitute a violation of the constitutional and conventional obligations of the authorities indicated as responsible. The lack of diligence and gender-based perspective in investigating caused the prosecutorial authority to conclude uncritically that she died as a result of an accident, despite the presence of evidence – which was not assessed for the assignment – that made the existence of acts of sexual violence presumable.
- p. 85 Biological blood samples and vaginal exudate were taken; however, there is no indication that their analysis had been given follow-up, even though the victims requested it.

- p. 85-87 In her first statement to the public prosecutor's office, KCPL's mother reported that her daughter had been the victim of femicide. She informed the public prosecutor about the harassment that KCPL suffered from her employer; she stated that *Ricardo* insisted on not paying KCPL her salary in the workplace and during working hours like the rest of her fellow hostesses. She also pointed out that he went several times to the other place where KCPL worked and requested that she be the one to serve him. She then claimed that the doctors who attended her at the hospital told them that KCPL's injuries were unlikely to result from an accident. Finally, she argued that one of the doctors who carried out the necropsy told her about lesions on KCPL's genitalia. There is no doubt that the people in the immediate family environment of KCPL could provide specific details about her employment relationship, and the violence in it; which information should have been adequately and sufficiently considered and analyzed, since there was at least an acceptable indicative basis.
- p. 87 The above evidence was sufficient to order the necessary procedures to confirm – or rule out – the hypothesis of a gender-based crime. The district judge should therefore have ordered the prosecutorial authorities to assess or supplement the evidence in an investigation by which the mistakes made were remedied; to conduct and ensure a diligent, thorough, impartial, and gender-sensitive investigation into the death, which occurred under conditions that may well reveal deliberate conduct – not accidental events – and the existence of gender-based motives in such conduct; and to eventually exercise a criminal action for the crime resulting from an investigation conducted by the standards developed by this Court in Injunction Under Review (*Amparo in Revision*) 554/2013.
- p. 87-88 It should be kept in mind that this Court, when it decided that Injunction Under Review (*Amparo en Revision*) 554/2013 stated that impunity sends the message that violence against women is tolerated, which favors its perpetuation and the social acceptance of this phenomenon and the feeling and sense of insecurity of women. Moreover, state inaction and indifference to allegations of gender-based violence reproduce the violence that is

supposed to be challenged and implies discrimination in the right to access to justice.

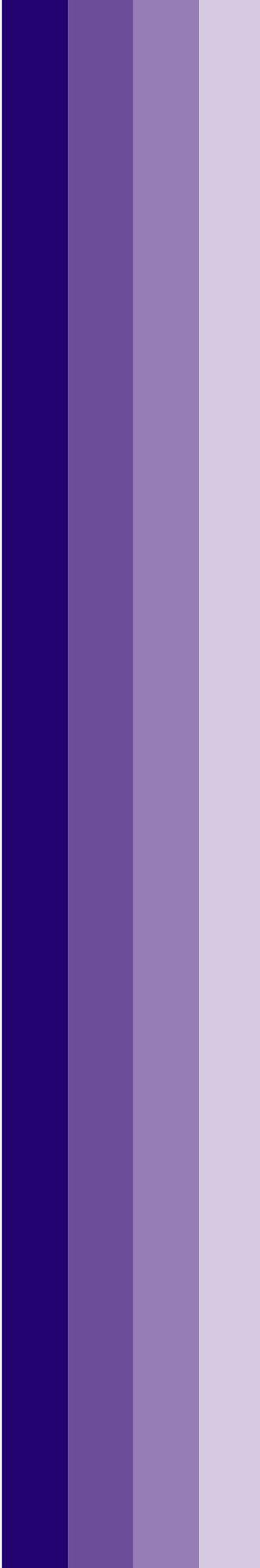
#### IV. Conclusions

- p. 88-89 There were violations of the fundamental rights of victims from the beginning of the investigation, as they were prevented from actively participating; they were not informed of the procedural status of the evidence gathered, nor of the steps that were taken to carry out the assignment. The ministerial authority failed to gather evidence or carry out the procedures that would enable it to clarify the cause of death in a satisfactory and well-founded manner. With these actions, the rights to access to justice, truth, and a life free from discrimination and gender-based violence were not respected. The investigation concluded with a weak accusatory hypothesis and with low conformity to the aspirations for justice. This was produced by an investigation that was not conducted with a gender-based perspective around violence despite evidence that required incursion into a line of inquiry related to gender-based violence. The district judge should have invalidated the assignment and ordered the authorities to take all necessary steps to supplement their investigation in an exhaustive, impartial, and gender-sensitive manner, with the participation of the victims.
- p. 91 While the resolution of this case seeks to address the violations committed during the investigation, its effect extends to society at large, since in addition to initiating the procedures necessary to sanction administratively or even criminally the authorities involved for their irregular activity, the reinstatement of the investigation is ordered seeking to deter the authorities from carrying out investigations without submitting to constitutional provisions.

#### Decision

- p. 91-92 In conclusion, it is appropriate to grant protection to the victims, first of all to invalidate the assignment of August 20, 2013. The public prosecutor's office is ordered to take all necessary measures to investigate, with a gender perspective, the death of KCPL, in compliance with the guidelines developed

in this ruling. In the development of the investigation, the public prosecutor's office shall notify and inform the victims of the progress in the investigation and the carrying out of procedures in order to enable their direct intervention. Finally, the public prosecutor's office shall exercise a criminal action for a crime that addresses the circumstances of gender-based violence in which KCPL was immersed.



## VI. RIGHTS OF CHILDREN AND ADOLESCENTS



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## SEPARATION OF CHILDREN FROM MOTHERS IN PRISON

### *Amparo en Revisión 644/2016*<sup>22</sup>

**Keywords:** *best interest of the child, gradual separation of children from mothers in prison, suitable interpretation.*

#### **Summary**

KVA, who is deprived of her freedom, claimed that the authorities of the Social Reintegration Center of Puebla (*Centro de Reinserción Social de Puebla, Cereso*) attempted to completely separate her from her daughter based on Article 32 of the Regulation of Social Reintegration Centers for the State of Puebla (Regulation) which establishes that at 3 years old, the children can no longer live with their mothers. KVA filed an injunction (*amparo*) against that decision. The federal district judge of Puebla that heard the matter decided to dismiss the complaint, and therefore, filed an appeal (*recurso de revisión*). The appeal was heard by the

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<sup>22</sup> Decision issued by the First Chamber of Mexico's Supreme Court of Justice (March 8, 2017). Reporting Justice: Arturo Zaldívar. *Action For Constitutional Relief Through Injunction 644/2016*

First Chamber of Mexico's Supreme Court of Justice (this Court) through the exercise of its authority to assert its jurisdiction.

### Issue presented to the Supreme Court

Whether the interpretation by the district judge of Article 32 of the Regulation, based on which the authorities ordered the complete separation between KVA and her daughter, was constitutional.

### Holding and vote

The injunction (*amparo*) was granted for the following reasons: The complete separation of the mother and her daughter is not constitutional and therefore the authorities must implement a gradual, sensitive and progressive separation while guaranteeing that the child maintains close and frequent contact with her mother based on an evaluation of the needs and interests of the child. For this purpose, the authorities must facilitate an adequate space in which they can be together according to the needs of the child.

The First Chamber decided this matter by the unanimous vote of the five judges Arturo Zaldívar Lelo de Larrea, José Ramón Cossío Díaz, Jorge Mario Pardo Rebolledo, Alfredo Gutiérrez Ortiz Mena (reserved the right to draft a concurring opinion) and Norma Lucía Piña Hernández.

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### EXTRACT OF THE DECISION

p. 1 Mexico City. The First Chamber of Mexico's Supreme Court of Justice (this Court), in session of March 8, 2017, issues the following decision.

#### Background

p. 2 On October 16, 2006, KVA and JOOA were married inside the Social Reintegration Center of the City of Puebla (*Centro de Reinserción Social de Puebla, Cereso*), where they were serving a sentence of 50 years of prison from the year 2001, for committing the crimes of kidnapping, homicide and robbery.

Years later, on June 18, 2011, KVA and JOOA had a daughter, who they registered with the name of AJOV. Since then, the girl has lived with her mother in the Cereso.

In August 2014, a litter after she turned 3 years old, AJOV was enrolled by her grandfather JLVC in a kindergarten close to his house, so she could begin her studies. Therefore, the girl began to leave the detention center on Sunday of each week, returning on Thursday to be with her mother again.

On August 27, 2014, KVA spoke with the Director of the Cereso, to request verbally that her daughter AJOV continue living with her on the weekends. The Director of the detention center answered that, this was impossible because the girl had turned 3 and under Article 32 of the Regulation of the Social Reintegration Centers for the State of Puebla. That circumstance was an impediment for the child to remain with her mother inside the reintegration center. Therefore, the Director decided that in the future the child would be denied access to the Cereso.

p. 3 As a result, KVA in her own right and in representation of her child AJOV, requested the injunction (*amparo*) on August 28, 2014.

p. 5 In her injunction (*amparo*) claim, KVA argued that Article 32 of the Regulation is unconstitutional, because it orders the complete separation of the child from her parents when she reaches the age of 3. Therefore, this provision violates the constitutional protection of the family unit, deprives the child of the right to live with her family and could have an adverse impact on her psychological and emotional wellbeing.

The complainant specified that it is not her intention that her daughter remain with her indefinitely, since she is aware that the girl must go to school. Nevertheless, she considers that Article 32 is invalid because it does not allow the child to be separated from her mother gradually.

p. 6 The federal district judge of Puebla issued a decision on January 14, 2015, in which he dismissed the injunction (*amparo*) proceeding with respect to

the claims against the Congress of the State of Puebla and denied the injunction (*amparo*) with respect to the claims against the Governor of the State of Puebla (Governor) and the Director of the Cereso.

- p. 7 KVA filed an appeal (*recurso de revisión*) against this decision on April 14, 2015, before the District Court.
- p. 9-10 The Delegate of the Governor filed a joinder of appeal (*recurso de revisión adhesivo*) on May 17, 2015.
- p. 10-11 The appeal was filed in a timely manner over which this Court assumed jurisdiction.

### Study of the merits

- p. 12 It is settled doctrine in this Court that the best interest of the child must prevail in any judicial dispute involving the rights of children. In this regard, the best interest of the child requires the supplementation of any deficiency in the complaint, in all decisions that could affect the rights and interests of children and adolescents, even when this means considering some issues not advanced by the parties in their complaints. That offers a procedural window to guarantee the interests of children and adolescents when the claims of the parties are insufficient in that regard.
- p. 13 Following this reasoning, the fundamental purpose of the decision on this matter must be to privilege the interests of AJOV, a girl that has lived inside a detention center with her mother.
- p. 13-14 In this regard, on the one hand there is a fundamental interest in the mother and child remaining together, and not being separated unless there is some impact on the rights of the child. On the other hand, it must be recognized that the situation of detention can complicate the exercise of the right of the child to enjoy the maternal relationship, since penitentiaries are not meant for the development or protection of children. In fact, they often lack the infrastructure and services necessary for this. Therefore, in this case the

State has the duty to specially guarantee the enjoyment of the maternal relationship through protection measures intended to overcome the difficulties inherent in the context of incarceration.

- p. 14 Whether the child remains in the Cereso must be strictly evaluated in light of the best interest of the child. Thus, it may be that the child must leave the place in order to satisfy other needs that do not depend on the family unit—such as receiving an education in the classroom—, among other reasons. However, given the importance of the maternal relationship for the children and adolescents and the devastation that can result from a separation, the State is obligated to implement a sensitive and gradual separation, while also guaranteeing close and frequent contact between mother and child, provided it is the most beneficial arrangement for the child in the specific case.

## I

### Principle of keeping the child with its biological family

- p. 17-18 Following international law—and especially the precedents of the Inter-American Court [of Human Rights]—, this First Chamber has recognized the principle of keeping the child with its biological family as a fundamental protection with the enjoyment of the stability and permanency of the child in its nuclear family. As with the Inter-American doctrine, it has been understood that this protection is linked with the right of persons not to receive arbitrary interferences in their family, which is expressly recognized by Article 12 of the Universal Declaration of Human Rights.
- p. 18 In this regard, this First Chamber established in the Action for Constitutional Relief (*Amparo Directo en Revisión*) 3799/2014 that “a primordial right of children lies in not being separated from their parents, unless [this] is necessary in order to protect their best interest.” In the same light, the injunction (amparo) Under Review (*Amparo en Revisión*) 504/2014 established that children have the right to live with their family, primarily their biological family, and therefore the measures of protection dispensed

by the State must prioritize the strengthening of the family as a principal element of protection and care of the child. Also, the injunction (amparo) Under Review (*Amparo en Revisión*) 518/2013 recognized the duty of the state authorities not to separate children and adolescents from their parents unless it is necessary for their best interest.

- p. 18-19 In Summary, this Court has understood that the principle of keeping children in their biological family is a fundamental interest to protect because children grow up and are cared for by their parents. According to this, the authorities must preserve and always favor keeping children in the nuclear family, unless such situation can have an adverse impact on their interests.
- p. 19 The above suggests that the State must not only safeguard the stability of children in their nuclear family, but also guarantee that they can effectively enjoy their family relations. In that regard, even if the separation is considered necessary because of an adverse impact on the wellbeing or rights of the child, the State must ensure that children maintain constant contact with their parents, unless that is contrary to the wellbeing or rights of the child.
- p. 20-21 In this regard, and as established when deciding the Action for Constitutional Relief (*Amparo Directo en Revisión*) 1573/2011, nature ensures that the child experiences complete identification with the mother in the first months and years of life. This is so not only with respect to the biological needs of the child regarding nursing, but also, as has been developed by various specialists internationally, regarding the prominence of mothers in the formation of the personality of their children during the first stage of their lives, which is decisive in the development of their conduct in the future.
- p. 22-23 In conclusion: the affective relationship between a small child and that child's mother has a crucial influence on the development of the child. This strengthens the fundamental interest that the young child remain close to her mother. As a consequence, even when the separation is necessary, in the

case of young children, it is especially important that mother and child remain in close, personal and frequent contact to the extent possible, unless such circumstance is contrary to the interests of the child.

## II

### The situation of incarceration and the maternal relationship

p. 23 It must be recognized that detention centers can hinder the exercise of the right of the child to enjoy the affections and care of her mother in appropriate conditions. In this regard, penitentiary institutions not only do not have the purpose of child development, they often have fundamental deficiencies in services and infrastructure that can obstruct the enjoyment of the maternal relationship.

In this regard, the specialized literature indicates a variety of conditions that make detention centers inappropriate for a child to be with her mother. Thus, it is argued that children frequently observe inappropriate practices such as sexual relations, drug consumption, or quarrels and fights. It is also pointed out that the penitentiary is inconvenient for the constitution of children, because it exposes them to a certain visual and auditive violence. It is also stated that children could be in unsafe conditions given the possibility of uprisings or riots.

p. 23-24 Furthermore, the absence of services that children need is obvious, such as healthcare, education, food, specialized and alternative care, professional attention, among others. In addition, some limitations are asserted in relation to the infrastructure. This is the case of green areas, infirmaries, nursery schools, play areas, toys, *inter alia*; all of which would be positive for the development of the child.

p. 24-25 As is seen, the situation of incarceration places the relationship between a mother and her child in a complex context. However, this circumstance in itself should not be an excuse for children not to fully enjoy their maternal

relationship. Therefore, the challenges brought by confinement must be remedied through reinforced measures of protection, intended to guarantee that the mother and child can have a positive relationship in dignified and adequate conditions.

p. 25 In this regard, given the special condition of vulnerability faced by children and their mothers in this context, the duty of diligence of the State is especially intensified. Therefore, in this particular case the State must take specific measures that guarantee the right of the child to maintain frequent, personal and direct contact with its mother; especially in the case of a small child that fundamentally needs maternal closeness.

p. 26 Thus, in this case the State must implement specific actions intended to guarantee that the child has a life close to its mother, enjoying her affection and her care in positive conditions.

Therefore, efforts must be made in the penitentiaries to articulate a respectful context for the dignity of the child and its right to privacy, and an environment friendly to it that contributes to a positive parent-child interaction. In this regard, the States are called to implement the best practices for detention, making the necessary adjustments in order to preserve the best interest of the children for mothers who are incarcerated. In other words, placing “the children and their rights as the center of the actions and of the manner in which they are applied.”

p. 27 Pursuant to the above, the penitentiaries that house mothers in detention must adopt the necessary policies so the children have sufficient healthcare, food, hygiene, clothing, potable water and recreational services. It is especially important that parents have a context that allows them to perform their role in the best way possible, without the limits of the situation of incarceration.

p. 27-28 Thus, the prisoners must be provided the maximum possibility to dedicate time to their children. It is also relevant that women have adequate information regarding their maternal responsibilities and the care of their

children. The children also must have appropriate services for medical care, and their development should be supervised by specialists in collaboration with the health services of the community. Specifically, it is important that the State provide advice on the health and diet of mothers, supplying sufficient food without charge to pregnant women, babies and nursing mothers, on a regular basis, in a healthy environment, that allows the women to nurse their babies and care for them.

p. 28-29 Additionally, it is advisable that all personnel of the prison have training in human rights, including instruction in gender-based perspectives and children's rights. In this regard, it is relevant for the personnel of the center to be sensitized on the development needs of the children and receive basic notions of healthcare of children so they can react correctly in case of need and emergency. For this purpose, documents may be consulted such as the human rights training Manual for prison officials, published by the Office of the High Commissioner of the United Nations for Human Rights.

p. 29 Likewise, disciplinary sanctions and other corrective measures should never include the prohibition or limitation of contact between mother and child. In addition, as a result of the best interest of the child, the point of view of the child must be taken into consideration in any decision related to her interest.

In Summary, the fact that the mother of a child is deprived of her liberty is a circumstance that can prevent the child from fully enjoying the maternal relationship. Therefore, in this situation the State has various duties intended to reduce those difficulties. Ultimately, those duties ensure that the situation of incarceration does not mean the need to separate a child from her mother, in a moment when it fundamentally needs the care of her mother.

p. 29-30 Nevertheless, it must be emphasized that the right of the child to live with her mother is important to the extent that such circumstance is best for the interests of the child. In effect, international law and the precedents of this First Chamber protect keeping the child with her mother because there are

solid bases showing that it is appropriate in light of the best interest of the child. However, the reality may be different.

### III

#### The separation of the child

p. 30 In effect, even though there may be other reasons that justify separating a child from her mother in detention, this Court notes that one frequent reason is that the child reaches a particular age. Thus, with the growth of the child a progressive process of individuation takes place through the arising of new needs for her development. In this situation, the child still needs her mother, but requires other things that do not depend strictly on the family unit.

p. 31 In this line of thinking —and although there is no consensus regarding an appropriate age for a child being separated from her mother in detention— the mere growth of the child may justify that she enter into contact with the outside world in order to enjoy other rights and, as a result, be separated from her mother.

However, it must be emphasized that the separation of mother and child is a delicate intervention in the principle of maintenance of the child with her nuclear family, above all, because it can be devastating for the development of a small child. This seems to be true for any mother-baby relationship, but it is even more delicate in the case of children with mothers in detention.

In fact, it has been indicated that the separation of a child from her mother can be devastating for the physical health of the child. In addition, even when such separations only last a few days, it has been shown that their consequences persist even 6 months after the children have reunited with their attachment figures.

p. 33 The case of children that live with their mothers in detention is no different. On the contrary, the frequent separation of the child with respect to its parents intensifies, instead of alleviating, the challenges a child faces whose

mother is deprived of liberty. In fact, the separation of the child with respect to her mother in detention can be more painful than other forms of parental separation due to the stigma, the ambiguity and the lack of social support and compassion that it results in.

The literature recognizes that the separation between mother and child due to parental incarceration can produce a serious breaking of the affective relationship, and severely challenge the reconstruction of the relationship later.

In this regard, the interruption can cause the child to lose her primary source of emotional and psychological resources, compromising its social, emotional and cognitive development. The studies reveal that the most frequent reactions of children separated from their mothers include sadness, confusion, depression, worry, anger, aggressiveness, fear, developmental regressions, sleep problems, food disorders and hyperactivity. Otherwise the research indicates that child separated from their mothers deprived of liberty are more likely to exhibit behavior and discipline problems, poor school performance, depression, anxiety and hostility toward others.

- p. 34 In that regard, while the lawmaker can decide that from a certain date the child must leave the prison and therefore may be separated from her mother, the importance of the mother-baby relationship for the child in connection with the best interest of the child, conditions the specific form in which that separation should be carried out.

In the judgment of this Court the authorities must articulate a sensitive and gradual separation, and also guarantee close and frequent contact between mother and child once separated, provided this is the most beneficial for the child in light of all the specifics of the particular case.

#### IV

#### Conforming Interpretation of the challenged provision

- p. 34-35 This Court considers that the first paragraph of Article 32 of the Regulation is not unconstitutional, provided it is interpreted in conformity with the

best interest of the child, such that once the child reaches 3 years of age, the separation be carried out slowly and sensitively with the child, carefully taking into account her interests and ensuring that subsequently mother and child can have close and frequent contact, according to what is best for the child.

- p. 35 Therefore, the challenged provision is constitutional as long as it is interpreted in the terms explained below:

First of all, once the child reaches 3 years of age, the removal must be done sensitively and gradually, as long as alternatives for care convenient for the best interest of the child have been identified. In this regard, both the parents and the children must be provided with psychological and emotional accompaniment during and after the separation. This is in order to prevent and minimize any possible impact, mainly on the wellbeing of the child.

- p. 35-36 Secondly, the form in which the separation of the child from her mother is executed cannot be based on generalizations or conjectures without basis, but must part from a detailed assessment of the real conditions of the case, based on the result most favorable for the interests of the child. In that regard, even though the separation can take place from when the child has reached 3 years of age, what is relevant is not the age itself, but the fact that because of the child's growth, it has needs that cannot be satisfied inside the social reintegration center, such as receiving a classroom education.

- p. 36 Therefore, the questions to consider must include the conditions in the prison and the quality of the alternative care that the child will receive outside of the center, including the needs that it must satisfy outside. In this respect, the authorities must act with flexibility and make decisions based on the individual circumstances of the child and her family. This shows the importance of deciding on the basis of all the possible information.

Thirdly, even when the separation is necessary, it must be procured that mother and child maintain close, frequent and direct contact, as much as possible in each case. In this aspect the duty of the State to implement reinforced measures of protection becomes especially relevant.

- p. 37 In this respect, it is advisable that the visits of the children that lived in prison take place in a manner and with a frequency in line with the best interest of the child, taking into account the closeness with which the child interacted with her mother when it lived with her, as well as the needs of the infant outside. According to the above, it is useful that the relatives and the child protection institutions collaborate with the penitentiary authorities to ensure that the child can visit her mother as frequently as possible, unless there are exceptional considerations based on the rights of the child.
- p. 37-38 It is also important to take into account the opinion of the child upon separating it from her mother and placing it in alternative care, however young the child may be. In this respect, it is advisable to take into account that (i) the right includes listening to the children and taking their opinions into account; (ii) the relevance of the opinion of the child must be evaluated in function of her maturity; and (iii) the right of participation of children does not imply that the wishes of the child must always be followed, since such rigidity could ignore the specific conditions that surround the children in particular cases, and be in detriment of their own best interest.
- p. 38 Finally, it is relevant to consider that small children need an explanation as to why they cannot remain by their mother's side in the center, and they need to know if they can—and in what manner—visit her subsequently.

Given this panorama, the provision is not unconstitutional as long as it is interpreted and applied in the above explained terms.

## V

### **Analysis of the challenged state action**

- p. 39 First of all, it is important to note that while the article does not establish the conditions in which the distancing between mother and child should be carried out, the Director of the Cereso applied the provision in a specific manner.

- p. 40 In effect, there is no evidence in the court record of any other consideration regarding the individual conditions of AJOV, except that she had reached 3 years old. In this regard, no care was given to ensure that mother and daughter maintained close or frequent contact after the separation, according to the needs of the child. In addition, the authorities did not take any course of action to listen to the opinion of the child. In this regard, the separation was declared without fully evaluating the circumstances of the particular case, without investigating the impact of the decision on the psychological or emotional wellbeing of AJOV and without considering the possibility of a gradual and sensitive separation.
- p. 40-41 Consequently, it is clear that in this case there was an unconstitutional application of the rule. Therefore, this Court must grant the *injunction (amparo)* to the complainant and her child against the application of said legal provision. Thus, the determination of the Director of Cereso is annulled and it is ordered that a separation between mother and daughter be done in a manner that is fully compatible with the best interest of AJOV.

### Decision

- p. 42 In view of the arguments explained in this decision, this Court revokes the appealed decision and grants the *injunction (amparo)* for the effect that the Director of the Cereso, authority indicated as responsible in the proceeding *injunction (amparo)*, annuls the decision to remove AJOV from and not permit her to return to the Cereso, and issues a new one ordering a separation that abides by the following guidelines:
- The departure of AJOV from the social reintegration center must be gradual and progressive, articulated based on an assessment of the needs of the girl, by virtue of what is more favorable for her interests.
  - In addition, the removal must be done with sensitivity, providing to the extent possible psychological accompaniment to the child, in order to minimize any possible impact on her wellbeing.

- p. 42-43 - Providing it is in the best interest of AJOV, the authorities must facilitate that mother and daughter maintain close, direct and frequent contact, through the establishment of a visitation schedule articulated with full support of the needs of the child. In the schedule that is set, the need of the girl to receive the care and affection of her mother must especially be taken into account, above all in view of her young age and the closeness she has had with her.
- p. 43 - For these purposes, the authorities must facilitate an adequate space in which KVA and AJOV can be together according to the needs of the child.



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## BULLYING: COMPENSATION FOR SCHOOL BULLYING

### *Amparo Directo 35/2014*<sup>23</sup>

**Keywords:** *principle of best interests of the child, right to bodily integrity, right to dignity, right to education, right to non-discrimination, right to a fair compensation, bullying, school harassment, pain and suffering [daño moral], public and private school institutions, attention deficit hyperactivity disorder*

#### **Summary**

AMGH enrolled her son, DBG, in first grade in the “Institute”. In his second year, DBG became a victim of psychological mistreatment by his Spanish teacher (MLPV) and his classmates (with the knowledge and consent of MLPV). As a result, his problems with anxiety, low self-esteem, frustration, depression and adaptation intensified. Later, it was confirmed that DBG has Attention Deficit Hyperactivity Disorder (ADHD), so his mother met with various authorities of the “Institute”, who promised to address the problem. When no solution was specified,

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<sup>23</sup> Decision issued by the First Chamber of Mexico’s Supreme Court of Justice (May 15, 2015). Reporting Justice: Arturo Zaldívar. *Action for Constitutional Relief Through Direct Injunction 35/2014*

DBG stopped going to school and, subsequently, the Spanish teacher resigned. Therefore, AMGH, in her own right and in representation of DBG, sued the “Institute” and MLPV for compensation for the psychological harm caused to her son. A civil judge in the State of Mexico issued a final decision that absolved the “Institute”. AMGH filed an appeal which confirmed the ruling of the court below. DBG’s mother then filed an injunction (*amparo*), which was granted by a federal collegiate civil court in the State of Mexico. The collegiate court ordered the reinstatement of the proceeding in order for other evidence to be taken into account, including the opinion of the boy. The civil judge again absolved the co-defendants. Therefore, AMGH filed an appeal, which confirmed the decision below. AMGH filed a second injunction (*amparo*) which was taken up by the First Chamber of the Mexico’s Supreme Court of Justice (this Court), exercising its authority to assert jurisdiction.

### Issue presented to the Supreme Court

Whether there was pain and suffering (*daño moral*) inflicted on DBG as a result of MLPV’s bullying and the failure of the “Institute” and its staff to comply with the legal and general duties of care.

### Holding and vote

The appealed decision was vacated and AMGH was granted the injunction (*amparo*), in her own right and in representation of her son DBG, for essentially the following reasons. Bullying is a particularly complex process that constitutes a threat to the dignity, bodily integrity and education of the affected child and also affects the lives of those who observe it, creating an atmosphere of insecurity and anxiety incompatible with learning. In this regard, the protection of childhood and adolescence by the State must be particularly high, because of the special vulnerability of children and adolescents in general, and the devastating effects that violence and/or intimidation can produce in them. In addition, in some specific situations, bullying can constitute a type of discrimination, if the harassment is the result of any of the categories protected by Article 1 of the Constitution. Furthermore, it was considered that when private institutions provide public educational services to children and adolescents, they are bound by the

principle of the best interests of the child and they have the obligation to protect the rights of the child to dignity, integrity, education and non-discrimination. In this case, the liability of both the teacher for her actions and the “Institute” and its staff for their failure to comply with their duties was proven according to the test established by this Court for assessing acts constituting bullying, since the psycho-emotional changes presented by DBG resulted directly from the conduct of MLPV and the negligence and indifference of the “Institution” and its staff to resolving the situation. Therefore, the injunction (*amparo*) was granted since a serious impact was caused on highly protected rights of the victim and present and future economic impacts resulting from the pain and suffering (*daño moral*) were caused. Thus, based on the right to receive fair compensation, according to the degree of liability of the teacher and of the “Institute” and their economic capacity, the order was issued for a new decision in which the “Institute” is ordered to pay compensation for pain and suffering for \$500,000 pesos.

The First Chamber ruled on this matter by a unanimous four votes of the Justices Olga María del Carmen Sánchez Cordero de García Villegas, Arturo Zaldivar Lelo de Larrea, Jorge Mario Pardo Rebolledo (reserved the right to formulate a concurring opinion) and Alfredo Gutiérrez Ortiz Mena (reserved the right to formulate a concurring opinion). Justice José Ramón Cossío Díaz was absent.

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### EXTRACT OF DECISION

p. 1 Mexico City. The First Chamber of the Mexico’s Supreme Court of Justice (this Court), in its session of May 15, 2015, issues the following decision.

#### Background

p. 10 AMGH filed a claim for pain and suffering (*daño moral*) against the “Institute” and its teaching staff, specifically the teacher, MLPV. She based her claim on the school’s failure of care and on the incitation to bullying, abuse, harassment and violence of the teacher MLPV against her son, DBG, who at the time the events took place, was only 7 years old. She indicated that such aggressions were related to the fact that the boy showed indications of Attention Deficit Hyperactivity Disorder (ADHD).

- p. 11 The relevant proven facts show that AMGH enrolled her son in first grade for the 2008-2009 school year at the “Institute”. During that school year the boy already showed characteristics of ADHD, such as restlessness and being easily distracted. However, he had not yet been diagnosed with this disorder. DBG concluded the first year of school with apparent normality, and therefore AMGH reenrolled the boy in second grade for the 2009-2010 school year. During that year he was assigned MLPV and DRL as head teachers in Spanish and English respectively.

When the boy began second grade, at 7 years old, he began to manifest discontent with the treatment he received from his Spanish teacher because she yelled at him and constantly denied him recess. He also refused to go to school because he was subject to attacks by his schoolmates. He stated that his teacher mistreated him emotionally and psychologically, saying things like he was a mental retard, and encouraged his schoolmates to harass him, even fomenting physical aggression.

- p. 12 The psycho-pedagogy of the “Institute” stated that the boy presented characteristics of ADHD. So AMGH focused on treating the problem and channeled her son with the clinical psychologist who, among her conclusions, warned of other problems in the boy such as anxiety, low self-esteem, frustration, depression and problems adapting.

As a comprehensive treatment she suggested, among other things, the taking of an electroencephalogram and provided various suggestions to the boy teachers to obtain better responses in conduct.

- p. 13 Nevertheless, the problems in the emotional state of DBG intensified as a result of the constant physical and verbal aggression he suffered, by both his schoolmates and his teacher.

The report prepared by the teacher MLPV also shows that she knew of the harassment DBG suffered. It is also seen that the teacher only indicated negative aspects of the boy.

- p. 14-15 Almost 9 months after the school bullying of DBG began, the boy was diagnosed with ADHD. A meeting was held with the teaching staff and leadership of the “Institute” along with AMGH in order to inform her that they did not know how to treat her son and that lately he had isolated himself from his classmates. When the meeting ended the teachers promised that the class would reintegrate DBG. The mother states that practically no actions were taken by the school staff since the abuses and harassment resumed just a week after that meeting.
- p. 15 However, and given the resumption of the aggressions, AMGH decided that DBG would not return to the school for the period of the last month and a half of the school year 2009-2010. Finally, on July 9, 2010, the teacher MLPV presented her resignation to the “Institute”.
- p. 15, 18 The school bullying, the violence, the harassment, the segregation, the jokes, and the social exclusion that DBG suffered, at 7 years old, by his teacher and his classmates, were corroborated along with statements by the mother and the child and with various forms of psychological and sociological evidence. This coincided in indicating that DBG suffered physical and psychological mistreatment in his school.
- p. 1-2 Therefore, on January 27, 2011, AMGH, in her own right and in representation of her son DBG filed an ordinary civil lawsuit against the “Institute” and the teacher MLPV, for compensation for the psychological damage caused to her son by the various physical and psychological aggressions that occurred during the boy’s stay in second grade (2009-2010).

The civil judge of the State of Mexico that heard the matter issued a final decision in which he determined to absolve the “Institute” of the claims made, since the content of the evidentiary materials did not prove the physical and psychological mistreatment of the boy.

- p. 3 AMGH filed an appeal that was heard by a civil chamber of the State of Mexico, which confirmed the lower court ruling.

- p. 3-4 AMGH then filed an injunction (*amparo*) before a federal collegiate court, which granted it to the effect of ordering the reinstatement of the proceeding, for the original judge to receive the opinion of the boy, as well as collect any other evidence that he may consider necessary to determine whether or not the boy was mistreated.
- p. 4 The civil judge of the State of Mexico issued his ruling in observance thereof, in which the “Institute” and the teacher MLPV were again absolved since, in his judgment, the evidence contributed was still insufficient to prove the mistreatment of the boy.
- p. 5-6 AMGH then filed an appeal and the civil chamber of the State of Mexico that heard the matter issued a ruling determining that AMGH did not present appropriate and decisive evidence in the hearing to demonstrate convincingly that the boy had suffered mistreatment, bullying and discriminatory conduct by the teaching staff of the “Institute”.
- p. 7-9 Finally, AMGH filed an injunction (*amparo*) and the collegiate court decided to ask this Court to exercise its authority to assert jurisdiction over the injunction (*amparo*), which it did.

### Study of the merits

- p. 19 The situation faced by DBG constituted school bullying, incited and encouraged by his teacher, since the school and its educational staff did not respond appropriately. Such conduct generated an illegitimate and unconstitutional act on personal aspects of the child, that ultimately violated his dignity and affected his rights to bodily integrity, education and non-discrimination.

### d) Extent of the bullying phenomenon and its complexity

- p. 21-22 “Bullying” is an English word that refers to school harassment. The phenomenon analyzed here is limited to the harassment or bullying against children occurring in public or private educational institutions. The standard

of liability that is established in this decision, as well as the type of harassment that is studied, is based on the enhanced protection of children and the legal and professional duties of educational institutions.

- p. 26 From an analysis of the sources used, this Court considers that school bullying is any act or omission that repeatedly assaults a child or adolescent physically, psycho-emotionally, economically or sexually, occurring under the care of school institutions, whether public or private.
- p. 27 It should also be specified that school bullying can occur between students, or between students and teachers, as the National Human Rights Commission indicates.

Not all social problems that schools have are part of the bullying phenomena, nor is all conduct that can be described under this name equally serious regarding harm and consequences.

In addition, it can be complicated to clearly identify the aggressors or bullies, since it can occur as a group action, in which the liability can be dispersed. It is also easy to confuse the conduct constituting bullying with isolated aggressions. The time in which the phenomenon occurs, and its seriousness can vary widely. All these characteristics make the identification and remediation of bullying a particularly complex process.

**e) Enhanced protection of children's rights**

- p. 28 The duty to protect the best interests of the child in any judicial dispute where the rights of children are involved constitutes a recurring doctrine of this Court.
- p. 29 The principle of best interests requires all state authorities to protect children's rights through "enhanced" or "compounded" measures, and that the interests of children be protected to a greater degree.
- p. 30-31 It is important to mention that the constitutional protection children deserve is not equivalent to what other vulnerable groups must receive,

since when the victim of a particular type of violence is a child or adolescent, the diligence of the State must be particularly high, both because of the special vulnerability children and adolescents generally have, and the devastating effects violence and/or intimidation can produce on developing personalities. In this regard, the fight against school bullying is an imperative derived from the recognition of the human rights of children and adolescents and from the enhanced protection that children require due to their particular situation of vulnerability.

p. 31 Comparative law and specialized doctrine have indicated that school harassment or bullying constitutes a threat to dignity, bodily integrity and education of the affected children. Similarly, in some specific situations school harassment can constitute a type of discrimination.

The rights to dignity and bodily integrity, to education and to non-discrimination are protected in the Federal Constitution and in various international treaties signed by Mexico.

p. 32 Furthermore, this Court has held that the constitutional protection of integrity includes the accusation of any act inflicting physical, psychological and moral harm to others. Thus, the sphere of dignity includes the protection not only of bodily integrity, but of the mental, moral and spiritual intangibility of a person.

p. 33-34 Furthermore, the education children are entitled to is conceived to prepare them for daily life, strengthen their capacity to enjoy all the human rights and promote a culture in which the values of human rights prevail, since education must seek to advance the fight against discrimination and inequality.

p. 34-35 Schools play a critical role in the construction of resilience and feelings of wellbeing in the child, which have also been linked to reducing the possibility of the child being victimized in the future. They offer to children the possibility of learning and internalizing the values of solidarity, tolerance, non-discrimination, and mutual respect, which are important resources for

the promotion of non-violence and to overcome tension and mediate conflicts, between students and between students and teachers, and even in the community.

- p. 35 School harassment, however, changes the environment that should be fostered in the school; in these cases children are exposed to violence, and can even be subject to it.

Thus, the negative effects of school violence go beyond the impact on the affected child. This situation affects the lives of those who observe it, creating an atmosphere of insecurity and anxiety incompatible with learning. The models of violence learned in school and in the home are reproduced in broader contexts, in the neighborhood or in the community in general.

- p. 35-36 Children have a right to feel secure in school and not be submitted to the recurring oppression or humiliation of harassment. The security of children in the school constitutes a fundamental basis for the exercise of their rights to dignity, integrity and education.

- p. 36 In addition to affecting the above mentioned rights, bullying can also constitute discriminatory treatment when its motive is the fact that the victim belongs to a group specially protected in Article 1 of the Constitution.

In this regard, the judge must be especially careful when there is evidence that the school bullying occurred for some reason related to a category specially protected by the Constitution.

Various studies and reports clearly show that children with disabilities are in a situation of special risk.

- p. 37-38, 40 In this case, DBG was diagnosed with ADHD and, although we cannot clearly define ADHD as a form of disability, this Court considers that children with ADHD are especially vulnerable and therefore teachers, schools and administrative authorities should take enhanced protection measures to prevent, treat and remedy any situation of harassment the child or adolescent suffers.

p. 40 Federal and local authorities should adopt special measures to protect the rights of children and adolescents that are vulnerable because of specific circumstances and to guarantee that those children are not subject to mistreatment or discrimination.

In that regard, the educational authorities have the obligation to create the conditions for exercising the right to education of children in conditions of equality.

p. 40-41 Therefore, to protect the rights of children, the State must guarantee that education is provided with equity in integrated, safe spaces, free from violence, where the children can develop their abilities and skills, and can learn the values that will allow them to live in society.

p. 41 As was indicated in the Action for Constitutional Relief Through Direct Injunction (*Amparo Directo en Revisión*) 1621/2010, some duties derived from rules regulating fundamental rights can govern the conduct of private parties as well as actions of the State.

With respect to situations of school harassment, parents delegate the care of their children to teachers and directors, confiding that in those schools they will receive the care, attention and education they need.

Therefore, this Court considers that private institutions are bound by the principle of the best interests of the child and obligated to protect the rights of the child to dignity, integrity, education and non-discrimination.

p. 41-42 The above should not be understood to mean that the State is displaced from its duty to ensure the protection of the rights of children and adolescent when they are under the care of a private educational center. Rather, the enforceability of the duties of protection have a complex nature, in that the rights correlated to such duties are enforceable against, on one hand, all public powers in the State – from the lawmaker and the administration, public schools and teachers of the State, to the courts – but on the other hand, so are private parties, such as teachers, educators, directors or private schools in general.

- p. 42 Therefore, schools are obligated to provide enhanced protection of children and adolescents with any disability, based on this susceptibility to suffering discrimination in the form of school harassment.

#### **f) Test for the evaluation of the acts constituting bullying**

DBG's mother sues for two reasons: (1) compensation for the pain and suffering (*daño moral*) caused to her son by bullying attributed specifically to his teacher and, (2) compensation for the pain and suffering caused to her son by the negligence of the "Institute" and its educational staff in addressing the bullying situation.

- p. 43 This Court has indicated that in order for the triggering of implementation of the right to compensation for pain and suffering, the liability of the defendant must be proven, which can have a contractual or non-contractual origin. The latter can be subjective or objective.
- p. 44 Cases of bullying are subjective in nature inasmuch as the conduct of the aggressor or the negligence of the "Institute" is relevant. Therefore, liability in cases of school harassment can be derived from both positive conduct and failures of care of the staff responsible for the child or adolescent.
- p. 47 According to the evolution of damages law in the Mexican legal system, as well as the right to fair compensation, this Court considers that the adequate test for evaluating liability in the case of school bullying should be the same attached to subjective liability. Each of the elements that compose the test must be evaluated from the enhanced protection that ensure the rights of children to dignity, education and non-discrimination.

The application of such a test will depend on the type of liability claimed. If the suit claims bullying by aggressive actions or conduct, the following must be corroborated: (1) the harassment of the victim, which means the existence of the bullying is proven and it can be attributed to specific aggressors (teachers or students); (2) the physical or psychological harm the child or adolescent suffered; and (3) the causal link between the conduct and the harm.

p. 48 In contrast, when the suit claims failures in care of the School, the unlawful act or harmful conduct will be the negligence of the school; in this case the following must be corroborated: (1) the existence of the bullying, (2) the negligence of the school in responding to the school harassment, (3) the physical or psychological harm, and (4) the causal link between the negligence and the harm.

p. 48-49 In the judicial sphere, the complexity of school bullying and its relationship to children's rights justify a series of presumptions and differentiated standards for the evaluation of the facts. Thus, this Court considers it appropriate to apply a lower standard for both the attribution of liability and for the evaluation of the acts constituting bullying.

### 3. Existence of bullying or school harassment

p. 49 To apply the above described liability exams, it has to be corroborated that the case analyzed, in fact, constitutes bullying.

p. 50 Thus, if a case shows the occurrence of verbal or physical aggressions, more or less repeatedly, it will be valid to assume that a situation of harassment exists.

p. 56 In this case, the proven facts show conduct from which the existence of bullying can be inferred.

In addition, it was shown that these acts were repeated, generating a pattern of violence against DBG. Furthermore, the aggression that the boy suffered clearly arose in the school environment, since he was under the care of his teachers and the directors of the school.

Finally, it was also shown that such acts were based on the boy's ADHD, since the studies of the specialists also state that the teacher treated DBG in a harmful way, and that instead of ensuring his integration into the group, she isolated and humiliated him and denied him the attention he needed.

Therefore, this Court considers that the bullying conduct attributed to the teacher MLPV, as well as the generation of an environment of aggression against the boy, were proven.

#### 4. The negligence of the school and its educational staff

p. 57 In the case of liability for failure to act, the conduct of the person responsible will be unlawful when that person fails to comply with a legal obligation or duty of care owed and a harm is produced. Therefore, for there to be liability the harm caused must be accompanied by a duty of care of the responsible person regarding the victim.

p. 66 According to the regulatory framework on protection of children's rights in the school environment, as well as a broad understanding of children's rights, this Court considers that teaching centers have the unquestionable responsibility of guaranteeing safe spaces so that children and adolescents can pursue their studies free of aggressions and harassments. The adequate supervision and oversight of what happens in schools is something legitimately required from teachers and directors.

In cases of bullying, schools should diagnose, prevent, intervene and positively change the school environment.

p. 68-69 With respect to the standard that should be applied to determine the liability of schools, this Court considers that, once it is demonstrated that the bullying occurred in a situation under the control of the school – while students engaged in educational activities or were under the supervision of the employees of the school – it will be the educational center that has to show that it complied with the due diligence that providing educational services requires.

p. 70 In this case not only did the school not prove that it acted diligently, there is ample evidence that corroborates that it was negligent, including indifferent, with respect to the situation of bullying that DBG was experiencing.

p. 73 Thus, both the “Institute” and the teaching staff completely evaded their responsibility of control, oversight, protection and information.

These failures constitute true unlawful acts to the extent they are contrary to the legal and general duties of care. Indeed they constitute discrimination, to the extent that the improper attention that DBG received resulted from, in part, the ignorance and insensitivity of the school in treating a child with ADHD.

### 5. Evidence of the pain and suffering [daño moral]

For there to be liability, in addition to unlawful conduct there must be an injury.

p. 76 School bullying can affect economic or non-economic rights or interests. In the second case we have pain and suffering [daño moral]. Such damage broadly has both economic and non-economic consequences, which in turn can be present or future.

This Court has also indicated that the pain and suffering [daño moral], broadly speaking, must be certain from a qualitative perspective, even when its amount cannot be exactly determined.

p. 78 Therefore, the pain and suffering of the child from bullying will be proven when various aggressions are evident that, even if individually mild, end up producing harm to the moral integrity when carried out repeatedly, systematically and regularly.

p. 79-80 This Court considers that pain and suffering must be proven by the plaintiff, showing the existence of some of the psychological effects related to bullying, such as depression, low grades, low self-esteem, and a broad catalog of symptoms related to school harassment. To prove those effects, it is sufficient for expert witnesses in psychology to allege them.

p. 80-81 In this case, the content of the psychological evaluations shows that DBG presents symptoms of distress, anxiety, low self-esteem, night phobias,

dream regressions and difficulty in relating to other people. These symptoms have affected the physical and emotional health of DBG to such a degree that he has not been able to reintegrate into normal school activity, which allows us to conclude that the pain and suffering is fully evidenced, since in fact DBG presents significant psycho-emotional alterations that have had repercussions on his social, emotional and academic spheres.

### 6. Causal link between the conduct and the harm

p. 81 Finally, it is necessary to demonstrate that the harm experienced is a consequence of the conduct of the agent.

p. 82 In this case, it was shown that the segregation, the verbal and physical aggressions, that DBG suffered, were incited, encouraged and motivated, in part, by the conduct of the teacher MLPV. Such conduct ended up seriously affecting the integrity and morale of the boy. In addition, that conduct and the consequent harm that was caused to DBG, could have been avoided if the “Institute” had fulfilled its duties of care, required by both human rights rules and various administrative instruments.

Thus, it is clear that the pain and suffering was caused by the aggressions and neglect suffered by DBG. In other words, the causal link between the conduct and the harm is shown, thereby evidencing the civil liability of both the teacher MLPV individually and the “Institution”.

### g) Compensation for the damage

p. 82-83 It is established doctrine of this Court to consider that the right to receive “fair compensation” must be taken into account to determine the proper compensation for the harm caused to a person’s feelings.

p. 84 It is also considered that the punitive nature of compensation for pain and suffering [daño moral] can be derived from a literal interpretation of Article 7.159 of the Civil Code for the State of Mexico (Civil Code), since that article requires that in determining the “compensation”, the degree of impact,

the degree of responsibility and the economic situation of the responsible party, among other circumstances, must be evaluated.

- p. 85-86 Furthermore, the economic situation of the victim can only be weighed to evaluate his or her economic impacts resulting from the pain and suffering. It would be contrary to the principle of equality to calibrate the compensation corresponding to the non-economic consequences of the harm, since the economic situation of the victim is not useful to measure the quality and the intensity of the non-economic harm, and therefore it does not lead to satisfying the right to a fair compensation, because the social condition of the victim does not affect, augment or diminish the pain suffered.
- p. 86 Thus, it can be interpreted that Article 7.159 of the Civil Code is constitutional, only if it is interpreted in that the economic situation of the victim can only be analyzed to determine the compensation corresponding to the economic consequences resulting from the pain and suffering [daño moral].
- p. 88 Regarding the parameters and quantification of the amount of the compensation of the pain and suffering, to ensure that the compensation set is fair, this Court has established various parameters that help the judge to remedy the harm caused. This is addressing, on the one hand, the right to fair compensation and, on the other hand, the nature of the institution of pain and suffering [daño moral].
- p. 89 It is admittedly difficult to measure the suffering of a child, in a situation of school harassment, seeing him or her alone, humiliated, attacked continuously and without any protection from those that should have provided it.
- p. 90 In this case the following should be weighed with respect to the victim: A) The qualitative aspect of the harm or pain and suffering [daño moral] strictly speaking, which is composed in turn of the valuing of: i) the type of right or interest harmed, ii) the existence of the harm and iii) the seriousness of the injury or harm. B) The economic or quantitative aspect resulting

from the pain and suffering [daño moral]. In this aspect the judge must measure: i) the expenses accrued resulting from the pain and suffering [daño moral], and ii) the expenses to accrue. Regarding the liable party: i) their degree of liability and ii) their economic situation.

- p. 90-91 It should be emphasized that the sum that is imposed must be reasonable, fulfill the purpose of repairing but also dissuading, imposing responsible, justified reparations duly grounded in the above indicated considerations.
- p. 92-93 In this case, the impact on the feelings, emotions and psychological integrity of the child has extreme importance, given that it involves the dignity, integrity, education and non-discrimination of the child or adolescent, whose rights merit a specially enhanced protection in cases where a child or adolescent with special needs is involved.
- p. 93 Regarding the existence of the harm and its level of seriousness, the harm resulting from the school harassment in this case proves a serious level of impact, given that the social behavior of the child changed, since his family and school life was profoundly affected.
- p. 94-95 Regarding the economic aspect, in the initial claim the mother indicated that she had incurred in various medical and therapeutic expenses to address the ramifications of the harm caused to DBG. However, the evidentiary material in the court record does not contain any evidence to show the medical and therapeutic expenses the mother refers to.
- p. 95 Nevertheless, the expenses to be accrued can be shown, resulting from the psychological treatment the minor deserves.

Following the expert witness recommendations and given the impossibility of predicting the evolution of DBG and the specific number of sessions that could be necessary, this Court estimates that it is appropriate to establish a psychological session every fifteen days for a period of three years. In this way, according to the parameters used in the other actions for constitutional relief under a direct injunction (*Amparo Directo*) 31/2013, the economic

consequences resulting from the pain and suffering [daño moral] can be quantified in the sum of \$64,800.00 pesos.

- p. 96-97 Regarding the degree of liability of the co-defendants, both the “Institute” and the teacher MLPV engaged in a series of unlawful behaviors, which can also be qualified as serious.
- p. 97 The actions the teacher MLPV encouraged are of greater seriousness and of high social reproach, since in addition to the failure in her duties as a teacher, she engaged in conduct harmful to the dignity of DBG, which has generated serious consequences in the emotional, family and school sphere of the child or adolescent.
- p. 98-99 With respect to the negligence the school is sued for, the negligent conduct of both the “Institute” and its teaching staff is highly reproachable, since notwithstanding their obligation to generate an adequate school environment and create instruments of conduct that protect the students from abuse and harassment by other students or the staff, they completely failed to do so, and even permitted such violence, not only putting the child or adolescent in a situation of risk, but generating an inadequate environment for all the students.
- p. 99 Regarding the economic situation, to the extent the reparation for pain and suffering [daño moral] has a punitive and restitution facet, the capacity of payment of the responsible party must be evaluated in order to effectively dissuade it from committing similar acts in the future.
- p. 99-100 It terms of Article 7.168 of the Civil Code the school must respond for both the liability of the teacher MLPV and the negligence of the “Institute”. For this reason, only the economic position of the school will be evaluated. This Court considers that the different elements found in the court record lead to the conclusion that the Institution has an average economic situation.

### Decision

- p. 102 In this regard, given the serious effect on the dignity of the child, the high degree of responsibility of the teacher and the school and the average economic capacity of the latter, this Court considers that the federal protection requested by AMGH, in her own right and in representation of her son DBG, should be granted, reversing the challenged decision and issuing in its place another one restating the holdings of this Court and ordering the “Institute” to pay compensation for pain and suffering [daño moral] in the amount of \$500,000.00 pesos.
- p. 102, 105 Finally, this Court indicates the need for the competent authorities to create clearer and more specific regulatory instruments, based on which both public and private schools can construct a strategy to combat bullying which contemplates: I) preventing school harassment, constructing a social environment of respect and security in the schools, II) identifying the existence of latent problems of school harassment, III) effectively impeding the persistence of violent conduct, and IV) supporting and guiding the boy and his or her parents or guardians to guarantee the rehabilitation of the affected party.



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## JEHOVAH'S WITNESSES: OBJECTION OF THE PARENTS TO BLOOD TRANSFUSIONS FOR THEIR DAUGHTER

### *Amparo en Revisión 1049/2017<sup>24</sup>*

**Keywords:** *Right to religious freedom, right to health, right to life, right to private and family life, rights of parents, family autonomy, best interest of the child, intervention of the State, guardianship, Jehovah's Witnesses, blood transfusions, alternative treatment*

#### **Summary**

“Clara”, a 5-year-old girl belonging to the Raramuri ethnic group and a member of a family that are part of the religious organization of Jehovah's Witnesses, entered a hospital in a state of emergency and required urgent blood transfusions upon presenting a probable diagnosis of acute lymphoblastic leukemia. The parents of the child, after having been informed by the doctors that without the application of this treatment “Clara” could die that same day, refused its application arguing that they had the right to make decisions about their daughter and that they would do so in exercise of their religious freedom. Given the situation, the hospital

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<sup>24</sup> Decision issued by the First Chamber of Mexico's Supreme Court of Justice (August 15, 2018). Reporting Justice: Arturo Zaldívar. *Action for Constitutional Relief Through Injunction (Amparo En Revisión) 1049/2017*

authorities requested the intervention of the Office of the Deputy Director of the Agency for Auxiliary Protection of Children and Adolescents of the Morelos Judicial District, State of Chihuahua. The agency initiated an administrative procedure for protection of children and adolescents to assume the guardianship of the child and authorize the blood transfusions which were done until “Clara” was reported stable. Days later, the diagnosis of leukemia was confirmed and it was indicated to the parents that she may require more transfusions. The parents refused to initiate the treatment immediately and therefore the Agency authorized it due to the urgency of combatting the disease. The mother of the girl filed for a two-stage judicial review relieving and un-remediated breach of rights (*amparo indirecto*) proceeding against such act. The district judge of Chihuahua that heard the matter granted the injunction (*amparo*). The decision put into effect that subsequently the wish of the parents be respected to implement alternative treatments while blood transfusions were only authorized as a last resort. Disagreeing with the decision, the mother, the Agency, the special representative of children and adolescents and the Public Prosecutor assigned to the district court, each filed appeals, which were heard by the First Chamber of Mexico’s Supreme Court of Justice (this Court) upon reassuming its original jurisdiction.

### Issue presented to the Supreme Court

The lawsuit addresses whether the intervention of the State in the family autonomy was constitutional. This intervention came about when the State assumed the power to decide what medical treatment should be applied to a child. The girl’s parents refused blood transfusions for her based on their religious beliefs, thus putting her life at risk. The suit also addresses whether the decision of the district judge that the subsequent treatment respect the wishes of the parents except in cases of emergency, was in conformity with the right to life.

### Holding and vote

The injunction (*amparo*) was denied for the following reasons. As a general rule, it is the parents who have standing to authorize any medical procedure on their children and they are also free to implement the practices that they decide according to their religious

convictions and therefore the State is obligated to respect the free exercise of those rights. On the other hand, the Constitution also protects the rights to life and health of children as a preponderant constitutional interest. Therefore, even though parents have the right to weigh the alternative treatments together with the hospital personnel in the interest of safeguarding their religious beliefs, if they make a decision that puts at risk the life of the child, the State must intervene with the objective of implementing the best treatment to save the child's life. This does not mean that a total displacement of the parent relationship is authorized. The guardianship assumed by the State is limited to making medical decisions concerning the recovery of health while the other rights of the parents within the nuclear family should not be displaced at all. Therefore, it was ordered that the administrative protection of the child must continue. This was compelled with the understanding that the medical treatments necessary to stabilize the child will be authorized and also implied the authorization of blood transfusions not only as a last resort to save her life, but when the child's body required it.

The First Chamber ruled on this matter by a majority of four votes of judges Arturo Zaldívar Lelo de Larrea, Jorge Mario Pardo Rebolledo (reserved the right to formulate a concurring vote), Alfredo Gutiérrez Ortiz Mena (reserved the right to formulate a concurring vote), and Norma Lucía Piña Hernández (reserved the right to formulate a concurring vote). Justice José Ramón Cossío Díaz voted against (reserved the right to formulate a concurring vote).

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### EXTRACT OF THE DECISION

p. 1 Mexico City. The First Chamber of Mexico's Supreme Court of Justice (this Court), in session of August 15, 2018, issues the following decision.

#### Background

p. 2 "Luisa" and "Manuel" procreated two daughters: "Carmen", who was born in 2006, and "Clara", who was born in 2011. The members of the family belong to the Raramuri ethnic group and profess the religion of Jehovah's Witnesses.

In the first few days of the month of April of 2017 “Clara” presented signs of chickenpox, so her mother took her to the doctor. On April 19, the girl was examined. The attending doctor informed “Luisa” that “Clara” probably suffered from acute lymphoblastic leukemia, and that it was urgent that she go to the State of Chihuahua Children’s Hospital for Special Care.

p. 2-3 “Clara” was examined in the emergency room that same day. The hematologist concluded the child most likely had an infectious viral condition, and therefore requested the child be transferred for intermediate therapy including the initiation of antiviral treatments, antibiotics and hemo-derivatives (products derived from blood).

p. 3 The hematologist informed the parents of the seriousness of “Clara’s” state of health and of the medical treatment she considered best; including blood transfusions. However, the parents said that it was their wish to seek an alternative measure to the blood transfusion since they professed as a family the religion of Jehovah’s Witnesses.

Under these circumstances, the social worker of the children’s hospital considered that she should put the girl under the care of the Office of the Deputy Director of the Agency for Auxiliary Protection of Children and Adolescents of the Morelos Judicial District, state of Chihuahua (the Agency), due to the seriousness of the state of health of the girl, the need to carry out the blood transfusion treatment and the opposition of the parents to such treatment.

In response, the head of the Agency immediately interviewed the parents to encourage them to accept the proposed treatment. However, “Luisa” and “Manuel” continued to refuse it.

p. 4 In this situation, the head of the Agency decided to initiate the administrative procedure for protection of children and adolescents based on: (i) the diagnosis of possible acute lymphoblastic leukemia, (ii) the immediate necessity that “Clara” receive blood transfusions to save her life in the judgment of the specialists and (iii) the refusal of her parents to agree to that

treatment. The Agency ordered that the guardianship of the child be provisionally obtained in order to authorize the medical treatments that were necessary to save the life of the child.

As a consequence, “Clara” was taken to the intensive therapy unit. Under the consent of the Agency, the doctors initiated the application of immunoglobulin intravenously and transfusion of erythrocyte concentrate and platelet concentrate.

p. 4-5 It was not until the third day that “Clara” was finally reported stable. Since she was improving, the doctors determined that it was viable to suspend the transfusion of erythrocyte concentrate, though they expected that the transfusion of platelet concentrate and immunoglobulin should continue. On the fourth day, “Clara” was reported in good general condition, and therefore the personnel were ordered not to apply platelet concentrate transfusions for the moment.

On the seventh day, “Clara” was given surgery with the consent of the Agency. The doctor conducted an aspiration and took bone marrow in order to confirm the diagnosis. On this day a platelet concentrate transfusion was also done.

p. 5 In the following days, “Clara” received immunoglobulin and a transfusion of platelet concentrate.

p. 5-6 On the fifteenth day the results of the analysis of the bone marrow were issued, which confirmed that “Clara” suffered from acute lymphoblastic leukemia. In this context, the hematologist, the social worker of the hospital and the Agency met with “Clara’s” parents to inform them that the treatment the child required was chemotherapy, indicating to them that the consequences of the treatment, among others, implied the possibility of continuing to need blood transfusions.

p. 6 In this situation, “Luisa” and “Manuel” indicated that they needed a second medical opinion with respect to the best treatment for their daughter.

The doctor replied that it was urgent to initiate the chemotherapy cycles, but that she agreed to discuss the case with another doctor with a specialty equal to hers.

Given the refusal of the parents to immediately initiate the proposed treatment, the Agency authorized the initiation of chemotherapy due to the urgency of combatting the disease as soon as possible.

In this context, “Luisa”, in her own right and in representation of her daughter “Clara”, filed a suit for a two-stage judicial review relieving an un-remediated breach of rights (*amparo indirecto*) in order to detain the Agency from initiating the administrative procedure and assume the guardianship over her child so that she may authorize the procedures that were necessary in the course of the medical treatment to recover “Clara’s” health.

- p. 8 The district judge that heard the matter granted the definitive suspension, which meant that the Agency should not make any decision related to the treatment of the girl. Furthermore, the authorities of the Hospital should inform the mother in detail of the benefits and complications of the alternative treatments.
- p. 9 The doctor indicated that, according to the disease that “Clara” suffered, her probabilities of survival were around 90%, as long as the chemotherapy scheme is followed along with the supporting treatment: transfusions of blood components, antibiotics and hygiene-diet measures.
- p. 11 The district judge issued a decision on June 30, 2017 in which he granted the injunction (*amparo*).
- p. 11-12 The judge understood that the Agency had initiated the administrative procedure of protection illegally, without a prior investigation to evidence that the child was in a situation of abandonment, such that its decision in reality was based on discriminatory practices directed to the mother due to her religious beliefs.

- p. 12 The judge concluded that the personnel of the hospital had violated the right of the mother to know in detail the benefits or complications of the treatment that would be applied to the girl and therefore, to adequately obtain her consent in the application of treatments and interventions.
- p. 12-13 The judge concluded that in the subsequent treatment the desires of the parents to implement alternative treatments must be respected and only if it is “urgent or necessary”, that is, if the alternative treatments failed and as a last resort, could the blood transfusions be implemented.
- p. 13 Disagreeing with the decision, the mother, the Agency, the special representative of children and adolescents and the Public Prosecutor filed appeals.
- p. 16 A collegiate court of Chihuahua sent the file to this Court, which assumed jurisdiction to hear the present appeal.

### Study of the merits

- p. 21 This Court must determine if the State can intervene in a family relationship in order to apply medical treatment to a child in spite of her parents’ objection based on religious reasons as well as their desire to substitute it with an alternative treatment. In this regard the privacy of family relations acquires relevance.

### I. Right to private and family life

- p. 24 The right to private and family life is configured as a guarantee against the State and against third parties so they cannot unjustifiably intervene in decisions that only correspond to the nuclear family. Among those powers is the right of parents to make decisions concerning their children.

Thus, the protection that the family merits from intrusions of the State rests on the premise that parents are the most suited for making decisions about their children.

In this case, the decision of the parents to oppose the blood transfusions is an exercise of autonomy as representatives of the child in the medical context, which also rests on a special justification: religious freedom.

**a) Right of parents to raise their children according to their religious beliefs**

p. 25 One important decision for the nuclear family, in particular for the parents, consists of determining what religious education their children should have. The manifestation of values or beliefs that parents transmit to their children is, on the one hand, their right to religious freedom and, on the other hand, their right to educate their children in the manner they prefer.

The right to religious freedom has been conceived in court precedents and in doctrine, as the right that permits each person independently and autonomously to believe, cease to believe or not believe any particular religion. Thus, recognizing for all persons their right to maintain the integrity of their beliefs, to change their religious convictions or to assume atheistic or agnostic positions.

p. 26 The right to religious freedom involves two facets: internal (worship) and external (practice). This right imposes certain duties on the State to ensure its materialization. In this regard, emphasis has been placed on the State's obligation to assume a neutral and impartial role toward the different religions that are professed in its territory and its duty to promote tolerance among the different religious groups.

p. 26-27 Through these guarantees of protection and abstention, the State ensures that believers can effectively exercise their religious freedom and that they are not inhibited from its expression in both the internal sphere and in the exercise of public worship.

p. 27 Nevertheless, as with any other right, religious freedom is not absolute, since it is submitted to certain limits that the Constitution imposes: the imperative of public order, the rights of others, the prevalence of public interest and the fundamental rights of the person against an abusive exercise thereof.

- p. 29 This Court considers that parents have the right to express their religious and moral beliefs, and that from this freedom in relation to the right to private and family life, come the right to educate their children in the faith they profess. This power implies, of course, the right to make decisions on their children based on their beliefs, such as organizing life inside the family according to their religion or their convictions, instructing their children in religious matters, and taking them to public places of worship or to celebrate certain festivities.
- p. 29-30 Overall, the practice of the religion or convictions in which a child is educated may not harm the child's physical or mental health or full development.

#### **b) Right of parents to make medical decisions for their children**

- p. 30 Another decision that forms part of the spectrum of autonomous choices parents make under the cover of family privacy lies in the freedom to make medical decisions for their children.

While children lack the maturity necessary to make decisions concerning their health themselves, their guardians or parents must assume this role, always looking to satisfy the best interest of the child. The freedom to make these decisions is protected by family privacy, which confers on parents the responsibility of weighing different reasons based on medical advice, and choosing what is in the best interest of the child free of arbitrary interferences in their private life.

- p. 31 This Court understands that in the medical sphere parents face a complex scenario since, based on the advice of the doctors, they must carefully weigh the efficacy and the risks of the treatments according to the clinical condition affecting their child. In this intersection, they are called to seek at all times the wellbeing of their children, and therefore there must be a correspondence between the medical decision they assume and the therapeutic measures that best permit the child to maintain his or her physical wellbeing and recover his or her health.

### c) Progressive autonomy of children and adolescents

Now, it is worth clarifying that the right of parents to make decisions for their children diminishes as the child or adolescent grows in development and autonomy. In other words, until children and adolescents are capable of formulating and articulating their own values.

- p. 33 This Court considers that based on the best interest of the child, the child or adolescent may decide what medical treatments or interventions to receive, as long as this does not affect greater rights than his or her own autonomy, while that is still in formation. Thus, if the decision of the child or adolescent could put his or her health, or even life, at risk, the alternative that ensures recovery to the greatest extent should be chosen.

### II. The best interests of the child as a limit on parental rights

- p. 34-35 The best interests of the child should also be the guiding principle of those who make decisions in the name of children and adolescents. Thus, the exercise of private and family life must have as its objective to procure the greatest satisfaction of the rights of children. In that regard, the rights of parents must be exercised according to the prevailing interest of the children, and therefore the nature of the relations between children and parents should not be determined by the personal desires of the parents, but rather by the best interests of the child.
- p. 36 Thus, this Court understands that the medical decisions of parents over their children, while initially protected by a clear field of autonomy, cannot be sustained if they put at risk the health of the child (even when this is not necessarily the intention of the parents), in that the Constitution obligates the State to ensure that the rights of children are not violated.
- p. 37 Furthermore, the First Chamber of this Court in Injunction Under Review (*Amparo en Revisión*) 502/2017, ruled that the right of parents to instill in their children religious beliefs is not absolute and that it has a limit: the best interests of the child.

p. 38 Thus, this Court understands that religious freedom does not confer on parents the authority to decide on the life or death of their child children; thus, the rights of parents find their limit where the life of their children is put at risk.

This means that parents cannot object to the application of medical treatments whose purpose is to save the life of their child children. The life and health of children are not rights that are subordinated to the will of their representatives.

### **III. The intervention of the State in family autonomy in the case of risk to life**

p. 39 This Court considers that putting at risk the life of a child occurs when the parents, privileging their religious beliefs, refuse to follow the best medical treatment to save the life of their child.

p. 40 Likewise, it understands that the best medical treatment is the procedure recommended by medical science that has the highest level possible of scientific consensus. Therefore, such treatment is indicated with the greatest degree of priority.

p. 41 In this way, the principle of the best interest of the child requires that the treatment that has the greatest probability of saving the life of a child must always be chosen.

Now, it could happen that the parents object to the best medical procedure and consider that there are alternatives that could recover the health of the child, and not violate their religious beliefs.

Under this logic, Jehovah's Witnesses have explored various alternative procedures to the use of hemoderivatives in order to receive medical attention without violating their religious precepts. Thus, the exercise of their religion has led the Jehovah's Witnesses to prefer medical options that forego the consumption of blood components, and that also allow them to recover their health.

However, in order for an alternative proposed by the parents to prevail it is essential to show that the alternative offers a degree of recovery similar or comparable to the medical intervention that has been objected to. Otherwise, the child will be put in a situation of risk that could be avoided by applying the proven treatment. In that regard, the prevailing interest of the children and adolescents prevents the application of a treatment that is clearly inferior to the best treatment.

#### **IV. Development of the intervention of the State in family autonomy**

- p. 43 The State intervention in a medical context is governed by guidelines intended to preserve the best interests of the child without undermining the rights of parents. These guidelines are relevant from when the child will receive medical services, until – in case of a risk to the child's life – the State intervenes in order to protect the child's rights.
- p. 44 The parents have the right to know the medical alternatives available to treat their children. Thus – if the medical situation of the child permits it – the parents can request that they be informed of the medical alternatives available. The health personnel should explain them in detail in a manner that allows them to effectively weigh the advantages and the inconveniences of different procedures in order to elect the one that is in the best interests of the child.
- p. 45 Thus, once the doctors have received a definitive refusal of the parents and they consider that the delay in making decisions could affect the physical wellbeing or health of the child, they are obligated to inform the state child protection agency so that it can evaluate the need to intervene immediately in order to examine the case and authorize treatment.

Without prejudice of the above, this Court does not overlook the fact that in the case of emergency it may be essential that the treating physician intervene without consent in order to preserve the life of the child.

Furthermore, public entities must respect certain guidelines when intervening in family autonomy and deciding to assume the provisional protection of the child.

p. 46 With respect to the regulation of guardianship, this Court observes that at the federal level and in different regulations of entities of the Republic there is no specific procedure for the public agencies to intervene in the medical context for the purpose of protecting a child. Instead, it is seen that a generic procedure has been designed so that public entities can exercise a provisional or transitory guardianship when they note that children are in a situation of risk.

p. 49 It is important to clarify that in this case, the parents are not trying to put the life of their daughter at risk. Rather, they only wish to prevent the violation of the tenets of their faith in exercise of their religious freedom. Consequently, it is clear that they do not merit being excluded from the medical process or from making decisions that concern their children.

This Court emphasizes that the guardianship the State assumes is limited to making medical decisions concerning the recovery of the health of the child for the period the medical treatment lasts and it should not displace in any way the other rights the parents have in the nuclear family.

p. 50 In addition, provided it is medically possible, the parents have the right to be together with their children and they should not be separated against their will except when strictly necessary. Additionally, it is clear that health institutions have the obligation to provide them adequate attention free from discrimination.

Similarly, it is important that the implicated authorities recognize the vulnerability of Jehovah's Witnesses, both for belonging to a minority religion and for professing a belief contrary to the medical paradigm: blood transfusions. Therefore, the authorities involved must ensure that these persons are not stigmatized as bad parents or relegated to taking a secondary

role in the recovery of the child. In this regard, the public agencies should not act on the basis that the parents want to deliberately put their child at risk, or that they are trying to harm their rights.

#### V. Application of the standard to this case

p. 52 According to the doctors that received “Clara” on April 19, 2017, the child was in emergency conditions. As the hematologist indicated upon examining the girl, if a decision was not made quickly to authorize the blood transfusions, the child would not survive that night. Therefore, in this case there was an important urgency that required making an expedited decision in order not to put the well-being of the child at risk.

p. 55 Having reviewed the background of the case, this Court considers that the conclusions of the district judge are incorrect and that the actions of the State were appropriate to safeguard the wellbeing of the child.

p. 57-58 Furthermore, this Court understands that the hospital personnel not only did not act unilaterally. Rather, they had the duty, given the risk that the child would lose her life, to request the intervention of the child protection authority.

Furthermore, there is no element or record that suggests that the actions of the hospital personnel have threatened the dignity of the parents or encouraged discriminatory acts for their religion or ethnicity.

p. 58-59 With respect to the information provided to the parents of the state of health of “Clara”, the doctors did inform the parents of the probable diagnosis of lymphoblastic leukemia; the seriousness of the disease and the urgent need for blood transfusions. Furthermore, when the doctors had access to the confirmed diagnosis, they explained “Clara’s” illness to the parents, the treatment that it required and the possible consequences derived from it. Therefore, it is clear to this Court that the doctors did not violate their duty to inform the parents of the state of health of their daughter.

p. 60 With respect to informed consent, it can be verified that the doctors also did not violate this right, since from the moment that the parents stated their opposition to the treatment suggested for the child, the doctors abstained from applying blood transfusions until the competent authority ruled that it was responsible for making medical decisions for the girl in substitution of her parents.

Now, with respect to the restriction of access to a second opinion, from the contents of the records, this Court does not see that the parent requested a second medical opinion during the day of April 19<sup>th</sup>. Thus, during that day the parents only manifested their opposition to the blood transfusions and that, instead, an alternative treatment be given.

p. 60-61 It should be emphasized that when the parents mentioned, for the first time, the possibility of seeking a second medical opinion, the hematologist agreed to the possibility of speaking with another doctor, who had access to the Hospital, the medical notes and the clinical file, which shows that neither the doctors nor the Hospital personnel violated the right of the parents to request a second opinion.

p. 63 Furthermore, from a reading of the facts, it is seen that the Agency adequate followed the constitutional and legal duties established to assume the guardianship of a child.

This validates that the Agency did not act unilaterally simply because the mother had indicated she was a Jehovah's Witness; rather its intervention was developed based on the petition of the hospital authorities due to a conflict between medical opinion and the determination of the parents.

p. 66 Now, for this Court it is especially complex to accept an alternative treatment to the scheme indicated, as the parents of "Clara" wish. However, their autonomy to decide over their family cannot be displaced without adequate support.

p. 67 As was established previously, this Court understands that when parents oppose the medical decision to apply a treatment recommended by medical science to treat an illness that puts at risk the life of a child and try to

replace it with an alternate treatment, their proposal cannot be inferior (less secure, reliable or effective) to the treatment known to recover the health of the child. This implies that the capacity and safety of the alternative treatment may be scientifically corroborated.

In other words, for the decision of “Clara’s” parents to be implemented, it is necessary that a chemotherapy scheme like the one they ask for – one that completely excludes the possibility of administering blood transfusions and is based *solely* on stimulants of blood production such as erythropoietin – has support of medical science equal or similar to the best treatment.

- p. 70-71 However, considering the efficacy of the treatment that is normally indicated in comparison with the scientific controversy on stimulants and their risks, this Court is not persuaded that a treatment that excludes the transfusions has the support of medical science equal or similar to the treatment evidenced to be the best. Therefore, it cannot accept that the alternative treatment is in accordance with the best interests of the child.

### Decision

- p. 72 This Court considers that the claims of the Agency, the special representatives of the children and adolescents and the Public Prosecutor are grounded, for the following reasons: (i) the diagnosis of possible acute lymphoblastic leukemia in a child; (ii) the immediate need for “Clara” to receive blood transfusions to save her life in the judgment of the specialists, and (iii) the refusal of her parents to have such treatment done, merited the intervention of the State.

Furthermore, the claims of the Public Prosecutor, that the appealed decision violates the rights to life and health of the child because it prevents the doctors from being able to apply the best medical procedure when it is necessary, are grounded.

- p. 73 This Court understands that the claims of the mother are unfounded and therefore it is appropriate to revoke the appealed decision and deny the requested injunction (*amparo*).

As a consequence, the procedure to engage the administrative protection of children and adolescents that the Agency initiated must continue and the provisional guardianship assumed in parallel should endure. This is enacted within the understanding that each intervention made – whether it is in the exercise of the provisional guardianship, or of the guardianship that may be assumed once the administrative procedure is concluded – shall be conditioned on the purpose of authorizing the medical treatments that are necessary to stabilize the child and, in this regard, strictly justified on the basis of a risk to the health of the child.

Thus, it is clear that the power to intervene in the family autonomy must be transitory and rigorously obey the health needs of the child, which of course implies not authorizing superfluous, abusive, unnecessary or idle blood transfusions, but rather only when the child's body requires it according to medical experience and, definitively, not as a last resort to save her life.



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## RIGHT OF CHILDREN AND ADOLESCENTS TO PARTICIPATE IN MATTERS AFFECTING THEIR LEGAL SPHERE

### *Amparo Directo en Revisión 2479/2012<sup>25</sup>*

**Keywords:** *right of minors to participate in cases that may affect their rights, rights to visitation with parents, best interests of the child, due process, right to a hearing, access of children and adolescents to justice, progressive autonomy of the child.*

#### **Summary**

SATG and ERGO were married in Harris County, Houston, Texas, USA, and a girl was born from their union. A few years later, a Harris County court: (a) divorced the couple, (b) declared the loss of parental authority of SATG (the father) over his daughter, without visitation rights and (c) granted custody of the child to the mother. SATG initiated an oral proceeding on visitation and temporary possession with respect to his daughter in the state of Nuevo León, Mexico. The family court judge dismissed the case because of the existence of the Harris County court decision. SATG appealed that determination, but the family court chamber that analyzed the

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<sup>25</sup> Decision issued by the First Chamber of Mexico's Supreme Court of Justice (October 24, 2012). Reporting Justice: Arturo Zaldívar. *Action For Constitutional Relief Through a Direct Injunction 2479/2012*

appeal upheld the dismissal. SATG then filed an injunction (*amparo*). The Collegiate Circuit Court granted the injunction (*amparo*) to SATG in order for the family court chamber to issue a new decision in which it would order the family court judge to decide the matter by taking into consideration the right of the girl to be heard if the expert opinions so indicate. Given the decision of the Collegiate Circuit Court, ERGO (the mother) filed an appeal (*recurso de revisión*), which was heard by the First Chamber of Mexico's Supreme Court of Justice (the Supreme Court). In that request, ERGO essentially stated that the reinstatement was an opportunity for SATG to reframe his case and revisit issues that had already been resolved.

### Issue presented to the Supreme Court

Whether the interpretation by the Collegiate Circuit Court on the right of children and adolescents to participate in matters that may affect their legal sphere was constitutional.

### Holding and vote

The decision under appeal was upheld for the following reasons: The Supreme Court considered that the interpretation by the Collegiate Circuit Court was correct to guarantee the protection of the best interests of the girl. The right of children and adolescents to participate in judicial proceedings that may affect their rights was already recognized by the First Chamber of the Supreme Court when deciding Conflicting Lines of Precedent (*contradicción de tesis*) 60/2008-PS. This right is exercised progressively without establishing any predetermined age that can be applied generally to all children and adolescents but instead by analyzing each case. Furthermore, the right of children and adolescents to participate in judicial proceedings has a dual purpose, since it achieves the effective exercise of the rights of children and adolescents by recognizing them as subjects of the law, while allowing the judge to gather all the elements necessary to forge an opinion regarding a certain matter, which in turn is fundamental for due protection of the best interests of the child. In addition, the Supreme Court indicated the guidelines that must be observed for the participation of children and adolescents in judicial proceedings that may affect their legal sphere, regarding the admission, preparation and introduction of evidence, as well as the representation of the child or adolescent.

Therefore, the Supreme Court concluded that the right that is being protected in the injunction (*amparo*) lawsuit is the right of the girl to participate in the trial so that

another right she holds can be reviewed: that of visitation with one of her parents, when it is deemed appropriate. This situation does not imply a new opportunity for the father to reframe his arguments; rather, it introduces into the case an element that was never taken into consideration: the best interests of the girl. The reinstatement of the proceeding is an effort to ensure effective protection of the girl's rights.

The First Chamber of the Supreme Court decided this case by the unanimous vote of the five Justices Olga Sánchez Cordero de García Villegas, Arturo Zaldívar Lelo de Larrea, José Ramón Cossío Díaz, Guillermo I. Ortiz Mayagoitia and Jorge Mario Pardo Rebolledo.

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### EXTRACT OF THE DECISION

p. 1 Mexico City. The First Chamber of Mexico's Supreme Court of Justice (the Supreme Court), in session of October 24, 2012, issued the following decision.

#### Background

p. 1-2 SATG and ERGO were married in November 2002 in Houston, Texas, USA and in July 2004 their daughter was born. In January 2007, a Harris County court ordered: (i) the divorce of the two parents; (ii) the loss of parental authority of SATG (father of the girl), without any visitation rights; and (iii) the granting of custody of the girl to ERGO, her mother.

p. 2 In 2010, SATG initiated an oral proceeding on visitation and temporary possession of his daughter. The family court judge of the state of Nuevo León considered that SATG had no right to exercise parental authority or any other right over the girl by virtue of the decision of the Harris County court. Consequently, the family court judge ordered the case be dismissed.

p. 2-3 SATG then filed an appeal. The family court chamber of the state of Nuevo León that decided the appeal, upheld the dismissal and ordered SATG to pay expenses and costs.

p. 3-4 SATG filed an injunction (amparo) lawsuit against that decision, in which he stated that the family court chamber gave full probative value to a foreign

decision that removed his parental authority, which in Mexico is inalienable. The Collegiate Circuit Court granted the *injunction (amparo)* to SATG in order for the family court chamber to issue a new decision in which it will order the family court judge to decide the matter taking into consideration the right of the girl to be heard if the expert opinions so indicate.

- p. 6-7 ERGO requested the review of the decision of the Collegiate Circuit Court. ERGO argued that the restitution of the girl's human right to be heard in court does not truly contemplate her interest, since the reinstatement of the proceeding gives SATG an opportunity to reframe his case and revisit issues that were already resolved. She also pointed out that SATG's involvement with the girl, as well as her subjection to contact with experts who will supervise the visitation between them, represents an impact on the girl's right to a dignified life. The Collegiate Circuit Court sent the case file of the *injunction (amparo)* lawsuit to the Supreme Court and it was heard by its First Chamber.

### Study of the merits

- p. 20 The right under study is the right of children and adolescents to participate in matters that may affect their legal sphere.
- p. 20-21 Two terms should be clarified. First, the right analyzed is the right of children and adolescents to “participate” in judicial proceedings and not just to “be heard”. Article 12.1 of the Convention on the Rights of the Child indicates that this right comprises two elements: (i) that children and adolescents be heard; and (ii) that their opinions be taken into account, depending on their age and maturity. The term “participate” is adopted because it is considered more appropriate for describing the content of the right in question.
- p. 21 The second clarification is that the right under consideration entails the right of children and adolescents to participate in “matters” that may affect their legal sphere. The term “matters” implies the applicability of this right in the different aspects that relate to the access of children and adolescents to justice, in addition to other effects regarding decision making in the family

and the community. However, in this decision, only participation in judicial proceedings will be analyzed.

The dispute in this case was originally stated as the attempt of the biological father of the girl to obtain visitation rights with her. Both the family court judge and the family court chamber ruled on the confirmed loss of parental authority of the affected party regarding the girl, as well as on the invalidity of determining any visitation rights between them.

- p. 21-22     However, the Collegiate Circuit Court stated that visitation between two people entails the existence of two rights: that of each of them to visit with the other. The Collegiate Circuit Court noted the shortcoming of the family court judge and the family court chamber when only taking into account the right of the father to obtain visitation rights with his daughter and not the right of the daughter to obtain visitation rights with her father.
  
- p. 22-24     The right of children and adolescents to participate in judicial proceedings that may affect their rights was already recognized by the First Chamber of the Supreme Court when deciding the Conflicting Lines of Precedent (*contradicción de tesis*) 60/2008-PS. In that case, it was stated that this right is regulated in Article 12 of the Convention on the Rights of the Child and implicitly included in Article 4 of the Constitution. Article 41, part A of the Law for the Protection of Children's and Adolescents' Rights also reiterates this right. Therefore, the right of children and adolescents to participate in judicial proceedings that may affect their legal sphere is part of the Mexican legal system.
  
- p. 25-26     The right under consideration belongs to the due process rights, which include "core" rights that must be observed in all judicial proceedings, and another set of guarantees that are applicable only in processes that involve an exercise of the punitive power of the State. The due process rights that are applicable to any judicial procedure are those identified as the essential procedural formalities, also called "right to a hearing". In the Action for Constitutional Relief Under an injunction (*amparo*) (*Amparo Directo en Revisión*) 2961/90, the Plenary of the Supreme Court indicated that these

rights are: (i) the notification of the initiation of the procedure; (ii) the opportunity to introduce and present evidence on which the defense is based; (iii) the opportunity to plead your case; and (iv) the issuance of a decision that resolves the issues in dispute, in which the evidence and pleadings made in court are considered.

- p. 26-27 The right of children and adolescents to participate in proceedings that may affect their legal sphere is of a special nature. This “specialness” comes from the relationship of this right with the principle of equality and with the best interests of the child; its content does not seek to favor children and adolescents, but to provide them with additional protection to ensure that the disadvantages inherent in their special condition do not affect their interests in those judicial procedures.
- p. 27 The right under study constitutes an essential procedural formality in favor of children and adolescents, whose protection must always be observed in any type of procedure that may affect their interests. This idea is shared by the Inter-American Court of Human Rights, as can be seen from its advisory opinion on the legal status and human rights of children.

### **Content and scope of the right of children and adolescents to participate in judicial proceedings that may affect their legal sphere**

- p. 28 The concept of childhood or being underage protects those persons who require certain measures or special care due to their situation of special vulnerability before the legal system, as a result of their weakness, immaturity or inexperience.

Although children and adolescents hold human rights, they actually exercise their rights progressively, as they develop a higher level of autonomy. This has been called the “progressive acquisition of the autonomy of children and adolescents”, who during their early childhood act through other people – ideally, their relatives. Therefore, the right of children to participate in judicial proceedings that may affect their legal sphere is also exercised progressively, without establishing any predetermined age that can be applied generally to all children and adolescents, and instead analyzing each case.

p. 29-30 The right under analysis has a dual purpose, since it achieves the effective exercise of the rights of children and adolescents by recognizing them as subjects of the law, while allowing the judge to gather all the elements needed to forge an opinion regarding certain matters, which in turn is fundamental for a proper protection of the best interests of the child.

p. 30 The Supreme Court observes that the decision of the Collegiate Circuit Court to consider, *ex officio*, that the advisability of hearing the opinion of the girl, whose rights could be affected, should have been studied in the original trial, was correct.

The Inter-American Court of Human Rights, in the case of Atala Riffo and daughters vs. Chile – which involved a custody procedure – ordered the three girls involved to be given the right to be heard. The First Chamber of the Supreme Court has reached the same conclusions in multiple precedents, such as in the Action for Constitutional Relief Under a injunction (amparo) (*Amparo Directo en Revisión*) 2359/2010, which explained the obligation of judges to collect *ex officio* the evidence necessary to preserve the best interests of the child, which includes the child's own statement.

p. 31-32 Below are the guidelines that must be observed for the participation of children and adolescents in any judicial proceeding that may affect their legal sphere:

1) Admission of evidence. Whether testimony or a statement of the child or adolescent has been offered as evidence or their participation is determined *ex officio* by the judge, it is important to consider the following elements regarding the advisability of admitting the evidence:

a) Regardless of their age, it is important to take into consideration the maturity of the child or adolescent, which means their ability to understand the matter and its consequences, as well as to form their own judgment or criteria.

Given the above, the evidence should be admitted considering these factors:  
(i) the differences or variations in maturity of children and adolescents must

be considered for the evaluation of the evidence; and (ii) the obligation to listen to a child or adolescent does not mean accepting their wishes, but their opinion must be analyzed in accordance with the first factor. Likewise, forms of verbal and non-verbal communication should be considered. The maturity of the child or adolescent can be evaluated prior to the introduction of the evidence – by means of an expert opinion – or during the presentation of the evidence itself, as deemed appropriate.

b) Carelessness in the exercise of this right should be avoided, especially when the children are very young or in cases where the children and adolescents has been the victim of certain crimes, such as sexual abuse, violence, or other forms of mistreatment; and

c) It is important to avoid interviewing child or adolescent more often than necessary.

p. 32-33 2) Preparation of the evidence. Once the advisability of admitting the evidence has been considered, two measures should be adopted prior to the interview:

a) The child or adolescent must be informed – in accessible and friendly language – about: (i) the procedure, what it comprises, information on the pleadings and the consequences that may be generated; and (ii) their right to participate.

b) Once informed, it must be ensured that the child or adolescent participates voluntarily: it is an option and not an obligation. The moment of confirmation of this factor occurs immediately before the presentation of the evidence, when the child or adolescent is separated from the people who could pressure him or her to participate or refrain from doing so.

p. 33 3) Presentation of evidence. The statement or testimony of the child or adolescent must be taken in the form of an interview or conversation and not an interrogation or unilateral examination; this process must meet the following requirements:

a) Content: prior to the interview it is advisable for the judge – or the person authorized to carry out the process – to meet with a childhood specialist – psychiatrist or psychologist – to clarify the terms of what is to be discussed with the minor, so it is easier for him or her to understand and follow the conversation;

b) Place: the interview should take place, as far as possible, in a place that does not represent an environment hostile to the interests of the children and adolescents, where he or she can feel respected and safe to freely express his or her opinions.

c) Persons involved: in addition to the judge or official making the decision and the child or adolescent, two more people should be present during the proceedings: (i) the childhood specialist who has met with the judge – psychiatrist or psychologist –; and (ii) a person the child or adolescent trusts, who exercises his or her natural representation, as long as this does not represent a conflict of interest, which may be an interim guardian or an adult involved in the affairs of the child or adolescent, such as another family member who is not involved in the conflict, or a teacher, social worker or caregiver. The latter person should participate if the child or adolescent requests it or it is considered better to achieve his or her best interest.

p. 34 d) Recording of the process: as far as possible, the statement or testimony of the child or adolescent must be recorded in its entirety, either through the transcription of the entire process or with the use of the technology available to the court that allows the recording of audio. This will allow the interview to be fully assessed by higher *amparo* courts that may eventually hear the matter, while avoiding subjecting the child or adolescent to new interviews when they are not necessary.

p. 34-35 4) Representation of the child or adolescent. The children and adolescents must be directly involved in the interviews, but this does not mean that they cannot have any representation during the trial. The representation will fall on those who are legally called to exercise it, unless this situation

generates a conflict of interest – as often happens in custody matters – in which case the need to appoint an interim guardian must be analyzed.

5) Confidentiality. Although the final decision will be adopted by the judge, the children and adolescents must be consulted about the confidentiality of their statements, to avoid generating any conflict that may imply an impact on their mental health or, in general, their well-being.

- p. 35 Each of these measures must always take into account the best interests of the child, so no determination should be made that implies any harm to the children or adolescents, beyond the normal effects that are inherent in their participation in a judicial procedure. Likewise, all decisions taken in relation to the evidence and its assessment must be expressed clearly and exhaustively by the judge or court, so that they can be subject to analysis and control by higher courts and injunction (*amparo*) judges. This will make it possible to verify that the best interests of the child have been followed during the procedure and detect any deficiencies.

Judicial processes related to adoption, custody and visitation with children, especially during their early childhood, must be handled with exceptional diligence and speed by the authorities, through the consideration of all the elements of evidence that may be necessary.

- p. 35-36 Therefore, the Supreme Court considered that the conclusions of the Collegiate Circuit Court were correct and, indeed, constitute the best way to protect the best interests of the girl. Thus, the mother's argument that the decision of the Collegiate Circuit Court entails an opportunity for the father to reframe the dispute and revisit the issues that were resolved is unfounded. The right that is being protected in the injunction (*amparo*) lawsuit is the right of the girl to participate in the trial so her right to visit with one of her parents is reviewed. This situation does not imply a new opportunity for the father to reframe his arguments; instead, it introduces an element that was never taken into consideration: the best interests of the girl. The reinstatement of the proceeding for the purpose of protecting the rights of the girl is not

an affront to her best interests but rather a clear effort to effectively protect her rights.

- p. 37 The Supreme Court is very aware that participation in a judicial proceeding will necessarily have an impact on a child or adolescent; however, this impact is nuanced because: 1) the Collegiate Circuit Court assessed the matter that gave rise to the injunction (*amparo*) and concluded that the participation of the girl in the process does not constitute an excessive practice of the right in question; and, 2) the guidelines indicated by the Collegiate Circuit Court for the involvement of the girl in the process are intended to mitigate the impact that such participation may have, in order to effectively and comprehensively protect her best interests.

Therefore, the participation of the girl in the original trial, with due compliance with the measures established by the Supreme Court, is the appropriate measure to protect the best interests of the girl. It should be remembered that these measures include the assessment of the desire of the child and adolescent to participate in the trial.

- p. 37-38 In the event that it is determined that the visitation of the girl with her biological father is in her best interest, said visitation must also comply with certain standards aimed at safeguarding her psychological and emotional integrity.

### Decision

- p. 38 Since the contraventions alleged by the mother are unfounded, it is appropriate to uphold the decision of the Collegiate Circuit Court and, therefore, to grant the injunction (*amparo*) to the father.



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STANDARDS FOR THE EVALUATION OF  
EVIDENCE IN CIVIL PROCEEDINGS FOR  
CHILD VICTIMS OF SEXUAL ABUSE  
(GUIDELINES FOR OBTAINING AND  
ASSESSING THE STATEMENTS OF CHILDREN  
OR ADOLESCENTS VICTIMS OF SEXUAL ABUSE  
IN PROCEEDINGS FOR LOSS OF PARENTAL  
AUTHORITY)

*Amparo Directo en Revisión 3797/2014*<sup>26</sup>

**Keywords:** *Right to be heard in judicial proceedings, right to be protected from all forms of abuse, best interests of the child, parental authority, obtaining and assessment of evidence, children and adolescents.*

**Summary**

MBMJ reported a crime of sexual abuse committed against ACM, her daughter, by the girl's father ABCL, for which he was detained. Following an investigation, a criminal judge ordered the immediate release of ABCL for lack of evidence against him. The decision was confirmed in an appeal by a criminal court chamber. At the same time, MBMJ sued for ABCL's loss of parental authority over ACM, the provisional and final care and custody, an indemnity and the payment of expenses and costs originating from the suit. Subsequently, ABCL filed a counterclaim against MBMJ requesting the same relief. The judge who heard the case absolved

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<sup>26</sup> Decision issued by the First Chamber of Mexico's Supreme Court of Justice (October 14, 2015). Reporting Justice: Arturo Zaldívar. *Action for Constitutional Relief Through Direct Injunction 3797/2014*

ABCL and MBMJ from the relief claimed and only suspended the visitation rights of the girl with her father. MBMJ filed an appeal against that decision in which a family court chamber ordered the taking and presentation again of the expert testimonies in psychology and psychiatry to be able to issue a new decision. That decision was confirmed in an injunction (*amparo*) lawsuit filed subsequently by ABCL. In compliance therewith, the family court chamber issued a new decision ordering ABCI's loss of parental authority over ACM. ABCL filed an injunction (*amparo*) lawsuit against that decision and he was granted the constitutional protection requested. Finally, MBMJ filed an appeal (*recurso de revisión*), which was sent to the Supreme Court of Justice for its resolution.

### Issue presented to the Supreme Court

Determine the constitutional guidelines on the manner of conducting interviews intended to obtain the statements of children and adolescents that are believed to have suffered sexual abuse in proceedings for the loss of parental authority, the criteria for assessing the credibility of those statements and the evidentiary standard for declaring the existence of this conduct proven.

### Holding and vote

The injunction (*amparo*) is granted for the following reasons. The Supreme Court established that the right of children and adolescents to participate in judicial processes that affect their legal sphere implies that they should be heard and their opinions considered. However, in cases where a child or adolescent claims to have suffered sexual abuse and appears before authorities as a victim and witness of what occurred, his or her statement must be taken and assessed with different parameters from those required for the testimony of adults, in light of the principle of the best interests of the child. In this regard, the child's or adolescent's statement should be taken through an investigative or cognitive interview planned by a duly trained specialist. In that interview the child must be informed of the basic rules of the interview, the questions must be formulated properly, the child's perspective must be considered, and it must be videotaped. Furthermore, the credibility of the child's testimony in cases of sexual abuse must be assessed from the content of the statement using criteria that permit differentiating the

true statements from the false ones. Finally, the rights of children or adolescents to be heard in judicial proceedings and protected from all forms of abuse in connection with the best interests of the child were established. The decision orders that in proceedings where the loss of parental authority by one of the parents is requested based on certain facts that involve some type of abuse of a child or adolescent, the evidentiary standard of preponderance of the evidence must be adopted. Therefore, in this case expert evidence was ordered through a specialist in the techniques developed by the psychology of testimony to assess the statements of children and adolescents who are believed to have been sexually abused. In turn, it was determined that a new decision be issued based on the constitutional doctrine established by the Court in this decision.

The First Chamber of the Supreme Court decided this case by a majority of three votes of the Justices Arturo Zaldívar Lelo de Larrea, Olga María del Carmen Sánchez Cordero and Alfredo Gutiérrez Ortiz Mena. Justice Jorge Mario Pardo Rebolledo voted against (reserved the right to issue a dissenting opinion).

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### EXTRACT FROM THE DECISION

p. 1 Mexico City. The First Chamber of Mexico's Supreme Court of Justice (the Supreme Court), in session of October 14, 2015, issued the following decision.

#### Background

p. 33 On April 11, 2010, MBMJ reported acts constituting the crime of sexual abuse committed against her daughter ACM by the girl's father, ABCL.

p. 34 On December 12, 2010, the judge declared the immediate release of the defendant for lack of evidence to prosecute.

The Prosecutor filed an appeal of that decision and on March 16, 2011, a criminal court chamber upheld the appealed ruling.

p. 34-35 On April 27, 2010, MBMJ filed an ordinary civil lawsuit against ABCL asking for the following relief: (i) the loss of the parental authority he exercises over their daughter; (ii) the provisional, and eventually the definitive

care and custody of their daughter; (iii) an indemnity for damages and losses; and (iv) the payment of expenses and costs.

- p. 36 After processing the case, the judge issued a decision on July 4, 2012, absolving MBMJ and ABCL from the relief requested, but suspending the definitive visitation rights of the girl with the father until the affective paternal bonds were strengthened.

MBMJ appealed that decision and by decision of December 12, 2012, the appealed decision was reversed and the appeal declared moot, so that the necessary procedures could be carried out to collect and present the expert evidence in psychology and psychiatry which were admitted by the judge in the case.

- p. 36-37 The defendant filed an injunction (*amparo*) lawsuit against that determination. A district judge issued a decision denying the constitutional protection requested. The complainant filed an appeal (*recurso de revisión*) against that decision, which was decided amending the appealed decision and granting the injunction (*amparo*) so that the responsible Chamber would overturn the challenged decision and issue a new one that examines the grievances that were raised in the appeal of the first instance decision and fully assess with full jurisdiction the evidence presented in the dispute.

- p. 38 On October 30, 2013, ABCL requested the injunction (*amparo*) and protection of the federal courts against the decision issued by the responsible chamber. The Collegiate Circuit Court issued an injunction (*amparo*) decision granting the constitutional protection to the complainant.

MBMJ filed an appeal (*recurso de revisión*) against the direct injunction (*amparo directo*) decision. By ruling of August 19, 2014, the Collegiate Circuit Court hearing the case sent the case to the Supreme Court.

On September 11, 2014, this First Chamber of the Supreme Court took up the case and ordered it be turned over to Justice Arturo Zaldívar Lelo de Larrea to prepare the draft decision.

### Study of the merits

I. The fundamental rights of children in situations where accusations of sexual abuse are analyzed

- p. 38 This matter involves several fundamental rights of children and adolescents. One of them is the right to participate in the judicial procedures that affect their legal sphere.
- p. 39 The Supreme Court has ruled on several occasions on the scope of this fundamental right of children. In this regard, in Action for Constitutional Relief Through Direct Injunction (*amparo directo en revisión*) 2479/2012, it was clarified that this right comprises two elements: “(i) that children and adolescents be heard; and (ii) that their opinions be considered, depending on their age and maturity”.
- p. 40 That precedent held that the right to participate in judicial proceedings that may affect their legal sphere “has a dual purpose, since it achieves the effective exercise of the rights of children and adolescents by recognizing them as subjects of the law, while allowing the judge to gather all the elements necessary to forge an opinion regarding a certain matter, which in turn is fundamental for due protection of the best interests of the child.”
- p. 41-42 The same precedent established various guidelines for the exercise of the right of children to participate in the judicial processes that affect them: “(1) for the admission of the evidence it should be considered that: (a) the biological age of children is not the decisive factor for reaching a decision with respect to their participation in a judicial proceeding; instead it is their maturity, which means their ability to understand the matter and its consequences and form their own judgment or criteria; (b) carelessness in the exercise of this right should be avoided; and (c) interviewing children and adolescents more often than necessary should be avoided; (2) to prepare the interview in which they will participate, they must be informed in accessible and friendly language about the procedure and their right to participate, and it must be ensured that their participation is voluntary; (3) for the presentation

of the evidence, the statement or testimony of the child or adolescent should be taken in the form of an interview or conversation, which must meet the following requirements: (a) prior to the interview it is advisable for the judge to meet with a childhood specialist, psychiatrist or psychologist, to clarify the terms of what is to be discussed with the child or adolescent, so it is easier for him or her to understand and follow the conversation; (b) the interview should take place, as far as possible, in a place that does not represent a hostile environment to the interests of the child or adolescent, where he or she can feel respected and safe to freely express his or her opinions; (c) in addition to the judge or official making the decision, during the proceedings the childhood specialist who has met with the judge and, if the child requests it or it is considered better to achieve his or her best interest, a person the child or adolescent trusts, as long as this does not represent a conflict of interest, should appear; (d) as far as possible, the statement or testimony of the child or adolescent must be recorded in its entirety, either through the transcription of the entire process or with the use of the technology available to the court that allows the recording of audio; (4) the children or adolescents must be directly involved in the interviews, but this does not mean that they cannot have any representation during the trial, which will fall on those who are legally called to exercise it, unless this situation generates a conflict of interest, in which case the need to appoint an interim guardian must be analyzed; and (5) the children or adolescents must be consulted about the confidentiality of their statements, although the final decision is the judge's, "to avoid generating any conflict that may imply an impact on their mental health or, in general, their well-being".

- p. 41-42 Subsequently, in Action for Constitutional Relief (*amparo directo en revisión*) 2548/2014 it was emphasized that "it should not be ignored that often when aspects that affect the rights of children and adolescents are decided, they express an opinion that could be manipulated or is not theirs, and therefore the judge will have to be especially careful in assessing both the opinion of the child or adolescent and the rest of the probatory material, to adequately ensure the child's or adolescent's rights are duly protected and, at the same time, assume that as the child matures his or her opinions should be given more weight in the assessment of his or her best interests".

- p. 42-43 This same precedent also established that although “the child or adolescent has the right to express his or her opinion and for it to be duly considered in all the matters that affect him or her, this does not mean that the child’s or adolescent’s expressions in the judicial proceedings must unflinchingly be complied with, or that the child’s or adolescent’s wishes must necessarily be strictly followed, much less that they are binding on the court that hears the case”.
- p. 44 When resolving Conflicting Lines of Precedent (*contradicción de tesis*) 256/2014, the Supreme Court recalled that the participation of children “does not constitute an unrestricted rule in every judicial proceeding”, such that “both when evaluating *ex officio* the participation of children and adolescents and when analyzing the advisability of admitting their statement or testimony offered by the parties, the judge must avoid the excessive or careless practice of the law”.
- p. 45 The right of children and adolescents to be heard requires that the testimony of sexual aggression be taken in a certain way and that this statement be assessed with parameters different from those required for the testimony of adults. Moreover, it is clear that the content of this right in a situation such as the one described above is also closely linked to the best interests of the child.
- p. 47 In this regard, the Supreme Court held in Action for Constitutional Relief Through Direct Injunction (*amparo directo en revisión*) 1187/2010 that “the best interest is a guiding principle of interpretive activity related to any legal rule that has to be applied to a child in a particular case or that may affect the interests of a child”, which “requires the implementation of a systematic interpretation that, to give meaning to the rule in question, considers the duties of protection of children and adolescents and their special rights under the Constitution, international treaties and laws protecting children”.
- p. 48 In the mentioned Action for Constitutional Relief Through Direct Injunction (*amparo directo en revisión*) 2539/2010, it was determined that in the proceedings in which rights of children and adolescents are directly or indirectly involved, the best interests of the child imposes on the judge the

obligation to “obtain all the evidentiary material available and even the power to collect evidence *ex officio*”.

Finally, in the mentioned precedent the Supreme Court had suggested the possibility that some aspects related to the evaluation of the evidence in matters where children and adolescents are involved could be analyzed from a constitutional perspective considering the principle of the best interests of the child, specifically “those cases where for the appreciation of the facts, the status of child or adolescent of the person on whom the evidence falls is relevant”.

- p. 51 II. The impact of the fundamental rights of children on the evidentiary activity in cases of child sexual abuse.

Three successive moments are often distinguished in the evidentiary activity that unfolds in the process: the formation of the elements of judgment; their assessment; and what would actually be the decision with which it is determined whether the facts in dispute are proven.

### **I. Statement of the child or adolescent**

- p. 52 The first moment of evidentiary activity consists of the formation of the elements of judgment with which the decision will be made. In procedural terms, this set of elements is obtained from the offering, admission and application of the evidence. In relation to the subject at hand, in this first part the problems related to the way to take the statement of a child or adolescent that is believed to have been a victim of sexual abuse are addressed, as it is an aspect that directly affects the assessment of that statement.

#### **A. The “investigative interview”**

- p. 54 In this regard, there is a fairly widespread consensus in international human rights law and in comparative law that the statement of a child who is a victim of sexual abuse should be taken through an “investigative” or “cognitive” interview by a properly trained specialist. This type of interview is based on psychological principles that regulate memory and memory retrieval.

In forensics, the investigative interview refers to the “exchange” between an interviewer and a child or adolescent, in which the former uses different techniques with the purpose of obtaining from the child or adolescent “uncontaminated data” on the event of sexual abuse, in such a way that the interviewer investigates the memory of the child in relation to the circumstances of time, mode and place of the acts reported. Thus, it has been demonstrated that the quantity and quality of the information provided by the child who has been a victim of this type of behavior are directly associated with the ability of the specialist to relate to the child during the interview and conduct the exchange.

- p. 54-55 In this regard, this interview should be carried out as soon as possible, since the closer the child’s statement is to the moment when the events happened, the less risk there is of forgetfulness and contamination.
- p. 55 The Supreme Court also emphasizes the importance of doing the investigative interview as soon as possible to avoid the secondary revictimization of the child or adolescent.
- p. 57-58 Although a psychologist must participate in this interview, it should be clarified that the investigative interview is not properly expert evidence. As explained above, the purpose of this interview is not to identify “signs” or “symptoms” of the existence of any trauma. In these cases, the psychologist who conducts the interview facilitates the work of the Prosecutor and/or the judge contributing his or her education and training so that the child tells what happened and externalizes the information that is needed. At the time of the interview, the psychologist’s knowledge is used to obtain the statement, not to interpret it or assess it.
- p. 58-59 Thus, the Supreme Court understands that in cases involving children and adolescents who are believed to have been sexually abused, in both criminal and civil proceedings, the participation of a professional psychologist trained in the appropriate techniques to help obtain the victim’s statement is not a question of simple convenience; rather, it is a requirement imposed on the administrative and judicial authorities by the best interests of the

child and the fundamental rights of children and adolescents to be heard in judicial proceedings and be protected against all forms of abuse.

### **B. The psychology of testimony**

p. 64 The contributions made by the psychology of testimony are increasingly incorporated into forensic practice. At the international level and in comparative law this trend is even more pronounced in the case of the testimony of children.

In this regard, psychologists argue that, assuming that a person does not lie, the content of a statement depends on the different “interactions” between the memory and the account of the witness. From this point of view, the reliability of a testimony is determined by the correspondence between the account of the witness and what actually occurred. However, the testimony is not reliable if the person does not correctly remember what happened. For its part, the accuracy of the memory depends on the correspondence between the content of the event told and the content of the memory, i.e., the correspondence between the act witnessed by the witness and what is represented in the memory.

It should be clarified that while the reliability of the testimony ultimately depends on the accuracy of the memory, the number of elements remembered is logically independent of the accuracy. In this way, an accurate but poor memory is of little use in the courts, especially if what is remembered does not include details on the facts legally relevant for the process.

### **C. The particularities of children’s testimony**

p. 65 As with adults, there are problems in the different stages of memory encoding, storage and retrieval that have implications for the reliability of children’s testimony.

For these reasons, as has been pointed out, those responsible for questioning children and adolescents in the context of judicial proceedings on sexual

abuse must be professionals who have knowledge of the functioning of children's memory and cognitive development, since only then will they be aware of the problems that affect the reliability of children's testimony and, to that extent, they may be able to use the appropriate techniques to help the child or adolescent in the recovery of the memories of that episode.

Therefore, the problems related to the lack of precision, suggestibility and dishonesty that can affect child testimony must be counteracted or controlled to the extent possible with the help of the techniques developed by the psychology of testimony to obtain the statement of children and adolescents, which can only be properly applied by a professional duly trained in this area.

Moreover, these particularities of child testimony force judges to be very cautious when they evaluate this kind of evidence. On the one hand, it cannot be assumed that children always lie when they make an accusation of sexual abuse because their testimony contains certain characteristics. At the same time, it is also not possible to think that children always tell the truth when they relate these types of facts, since there are widely explored reasons that could affect the credibility of the statement.

#### **D. Guidelines for conducting investigative interviews**

- p. 70 First, the investigative interview should be planned. The planning implies that the interviewer gathers information on a series of factors related to the child that could influence the interview: ethnicity, gender, level of cognitive development, communication skills, knowing if it is suspected or known that the child was sexually abused before, etc. The advisability of conducting a "psychological evaluation" of the child before the interview should also be considered. In that evaluation, very useful aspects could be determined, such as the ability or willingness of the child to speak in a formal interview, a diagnosis of the cognitive, emotional and social development of the child, etc.
- p. 70-71 Second, the interviewer should inform the child of the basic rules of the investigative interview, so they know the way in which they are expected to behave, and clarify how these rules differ from a normal conversation.

Given that the purpose of the interview is to produce a precise and complete account, the child must be informed of the rules that help to achieve that goal, such as the following: the importance of telling the truth; they must say if they do not understand the question; they must respond “I don’t know” to any question they do not know the answer to; let them know they can use any type of language they wish in the interview; they should try to remember as many details as possible of the event, etc.

- p. 71 Third, the interviewer must formulate the questions in an appropriate way. In this regard, there is a fairly broad consensus that the questions should not be suggestive and should be as open as possible. The advantage of open questions is that they force the child to give the responses from their own memories and not from the information contained in the question itself. In this respect, it should be ensured that in the first phase of the interview the child gives a free account of what happened and only when that has concluded would clarifying, focused and specific questions to expand and clarify details of the information provided by the child be included.
- p. 71-72 Fourth, the interviewer should consider the child’s or adolescent’s perspective. On the one hand, if the child was abused, normally it will be very hard for them to talk about that episode, a situation that must be considered. On the other hand, the interviewer must be willing to use the words that the child or adolescent uses to describe their body parts and sexual activities, although the precise meaning of those terms must be ascertained. In this regard, the interviewer must also be aware that children use many words differently than adults do.
- p. 72 Finally, the interview must be videotaped. The fact that it is possible to know what the child said in their own words and the way in which they told their account, as well as the questions that were asked during the interview, is fundamental for the subsequent assessment of the credibility of the child’s or adolescent’s statement. Moreover, as already noted, the videotaping of the interview is also essential to avoid the secondary revictimization of the child.

## 2. The assessment of children's testimony

- p. 74 For the Supreme Court the best interests of the child and the fundamental rights of children or adolescents to be heard and be protected from all forms of abuse have an impact on how the statement of a child or adolescent should be assessed in cases of child sexual abuse.

### A. The assessment of the evidentiary material

Following the above, once the elements of judgment have been collected during the process, the judge is able to assess the evidence. The purpose of this activity is to establish the connection between the evidence and the truth or falsity of the statements on the facts in dispute. It is at this moment when the probative value of each piece of evidence in relation to a legally relevant fact in the proceeding is determined. In this regard, the first step of this operation consists of establishing the credibility of each piece of evidence.

- p. 74-75 The second step in the assessment of the evidence is to specify the evidentiary strength or weight of each piece of evidence in relation to the facts to prove in the proceeding. It should be noted that the form of establishing the evidentiary strength is different depending on whether it is "direct" or "indirect" evidence. To determine if evidence is direct or indirect, the relationship between the object of the evidence and the facts to prove must be considered. Thus, the evidence will be direct if it deals with the fact to be proved; in contrast, it will be indirect if the evidence refers to a secondary fact from which it is possible to infer the existence of the fact to prove in the proceeding.
- p. 76 Based on the above, a statement of a child or adolescent asserting to have been victim of sexual abuse and identifying a person as responsible is clearly direct evidence in relation to the fact relevant to the proceeding: the sexual abuse and the identification of the person who engaged in that conduct. Thus, to be able to establish the evidentiary strength of the child's or adolescent's statement in a proceeding whose purpose is to clarify whether an episode of sexual abuse occurred, the credibility of the child's statement

must be determined. However, the problem is that the criteria for assessing the credibility of the child's or adolescent's statement, especially if the child claims to have been sexually abused, cannot be the same as those used to assess the credibility of the statement of an adult.

### **B. Analysis of the credibility of the statements of children and adolescents in cases of sexual abuse**

p. 77-78 Specialists have proposed different ways of assessing the credibility of child testimony in cases of sexual abuse. An important approach for assessing the credibility of child testimony in sexual abuse cases has been developed by the psychology of testimony. From this perspective, the assessment must be made from the content of the statement using criteria that in theory make it possible to differentiate true accounts from false ones.

p. 78 This second type of analysis is used in comparative law and is based on the idea that statements based on real facts (self-experienced) are qualitatively different from statements that are not based on reality, whether because they are the product of fantasy, a lie or they have been suggested by someone else. Moreover, a great advantage of this type of credibility assessment is that it uses techniques with respect to which there is empirical research to support its reliability.

Thus, with expert evidence on the credibility of the child's or adolescent's statement as described above, it is not intended to validate the complaint of abuse with "clinical" or "psychological" indicators, nor to determine the impact of the alleged act on the child, nor much less delve into the "therapeutic phase of the victim", but to determine if there are indicators of credibility in the child's account. These indicators are based on criteria applicable to both isolated statements and the evolution of statements over time, if the child or adolescent has made statements several times during the proceeding.

p. 78-79 As an example, among the criteria of reality on isolated statements, the following can be mentioned: the location of the action in space and time; the clarity and vividness of the account; the richness of details in the

narration; the originality of the child's version compared with stereotypes or *clichés*; the internal consistency of the account, i.e. the logical and psychological coherence; the mention of specific details of a particular type of sexual aggression, and the reference to details that exceed the capacity of the witness because they go beyond their imagination or ability to understand; subjective experiences such as feelings, emotions, thoughts, fears, etc.; mentions of unforeseen events or unexpected complications; spontaneous corrections, specifications and supplements during the statement, etc.

- p. 79      Nonetheless, the conclusions for or against the credibility of a child's or adolescent's statement should not be extracted solely from a simple finding of the presence or absence of these indicators, since their weight in each specific case depends on multiple factors. For this reason, these criteria must be applied by professionals trained in these techniques and with an up-to-date knowledge of the results of the empirical research on these analysis procedures.

### C. Expert evidence in the psychology of testimony

- p. 80      It is important to emphasize that unlike the participation of a professional in the conduct of the investigative interview through which the child's or adolescent's statement should be taken, the intervention of a psychologist to assess the credibility of a statement in cases of sexual abuse does have the nature of expert evidence and, therefore, all the rules that discipline its practice and assessment must be applied to it. However, although the interventions of the psychologists in each case – to obtain the statement and to assess it – must be clearly distinguished, this does not mean that they are not intimately related.
- p. 80-81      When the trial court judges hear a case of child sexual abuse, whether in the criminal or civil jurisdiction, they must order the taking of expert evidence from a professional duly trained to assess the credibility of that statement, provided there are reasons to doubt the testimony of the child. Those reasons may support the belief that the child's or adolescent's statement

is “false”, “fictitious”, “induced”, “erroneous” or simply that it does not provide “sufficient information” on the episode of sexual abuse.

- p. 81 When the appellate courts hear this type of case in the second instance, and once the child’s or adolescent’s statement has been assessed, whether individually or jointly in light of the rest of the probatory material, if they consider that there are reasons to doubt the veracity of the account, they should not just take away probatory value from it; rather they must order the reinstatement of the proceeding for the purpose of processing the mentioned expert evidence of a specialist in the psychology of child testimony, in order to ensure that the reasons the statement is doubted in this case are consistent with the scientific knowledge that exists on the credibility of the testimony of children who have been victims of sexual abuse.
- p. 81-82 The injunction (*amparo*) judges are also obligated to proceed in the same manner when the analysis of the legality of the assessment of the evidence in the case file reveals reasons to doubt the child’s or adolescent’s statement.
- p. 82-83 In any event, when the judge relies on expert evidence of this kind to determine the credibility of a child’s or adolescent’s statement, given that there is a great variety of techniques that can be used for this purpose, the expert must be requested to provide the “epistemic support” of the conclusions. This should not only include the relevant explanations on the technique used and a justification of the conclusions reached, but also empirical information related to the studies done to establish the reliability of the technique selected.
- p. 83-84 In this regard, it is important to emphasize that judges are not obligated to accept the conclusions of the specialist of the credibility of the child’s or adolescent’s statement, since according to a system of rational assessment of evidence judges are free to decide whether to assume those conclusions given their confidence in the theoretical authority of the expert. Thus, while experts use their specialized knowledge to report on a particular aspect of reality, it is the judge who decides what to do with that information, which in this type of case means deciding whether to give credibility to the testimony of a child or adolescent who claims to have been sexually abused.

### 3. The evidentiary standard in proceedings of loss of parental authority for sexual abuse

- p. 86 Based on the above explanations, once all the elements of judgment available have been assessed, the judge must decide whether the evidentiary hypothesis in the proceeding is proven. Thus, through the evaluation of the evidence the judge determines the degree of confirmation of evidentiary hypothesis and, subsequently, decides whether the degree of confirmation reached in this specific case satisfies the evidentiary standard that must be used in the respective process. In this regard, the assessment made of the evidentiary material is not itself what conditions the decision to be adopted, but the evidentiary standard.
- p. 87 The evidentiary standards can be seen as procedural mechanisms through which the risk of error in evidentiary decisions is distributed. From this perspective, there are basically two types of errors: declare as proven a false hypothesis, i.e. a description of the facts that does not correspond to reality (false positives); or declare as not proven a true hypothesis, i.e., a description of the legally relevant facts that do correspond to what actually occurred (false negatives). Thus, the evidentiary standard can influence the intensity with which the interests or rights potentially affected by those errors are protected by elevating above the minimum required by epistemological rationality the level of confirmation required to prove a fact in function precisely of the interests or rights at stake in each type of process.
- p. 89 However, legal systems also assume that sometimes it is unnecessary to distribute the risk of committing evidentiary errors because the interests or rights affected by them are of a similar nature and, therefore, merit the same protection. This is what occurs in most cases in civil proceedings, where the evidentiary standard of preponderance of the evidence applies.
- p. 89-90 With the foregoing considerations, it is possible to address the problem stated in relation to the evidentiary standard applicable to a civil proceeding whose purpose is to determine if a child's father has engaged in conduct

that is cause for losing parental authority. First, if the above explained scheme is transferred to this type of proceeding, the evidentiary errors that could arise and the interests affected in either case would be the following: (i) declaring proven a cause when that conduct did not occur (condemn innocent parents), would be an error that would affect a very relevant right of one of the parents, as is the parental authority exercised over a child or adolescent; and (ii) declaring the cause for the loss of the parental authority not proven when the parent did engage in the conduct (absolve guilty parents), would be an error that would substantially affect the child or at least could put the child at risk of suffering harm.

p. 92      However, it should be recalled that since the recognition of the constitutional status of the fundamental rights of children established in international treaties, particularly those contemplated in the Convention on the Rights of the Child, the Supreme Court no longer considers the loss of parental authority as a sanction imposed on parents for violating their duties, the holding is instead that it is a measure necessary for the protection of the best interests of the child.

In this vein, Article 19.1 of the Convention on the Rights of the Child establishes the right of children to be protected from all forms of abuse, including sexual abuse. Thus, the Supreme Court considers that the interests of innocent parents that could possibly be harmed by the error of declaring the cause proven deserve the same protection as the interests of minors actually affected by the conduct of the parents who could also be harmed with the error of declaring the cause not proven.

p. 92-93      This consideration is reinforced in cases such as this one, when the loss of parental authority is demanded in a civil proceeding supported by an accusation of sexual abuse, since establishing a high standard of confirmation in order to protect the interests of parents that could be affected by the risk of committing the first type of error (condemn innocent parents), would expose minors to an equally undesirable risk, because given the characteristics of sexual abuse cases (conduct that is usually carried out in

a hidden manner, where the victim's testimony is the only direct evidence, etc.), a high standard of proof would also result in a smaller number of cases in which the sexual abuse is declared proven and, correlatively, in a greater number of cases in which the episodes of sexual abuse are declared not proven, with which the risk of committing the second type of error (absolve guilty parents) would also have a very high cost in global terms for minors.

- p. 93 In accordance with the above, the Supreme Court considers that the fundamental rights of minors to be heard in judicial proceedings and to be protected against all forms of abuse, in connection with the best interests of the child, impose the requirement that in civil proceedings when the loss of parental authority exercised by one of the parents is demanded based on certain facts that involve some type of abuse toward the minor, the evidentiary standard of preponderance of the evidence be adopted.

### Decision

- p. 94 The appealed decision was amended, and therefore the Supreme Court ordered expert evidence be submitted from a specialist in the techniques developed by the psychology of testimony to assess the statements of minors believed to have been sexually abused, and with that a new decision be issued based on the constitutional doctrine established by the Supreme Court in this decision.



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## ACCESS TO SEXUAL EDUCATION FOR CHILDREN AND ADOLESCENTS (RIGHTS OF CHILDREN AND ADOLESCENTS VIS-À-VIS THE EXERCISE OF PARENTAL AUTHORITY OF THEIR PARENTS)

### *Amparo en Revisión 800/2017*<sup>27</sup>

**Keywords:** Rights of children and adolescents, sex education, best interests of the child, equal treatment and non-discrimination, exercise of parental authority, freedom of conscience, thought and religion, right to personal integrity, right of children to association and assembly, privacy and access to telecommunications.

#### Summary

M in his own right and on behalf of his daughter, filed a two stage judicial review relieving an un-remediated breach of rights (*amparo indirecto*). In his lawsuit, he questioned the constitutionality of various provisions of the General Law on the Rights of Children and Adolescents (General Law) and the Law on the Rights of Children and Adolescents for the State of Aguascalientes (Aguascalientes Law). He argued, *inter alia*, that those provisions violated the best interests of the child, as well as the right of parents to educate their children in accordance with the values they deem appropriate for their normal and healthy development. The

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<sup>27</sup> Decision issued by the First Chamber of Mexico's Supreme Court of Justice (November 29, 2017). Reporting Justice: Alberto Pérez Dayán. Action For Constitutional Relief Through Injunction 800/2017

judge who heard the case dismissed the injunction (*amparo*) based on the presence of various grounds for invalidity. M filed an appeal before a Collegiate Circuit Court. The Collegiate Circuit Court decided to lift the dismissal ordered by the judge, and to refer the matter for its review and decision to the Supreme Court of Justice of the Nation since questions of constitutionality remained.

### Issue presented to the Supreme Court

Whether (i) Article 61, section I, of the *Amparo* Law is unconstitutional for violating the principle of progressivity; (ii) the Congress of the Union is empowered to legislate substantively on the rights of children and adolescents; (iii) certain provisions of the General Law and the Law in Aguascalientes violate the best interests of the child and the right of parents to educate their children because they establish, *inter alia*, the right to access to sex education and contraceptive methods, the right of children to association and assembly, privacy and access to telecommunications; (iv) these provisions impose an undue restriction on the exercise of parental authority.

### Holding and vote

The injunction (*amparo*) was denied for the following reasons. The challenged provisions do not violate the best interests of the child; on the contrary, they form a regulatory unit that provides for the recognition of children and adolescents as holders of human rights. They also provide that the Federal Government, States and Municipalities must implement measures and mechanisms to guarantee the full exercise, respect, protection and promotion of these rights. Consequently, the decision was amended due to the dismissal lifted by the Collegiate Circuit Court.

The Second Chamber decided this case with the unanimous vote of the five Justices Alberto Pérez Dayán, Javier Laynez Potisek, José Fernando Franco González Salas and Eduardo Medina Mora I, and Margarita Beatriz Luna Ramos (cast her vote against arguments).

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### EXTRACT FROM THE DECISION

p. 2 Mexico City. The Second Chamber of Mexico's Supreme Court of Justice, in session of November 29, 2017, issues the following decision.

## Background

p. 10-11 M, in his own right and on behalf of his minor daughter, sued for an injunction (*amparo*) and protection of the Federal Courts against the Constituent Assembly, the Congress of the Union –the Senate and the House of Representatives–, the Secretary of the Interior, the President of the United Mexican States, and the Legislative Branch of the State of Aguascalientes for the discussion, approval, issuance, publication and promulgation, within the scope of their respective competencies of:

(I) Article 1 of the Constitution, published in the Federal Official Gazette on the fourteenth of August of two thousand one, by which the word “gender” was added.

(II) Articles 10, second paragraph; 37, section V; 39, first paragraph; 50, sections VII and XIII; 57, section VI; 62; 103, section I; 16, section IV; 121; 122 and 126 of the General Law on the Rights of Children and Adolescents.

(III) Articles 1 section II, 4 section XXIII, 9, 10 second paragraph, 37 section I, 39 first paragraph, 40 third paragraph, 42, 47 antepenultimate paragraph, 53, 57 section VI, 79, 80 section II, 87, 88, 90, 93, 95, 96 section I, 100, 104 sections I and XII, 108, 109 sections VI, VII, XII, XIII, 110 first paragraph and section V, IX, XIII, 112 section XVIII, XXI, 116 sections VII and XV, 119 section I, XIII, 123 and 127 sections V and VI, as well as the Sixth, Seventh and Tenth transitory articles of the Law on the Rights of Children and Adolescents in the State of Aguascalientes.

p. 11-12 M stated that these legal provisions violate the role of parents with regard to the guidance and teaching of children in accordance with their moral and religious convictions; violate the best interests of minors; discriminate against adolescent boys and men on the basis of gender; and threaten the healthy development of the family.

p. 12 The District Judge issued a decision on July 14, 2015, in which he dismissed the suit based on the grounds for invalidity in Article 61, sections I and XXIII of the *Amparo* Law.

p. 15 M filed an appeal against this judgment.

In its session of June 15, 2017, the Collegiate Circuit Court decided that the grievances stated against the dismissal were well founded.

p. 20 It was thus necessary to overturn the dismissal declared by the judge and review the grounds for complaint that were not reviewed, except for Article 45 of the General Law, to which the grounds for invalidity set forth in Article 61, section XII, of the law applied.

The Collegiate Circuit Court declared that it was incompetent to analyze the arguments questioning the constitutionality of the challenged provisions of the General Law and the Law of Aguascalientes.

p. 20-21 It then referred the matter to the Supreme Court, which turned the case over to Justice Alberto Pérez Dayán for the resolution of the question raised.

### Study of the merits

#### XIV. Constitutionality of Article 61, section I, of the *Amparo* Law

p. 23 The principle of progressivity is not absolute; instead it is necessary to analyze whether this measure generates a reasonable balance between the fundamental rights at stake, without excessively affecting the effectiveness of any of them, since otherwise it will be regressive legislation.

p. 26 The fact that the new *Amparo* Law establishes a cause for invalidity that was not expressly established in the abrogated law does not imply that there is regression as to the validity of the means of constitutional control. It is plausible that this cause was implicit in the previous *Amparo* Law.

p. 29 The Supreme Court considers that the alleged right to challenge the articles of the Federal Constitution has no legal or judicial basis since it is not

feasible, through the injunction (*amparo*), to analyze the constitutional regularity of the provisions of the Federal Constitution.

- p. 30            Consequently, the dismissal declared with respect to the challenge to Article 1 of the Federal Constitution must remain firm.

**Power of the Congress of the Union to legislate on the substantive issue of the rights of children and adolescents**

- p. 31            Concurrent laws must protect the rights of minors and their best interests, and therefore such laws require substantive content to fulfill that purpose.

- p. 32-33        The three levels of government must give better results since as a fundamental right it should not be treated differently.

The purpose of the unification of substantive aspects is the full harmonization of the rights recognized in Article 4 of the Federal Constitution and in various international instruments, in order to achieve “the establishment of a comprehensive policy on the rights of the child.”

The Congress of the Union is empowered to legislate on substantive aspects of the rights of minors.

**Analysis of the constitutionality of Articles 10, 37 section I, 39, 40 third paragraph, 42, 47 antepenultimate paragraph, 57 section VII, and 116 section IV and XII, of the General Law on the Rights of Children and Adolescents [inclusion of the words “gender” and “sexual preference”]**

- p. 34            M argues that the articles are unconstitutional because the reference to the “gender” and “sexual preference” of minors can be linked to certain acts that do not correspond to the age of a child. This violates the best interests of the child, as well as the right of parents to educate their children according to the values they deem appropriate for their normal and healthy development.

p. 36-37 The provisions challenged are limited to protecting the equal exercise of the rights of minors by establishing two legal mandates:

(I) A clause prohibiting discrimination against minors. (II) Obligations on federal and local authorities to adopt special protection measures to give effect to the rights of those minors who are in a situation of vulnerability, among which sexual preference and gender are mentioned.

The challenged articles recognize the human right of minors to equal treatment before the law, in its dimension of prohibition of discrimination.

p. 37-38 The challenged provisions are not intended to establish, develop or regulate the sexuality of minors; nor do they undermine the creation of a safe and conducive environment for children or impede the right of parents to educate their children in accordance with the values they deem conducive to their healthy development. Their purpose is to recognize and protect the human right to equal treatment before the law.

p. 41 Articles 10, 37 section I, 39, 40 third paragraph, 42, 47 antepenultimate paragraph, 57 section VII, and 116 section IV and XII, of the General Law are consistent with the standard of constitutional review.

p. 42 The same conclusion is reached regarding the provisions of the Law of Aguascalientes, since these articles only replicate the content of the challenged mandates of the General Law.

**Analysis of the constitutional regularity of Article 37, section V, of the General Law on the Rights of Children and Adolescents [discrimination against children and adolescents on the basis of gender]**

p. 43 According to the plaintiff, for the authorities to take the necessary measures to achieve the empowerment of girls and adolescent females implies that they must establish a legal benefit in favor of some minors solely because of their sex. Implicitly, this constitutes differential treatment of male children and adolescents who do not enjoy such protection, which results in the violation of Articles 1 and 4 of the Federal Constitution.

p. 43-44 The purpose of the provision is to ensure the substantive equality of minors.

Positive actions in the area of equality are intended to achieve, eventually, the elimination of historical discrimination against certain groups and, even if there is differential and preferential treatment for this group, it is not contrary to the human right to equal treatment before the law, provided that such a measure is reasonable and proportionate. The mandate is, then, constitutionally reasonable.

p. 50 Article 37, section V, of the General Law, by establishing institutional measures aimed at promoting the empowerment of girls and adolescent females, does not violate the human right to equality to the detriment of boys and adolescent males. Such positive actions are in accordance with the standard of constitutional review insofar as their purpose is to achieve substantive equality – i.e., not just legal, but actual - between men and women who are of age.

p. 51-52 They do not violate Articles 1 and 4 of the Federal Constitution; on the contrary, they serve their contents. The same applies to the provisions of the Aguascalientes Law.

**Analysis of the constitutionality of Article 50, sections VII and XI, of the General Law on the Rights of Children and Adolescents [violation of parental authority of parents and the best interests of children and adolescents]**

p. 54 M alleges that guaranteeing minors access to contraceptive methods, as well as providing advice and guidance on sexual and reproductive health, violates parental authority and creates a harmful environment for minors.

p. 57 The human right of minors to enjoy the highest possible level of health is an inclusive prerogative, encompassing not only timely and appropriate prevention, but also the right to grow and develop to the fullest and to live in conditions that enable them to enjoy that human right.

- p. 58 The child's right to health consists of a series of freedoms and rights. Among the freedoms of growing importance as capacity and maturity increase is the right to control one's own health and one's own body.
- p. 66 The normative provisions challenged are not in violation of the best interests of the child, nor do they generate an environment harmful to minors; rather they are an integral part of the human right to the highest possible level of physical and mental health of minors.
- p. 68 The rights of children should not be understood as an impediment for parents to educate and guide minors within an ethical, moral or spiritual framework that allows the full and harmonious development of their personality and that guides them to prevent acts that are harmful to their well-being.
- P. 70 The General Law does not deny the parental rights to educate and guide minors; on the contrary, its provisions expressly recognize them and even impose the obligation on federal and local authorities to provide them with the tools to carry out their role.

**Analysis of the constitutionality of Articles 57, second paragraph, and 103, section I, of the General Law on the Rights of Children and Adolescents [violation of the exercise of parental authority]**

- p. 73 M argues that the articles infringe the right to exercise parental authority over minors because they limit such exercise by imposing an obligation on parents to exercise it in accordance with the provisions of the Law.
- p. 76 Ensuring that any action or measure taken with respect to minors does not violate the rights recognized for minors is constitutionally reasonable. The exercise of parental authority is constrained by the observance of legal principles aimed at the protection of minors.
- p. 77 Subjecting the exercise of parental authority and, in general, the care of minors to the provisions of the General Law is a basic necessity so that

minors can enjoy a full life in conditions commensurate with their dignity and that guarantee their integral development.

Parental authority is not configured merely as a right of the parents, but for the benefit of the children. It is aimed at the protection, education and integral formation of the child, whose interest is always prevalent in the parent-child relationship.

- p. 79      Consequently, the General Law does not violate the right of parents or other caregivers to educate minors. The same conclusion is reached with respect to the provisions of the Aguascalientes Law.

**Analysis of the constitutionality of Article 62 of the General Law on the Rights of Children and Adolescents [freedom of conscience and religion]**

- p. 81-82      M states that the article is unconstitutional since, while it is good that there is freedom of conscience and religion, it is inappropriate to treat minors as if they were adults.
- p. 83      The purpose of the challenged provisions is: (I) to recognize and guarantee the human right of minors to have freedom of thought, conscience, ethics and religion; (II) to establish that such freedoms may only be limited by law when necessary to protect the fundamental rights and freedoms of others; and (III) that minors may not be discriminated against in any way for exercising their freedom of ethical convictions, thought, conscience, religion and culture.
- p. 89      As they mature and acquire greater awareness, it will be minors who exercise the right to freedom of thought, conscience and religion. The parental function must necessarily decrease progressively, while children acquire, during adolescence, an increasingly active role in the exercise of their elective capacity, until they transition to adulthood.

**Analysis of the constitutionality of Article 50, section XIII, of the General Law on the Rights of Children and Adolescents [voluntary sterilization]**

- p. 90 M argues that the articles are unconstitutional because they prohibit forced sterilization and imply that, on the contrary, if it were consented, it is allowed.
- p. 93 The Supreme Court does not find that the legislator has granted a right to minors to voluntarily undergo sterilization procedures; only the obligation of the authorities to carry out and implement programs against the forced sterilization of minors is inferred.
- p. 94 It is not possible to examine the constitutional regularity in the abstract of the voluntary sterilization of minors, since the constitutionality of such legal question would be analyzed in specific cases, for example, if a provision is issued that expressly provides for access to such a procedure.

**Analysis of Article 13, sections XVI, XVII and XX, of the Law on the Rights of Children and Adolescents for the State of Aguascalientes [right of association, privacy and access to information technologies]**

- p. 95 M argues that the challenged sections are unconstitutional because they violate the right of parents to educate their children according to their own convictions. This is because (i) children cannot have unrestricted freedom to associate and assemble; and (ii) the right to privacy of minors must always be monitored by parents to prevent them from being perverted or disoriented.
- p. 96 The challenged provisions recognize the human rights of minors: (I) to associate and assemble; (II) to privacy and; (II) to access to information and communication technologies, as well as to broadcasting and telecommunications services. Thus, they recognize, at the secondary level, the rights derived from Articles 6 of the Federal Constitution and 15, 16 and 17 of the Convention on the Rights of the Child.

### a. Right of association and assembly

- p. 99 The right of association and assembly cannot be conceived identically for children and adolescents. Each of these stages of childhood presents a differentiated degree of freedoms and duties with respect to its exercise: the higher the levels of learning, knowledge and maturity, the greater the possibilities for minors to have a wider margin of autonomy to exercise, by themselves, such rights.
- p. 101 In conclusion, the Aguascalientes Law, by recognizing the right of association and assembly, does not violate the best interests of the child, nor the right and duty of parents to ensure the well-being of their children and their healthy development.

### b. Right to privacy

- p. 103 The right to privacy of minors does not imply that the parental roles of guidance, teaching and care are ignored. It means, rather, that those roles are adapted to each stage of childhood in such a way as to allow children and, above all, adolescents to exercise gradually, by themselves, their right to privacy in an informed and responsible manner.

The Aguascalientes Law, by recognizing the right to privacy, does not violate the best interests of the child, nor the right and duty of parents to ensure the well-being of their children and their healthy development.

### c. Right to information technology

- p. 105 The Supreme Court, aware of the possibilities, benefits and risks of information technologies and their easy access, considers that parents cannot ignore their duty to protect the child against all information. Although minors have the right to access information and communication technologies, as well as broadcasting and telecommunications services, this cannot be understood to mean that children can and should access any material and information through such means of communication and at any stage of childhood.

p. 107 In conclusion, the Aguascalientes Law, by recognizing the right to communications, as well as access to telecommunication and radio broadcasting services, does not violate the best interests of the child, nor the right and duty of parents to ensure the well-being of their children and their healthy development.

**Analysis of the constitutionality of Articles 19, section IV, and 96, section I, of the Law on the Rights of Children and Adolescents for the State of Aguascalientes [right to identity and free development of one's personality]**

M states that the articles are unconstitutional because it is incorrect to establish the right to identity of minors and that the authorities must collaborate in the search, location and obtaining of the information necessary to prove or restore the identity of minors. This function supplants the role of parents.

**d. Right to privacy**

p. 108 The article recognizes the human right to identity. For its effective protection, local authorities must collaborate with the search, location and obtaining of the information necessary to prove or restore the identity of children and adolescents.

The rule is limited to sending the location and the safekeeping of the official data that make it possible to identify a minor to the local authorities, such as: (I) name; (II) nationality; (III) cultural affiliation; (IV) kinship; and (IV) in general, any other information with which the minor's identity can be determined or restored.

**e. Right to free development of one's personality**

p. 108-109 M states that the provision is unconstitutional since minors cannot enjoy the free development of their personality. Children are in training and cannot freely develop their personality except with the advice of the parents.

- p. 111 Minors do have the right to the free development of their personality. The development of their being and their abilities as a person should not be understood in isolation, but as an integral and interdependent part of the right to education, training and teaching that both the state and parents or other caregivers must provide.
- p. 111-112 The Supreme Court considers that the recognition for minors of the free development of their personality does not violate or prevent parents from advising, guiding and forming their children. On the contrary, such an educational function is a necessary prerequisite for children and adolescents to truly display the gifts, skills, capacities and characteristics that make them unique and that allow them to lead a full and satisfactory life within society progressively.

**Analysis of Article 27 of the Law on the Rights of Children and Adolescents for the State of Aguascalientes [adoption of children and adolescents]**

- p. 112 M argues that the article is contrary to the standard of constitutional review since it does not seek the best interests of the child because it refers to people interested in adopting minors, which can be a plurality of individuals. Children have the right to have a father and a mother and not to be cared for by any person, collective or individual.
- p. 114 The fact that the challenged article has the phrase “interested persons” does not imply that it should be considered unconstitutional. The essential aspect of the right of minors to have a family through adoption is the suitability, virtues and qualities of whoever intends to adopt them.
- p. 115 The suitability of applicants for adoption is not limited to their marital status, specifically, to marriage, but to the qualities and skills to raise a child and that, precisely, determine them as the most beneficial option for the well-being and healthy development of the child. This must be assessed by the competent authority.

**Decision**

- p. 116      The arguments put forward by M are unfounded. Therefore, the decision is amended – in relation to the dismissal by the Collegiate Circuit Court - and the *injunction (amparo)* against the articles of the General Law and the Aguascalientes Law is denied.

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RIGHT OF CHILDREN AND ADOLESCENTS TO  
THE FREE DEVELOPMENT OF THEIR  
PERSONALITY, RIGHT TO MARRIAGE,  
AND RECOGNIZING GENDER VIOLENCE

*Acción de Inconstitucionalidad 22/2016*<sup>28</sup>

**Keywords:** *right of children and adolescents to the free development of their personality, right to marriage, gender violence, rights of children and adolescents, best interest of the child, principle of progressivity of human rights, proportionality test, child marriage.*

**Summary**

The Human Rights Commission of the State of Aguascalientes [Comisión de Derechos Humanos del Estado de Aguascalientes] (the CDHEA) filed an action of unconstitutionality (*acción de inconstitucionalidad*) against the decrees of 309 and 310, issued by the Aguascalientes Congress. The purpose of those decrees was to reform various provisions of the Aguascalientes Civil Code [Código Civil de Aguascalientes] (CCA), so that children and adolescents could be granted waivers to marry. The CDHEA argued that the elimination of this possibility was contrary to Articles 1, 4, 14 and 133 of the Federal Constitution; 16 of the Universal Declaration

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<sup>28</sup> Decision issued by the First Chamber of Mexico's Supreme Court of Justice (March 26, 2019). Reporting Justice: José Fernando Franco González Salas. Action of Unconstitutionality 22/2016

of Human Rights; 23 and 24 of the International Covenant on Civil and Political Rights; 17 and 19 of the American Convention on Human Rights (ACHR); 8.1 of the Convention on the Rights of the Child (CRC) and 2 of the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (Consent Convention), instruments protecting the rights to legal security, marriage, the protection of the family and childhood, the free development of one's personality and non-discrimination.

### Issue presented to the Supreme Court

To determine whether or not eliminating the possibility of granting marriage waivers to children and adolescents under 18 so that they can marry for serious and justifiable causes, in Aguascalientes, violates the human rights of children and adolescents.

### Holding and vote

The challenged reform was declared valid essentially for the following reasons. This Court concluded that the reform was not contrary to the Federal Constitution or to the international treaties that Mexico is party to. In particular, it was determined that the Consent Convention was not violated since it establishes that the State parties have the power to implement waivers, which does not constitute an obligation to implement them. Furthermore, it was considered that the reform constitutes a reasonable measure in relation the purpose sought, since the measure complies -eliminates the waivers- with a constitutional and conventional purpose -the protection of children and adolescents from a harmful practice- and this does not disproportionately affect other rights. Regarding the free development of one's personality, the conclusion was reached that the reform, rather than violating this right, strengthens it, since before the reform it could not be considered that the children and adolescents who were able to marry exercised this freedom fully, because their will was substituted by the will of their parents and/or a judge. Furthermore, it was emphasized that the rights derived from filiation are not affected since they are recognized regardless of whether or not they are married. Finally, this Court determined that the rights and benefits accessed through marriage are not violated since the purpose of the reform was to protect the rights of children and adolescents that are considered broader than any other right derived from the marriage.

The claim that the Aguascalientes Congress has violated Article 2 of the Consent Convention by eliminating the waivers so minors could marry was dismissed by a majority of 9 votes of the Justices Norma Lucía Piña Hernández, Yasmín Esquivel Mossa, Juan Luis González Alcántara Carrancá, José Fernando Franco González Salas, Luis María Aguilar Morales, Eduardo Medina Mora I. (reserved the right to a concurring opinion), Alfredo Gutiérrez Ortiz Mena, Javier Laynez Potisek, Arturo Zaldívar Lelo de Larrea. The Justices Jorge Mario Pardo Rebolledo, and Alberto Pérez Dayán voted against.

The claim that the reform constitutes a constitutionally valid restriction was approved by a majority of 5 votes of the Justices Norma Lucía Piña Hernández, Alfredo Gutiérrez Ortiz Mena, José Fernando Franco González Salas, Javier Laynez Potisek, Arturo Zaldívar Lelo de Larrea. The Justices Juan Luis González Alcántara Carrancá, Luis María Aguilar Morales, Jorge Mario Pardo Rebolledo, Eduardo Medina Mora I., and Alberto Pérez Dayán voted against.

It was determined that the reform does not violate the free development of children's and adolescents' personality by a majority of 5 votes of the Justices Norma Lucía Piña Hernández, Alfredo Gutiérrez Ortiz Mena, José Fernando Franco González Salas, Jorge Mario Pardo Rebolledo, and Javier Laynez Potisek. The Justices Juan Luis González Alcántara Carrancá, Luis María Aguilar Morales, Eduardo Medina Mora I., Alberto Pérez Dayán, and Arturo Zaldívar Lelo de Larrea voted against.

It was determined that the reform by the Aguascalientes Congress does not violate the principle of progressivity of human rights by a majority of 5 votes of the Justices Norma Piña Hernández, Alfredo Gutiérrez Ortiz Mena, José Fernando Franco González Salas, Jorge Mario Pardo Rebolledo, and Javier Laynez Potisek. The Justices Juan Luis González Alcántara Carrancá, Luis María Aguilar Morales, Eduardo Medina Mora I., Alberto Pérez Dayán, and Arturo Zaldívar Lelo de Larrea voted against.

It was determined that this reform does not violate the rights of children born out of wedlock, nor violates the rights they have access to through marriage by a unanimous 10 votes of the Justices Norma Piña Hernández, Alfredo Gutiérrez Ortiz Mena, Juan Luis González Alcántara Carrancá, José Fernando Franco González Salas, Luis María Aguilar

Morales, Jorge Mario Pardo Rebolledo, Eduardo Medina Mora I., Javier Laynez Potisek, Alberto Pérez Dayán and Arturo Zaldívar Lelo de Larrea.

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### EXTRACT OF THE DECISION

p. 1 Mexico City. The Plenary of Mexico's Supreme Court of Justice (this Court), in session of March 26, 2019, issues the following decision.

#### Background

p. 1-2 On March 22, 2016, a brief was received by the President of the Human Rights Commission of the State of Aguascalientes [Comisión de Derechos Humanos del Estado de Aguascalientes] (CDHEA). An action of unconstitutionality (*acción de inconstitucionalidad*) was filed against the reform of Article 145 of the Civil Code of Aguascalientes [Código Civil de Aguascalientes] (CCA) and consequently, the derogation of Articles 85, 86, 87, 88, 90 section II, 95 sections II and IV, 146, 148, 149, 150, 151, 152, 153 section II, 169, 184, 465 section II, 473, 521, 647 section II, 660, 665 and 667, and the reforms of Articles 28 section I, 90 section V, 92, 153 section I, 168, 179, 231, 287, 435, 457, 460, 464, 495, 663 and 775 (sic) section I, of the CCA, issued through Decree Number 309 issued by the LXII Legislature of the Congress of the State of Aguascalientes, and also as a consequence of the derogation of Articles 138, 260, 261, 262, 263 and the reform of Article 137 of the CCA issued through Decree number 310 issued by the LXII Legislature of the Congress of the State of Aguascalientes, both published in the Official Gazette of the State of Aguascalientes on February 22, 2016 in the first section.

p. 7 The CDHEA specified as violated constitutional and conventional concepts Articles 1, 4, 14 and 133 of the Federal Constitution; 16 of the Universal Declaration of Human Rights; 23 and 24 of the International Covenant on Civil and Political Rights; 17 and 19 of the American Convention on Human Rights and 2 of the Consent Convention.

- p. 7-8 By order of March 29, 2016, the President of this Court ordered the case file be formed and recorded. Judge José Fernando Franco González Salas was designated and he, through ruling of March 30, 2016, admitted the action.

### Study of the merits

- p. 86-87 An analysis done of the group of reforms made to the normative system related to the exceptional possibility that, until before February 22, 2016, youth over fourteen and under eighteen years of age had, in serious and justified cases, according to the judicial authority, exercised the right to marry in the State of Aguascalientes, as well as all the provisions that the recognition or permission for marriage of minors might imply.
- p. 87 Furthermore, those violations must be analyzed taking into consideration the principles of the best interest of the child and within the perspective of gender, emphasizing the impact suffered by girls (under eighteen years of age) who marry through the granting of waivers.
- p. 88-91 When deciding Action of Unconstitutionality (*Acción de Inconstitucionalidad*) 39/2015, this Court considered that the best interest of the child is an expression of the principle of personal autonomy and it has an important connection to the free development of one's personality. According to this principle, since the free individual choice of life plans and ideals of human excellence are valuable in and of themselves, the State is prohibited from unduly interfering with that choice and their materialization. The State must be limited to designing institutions that facilitate the individual pursuit of those life plans and the satisfaction of the ideals of virtue each person chooses, and to preventing the unjustified interference of other persons in pursuit thereof.
- p. 92 Notwithstanding that rights of minors are involved, their exercise, under certain conditions, may be restricted based on their conditions of immaturity. In effect, as a general rule, minors have not reached the conditions of sufficient maturity to rationally weigh their own interests, and therefore

certain decisions they make, under those conditions, could have the effect of harming their future autonomy and their own interests. Thus, while the progressive participation of minors in all the decisions that affect them must be procured; under certain conditions it is justified to impose on them the exercise of certain rights, including against or without their consent; these types of measures are justified if and only if and to the extent that their purpose is, precisely, to preserve the autonomy of the minor.

p. 93,95 This Court has established that the best interest is a guiding principle of all normative production. This is understood broadly and related to the rights of the minor, which includes not only the interpretation and application of the law by the judges, but also all the measures undertaken by the lawmaker. When it involves legislative measures that affect rights of minors, the best interest of the child requires that judicial bodies engage in a much stricter scrutiny in relation to the constitutional legitimacy of the measure, since it involves an impact on a principle that compiles the fundamental rights of minors and, therefore, which can have a very important impact on their future autonomy. This means that every normative decision directed towards minors that does not give priority to their protection or seek the most benefit will be contrary, *prima facie*, to the best interest of the child.

p. 99 It is important to emphasize that child marriage in our country is common and mainly affects girls. This occurs more among girls those that live in poverty, have a lower level of education, and are concentrated primarily in rural and indigenous communities.

In effect, according to General Recommendation number 31 of the Committee for the Elimination of Discrimination against Women, child marriage is often accompanied by early, frequent pregnancies and births that provoke higher than average maternal mortality and morbidity rates. In these types of marriages, particularly when the husband is considerably older than the wife and in which the girls have a low level of education; the girls often have restricted decision-making power with respect to their own lives. Additionally, child marriage leads to higher rates of school dropouts,

expulsion from school, a greater risk of domestic violence and to the limiting of enjoyment of the right to freedom of circulation for girls.

Thus in this case it is necessary to take into consideration not only the best interest of the child but also a gendered perspective since only then can the consequences of child marriages –achieved through the granting of waivers to minors under eighteen years of age– be clearly seen with respect to girls (including adolescents).

### **I. Conventionality of the reform of the Civil Code of Aguascalientes**

- p. 100 Human rights are not static; rather they are dynamic in that they develop based on the changes in society as well as its needs that they try to satisfy within the greatest scope possible.
- p. 101-102 In the case of the right to marry, Article 2 of the Consent Convention established, on the one hand, that persons who have not reached the minimum age adopted by each State for marriage could not marry, and on the other hand that the States could establish exceptions to that rule when the competent authority, for justified causes and in the interest of the couple, waive the age requirement.
- p. 104 Since the issuance of that international instrument, it was recognized that the practice of child marriages should be restricted until its abolishment could be achieved. Therefore, the authorization established in Article 2 should not be understood as an obligation on the part of the States to establish that type of waiver nor as a right in favor of minors to obtain it. It could be understood as a mere power granted to the States so that, based on the circumstances and realities of the period in which the cited agreement was signed, in certain cases, if they considered it necessary, they could provide for and regulate these types of waivers. In this regard, while the Mexican State has the power to recognize age waivers for marriage this does not imply that these types of exceptions should necessarily be established.

- p. 104-105 Furthermore, the interpretation of the norms related to the waivers that permit child marriage must consider not only the terms of the Consent Convention, but also the terms of the CRC, the Convention on the Elimination of all forms of Discrimination against Women, and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women.
- p. 106-107 This makes it possible to corroborate that, while Article 2 of the Consent Convention is still in force and therefore the possibility of States providing waivers such as the one in question still exists, such provision, interpreted systematically, leads to the conclusion that the international trend is to gradually eradicate child marriages. This interpretation is strengthened if it is taken into consideration that both the Committee on the Rights of the Child and the Committee for the Elimination of Discrimination against Women have recommended to various countries that they eliminate from their internal laws the possibility of granting waivers to minors under 18 to marry. With respect to Mexico, they have recommended that the age limit of 18 be effectively applied in all the States and that practice be respected throughout the country. This recommendation provoked a series of internal reforms.
- p. 109 Given this scenario, it cannot be asserted categorically that the state lawmaker violated Article 2 of the Consent Convention, upon eliminating from the CCA all the norms related to the exceptional possibility that minors under eighteen years of age can marry, since the elimination of these types of waivers constitutes a legislative act that is a foothold in the framework of conventional powers the local lawmaker had, in accordance with the normative-conventional framework.

## **II. Reasonability of the measure in relation to the purpose pursued by the lawmaker**

- p. 110-111 This Court has applied a reasonability test as a methodological resource that allows it to elucidate whether the lawmaker, in exercise of its configurative

power, issued a reasonable law or made reasonable reforms. Regarding this case, the following questions must be raised:

a. Does the measure adopted by the lawmaker comply with a constitutional, conventional or important purpose for the State?

b. If the response to the above question is affirmative then it would have to be elucidated whether or not the legislative reform is related to the pursued purpose.

p. 111-115 The legislative process that resulted in the reform and derogation of the provisions challenged here shows that the restriction established by the lawmaker meets a valid purpose from the constitutional point of view. This consists of protecting children and adolescents from a practice that has been considered harmful for that sector of society both in the national and international sphere and which, it must be said, also has constitutional and conventional support in the best interest of the child. The following problems have been seen in a large number of marriages in which one or both parties are under eighteen years of age, and more so in the case of girls: it is hard for them to have access to education and information; they remain at the margin of social activities; they are considered adults legally and therefore they are deprived of all the special protective measures they are entitled to; they must assume the obligations corresponding to marriage, they are also more likely to acquire responsibilities resulting from paternity or maternity, as applicable; serious harm to health is eventually generated as a result of carnal compliance and other practices that have been associated with marriage; economic autonomy is restricted; and the development of skills and independence is limited and employment opportunities reduced, which also harms the family and the community.

p. 115 Regarding the second question, this Court considers that the legislative restriction is linked to the constitutional purpose sought in the suit since the objective of the reforms was precisely to protect minors, and especially girls, from the harmful and pernicious consequences that, given their special situation, they suffer when they submit or “agree to” marriage.

p. 116 It should also be said that in our country, and specifically in the State of Aguascalientes, it has been shown that when attempting to legislate waivers for marriage there is a risk that the lawmaker will issue regulations such as those in force until the reforms that are challenged here. As such, it was established that the waivers would be granted only for “serious and justified” causes and following the consent of the parents of the minor, making the free consent of the couple secondary.

Before the reforms challenged here in order for minors under eighteen years of age to be able to marry they had to have the consent of the father and the mother, if both were alive, or their substitute, and in the absence of one or the other, of the judge. This evidenced the intention of making the consent, preference and interests of the minors secondary, so that it could be substituted by that of their parents.

In this respect it must be said that the repercussions that girls and adolescents suffer in their development, health, education, independence and economic autonomy, among other aspects, as a result of child marriage, are not remedied nor cease to affect them by the fact of having obtained the consent of their parents.

p. 116-117 On the contrary, such consent, which does not even involve the minors’ wishes therefore compounds the possibility of harm to their development and violates the right they have to be heard and taken into account in the matters of their interest. By supplanting their consent minors are restricted in their autonomy and in their right to freedom.

p. 117-118 The fact that the waiver of marriage for minors under eighteen years of age is submitted to judicial control, which is to say to the authorization of a judge, with the prior consent of the parents of the minor, as was permitted, does not necessarily guarantee the security and wellbeing of the children and adolescents involved; on the contrary, it has generated situations that affect a large number of rights. In this regard, when the existence of “serious and justified causes” is established as a condition for granting the waiver, it

is shown that the intention was not to protect the rights of the respective children or adolescents; on the contrary, it was intended to “resolve”, through marriage with a girl or boy, a problem derived from “serious and justified causes”, such as the pregnancy or the violation of some local “custom” or of the gender roles that still survive in some societies, overlooking the free will of the minor and the real purpose of marriage, which should not be a consequence of a serious cause, but on the contrary, must be the result of the free and informed consent of the parties.

- p. 118 It does not go unnoticed that the percentage of mothers under nineteen increased from two thousand thirteen to two thousand fourteen; however, this cannot be considered sufficient reason to justify the existence of the waivers, since premature pregnancies are not “solved” marrying minor mothers, but rather by providing them with all the help and protection that the State, their parents, guardians or custodians are obligated to provide to all children and adolescents.
- p. 118-119 Until 2017, they followed existing practices such as arrangements for economic, social and cultural reasons, to marry minors, boys and girls (more often in the case of the latter) with persons even much older than them. This evidences that these practices have not been eradicated and, therefore, it is justified that measures be taken to contribute to eliminating them, in the interests of protecting the youth. It also does not go unnoticed that there may be girls and adolescents with sufficient mental capacity and development to fully understand the consequences of marriage and that even, in exceptional circumstances, there may be persons who, notwithstanding having married before turning eighteen, do not suffer all the harmful consequences referred to. However, this Court notes that even in those cases, to a greater or lesser extent, the children and adolescents that marry are impacted in one or more of the rights or aspects that involve their healthy development, or at least expose them to risk.
- p. 119-120 This justifies the measure adopted by the Lawmaker, which does not deprive or imply the absolute denial of the right to marriage, but only establishes a

reasonable minimum age to access that right, based on all the implications that its exercise may have. In this regard, it should be considered that it is justified constitutionally and conventionally and is reasonable with respect to the end sought.

### III. Protection of free development of minors' personality

- p. 120 Contrary to the argument of the plaintiff, with the elimination of the waiver for marriage the free development of minors' personality is not restricted; on the contrary, it contributes to guaranteeing this right with greater security. This is so since the challenged reform safeguards the best interest of children and adolescents by impeding them from being submitted to customs such as child marriage. These safeguards also intervene in the social pressures that girls in particular face. These pressures are due to the special situation of vulnerability of this sector of society due to their age, economic, social and cultural situation, and as such child marriage can only generate harmful consequences for them.
- p. 120-121 This Court notes that the presumed need to permit the existence of waivers is based on cases such as when girls or adolescents become pregnant, or when boys or adolescents impregnate their partner. In other words, these marriage occur in cases where, due to circumstances unrelated to the free consent of the minors, they are obligated to get married. This obligation arises whether due to social, family or even their own internal pressures, that somehow justify the necessity that they be permitted to marry.
- p. 121 In these cases it is obvious that we cannot speak of the existence of free consent of minors to assume the commitments that marriage implies, and much less that there is a physical, mental and/or economic preparation to face the obligations derived from the marriage; as such there is an even greater justification for avoiding that waivers be granted in relation to the minimum age for marrying in these situations.
- p. 121-122 In this regard, the establishing of a minimum age limit for exercising the right to marry, without the possibility of any waiver, does not definitively

limit the right people have to marry, nor the freedom they have to decide to form a family, nor the right minors have to be heard. The restriction only constitutes a temporary protection so that children and adolescents can enjoy, in that stage of their lives, the rights of childhood and adolescence, and have the opportunity to fully develop and prepare themselves so that, once the specified adult age is reached, they can face the burdens imposed by marriage and at the same time enjoy its benefits.

- p. 122 While the measure adopted does not have the scope of preventing two minors from living together as a couple, this does not constitute a valid or related reason for considering that the reform of the challenged provisions unconstitutional. The purpose of the measure was to protect children and adolescents from the harmful consequences of premature marriages and not regulate other types of relationships or social problems that involve minors.

It should be mentioned that the elimination of waivers could result in relieving those minors from social, family and even internal pressures, that in many cases are exercised against them; and thereby reduce the number of cases of premature unions. Therefore, this measure does not threaten the right to free development of one's personality; on the contrary, it strengthens it.

#### IV. Principle of progressivity

- p. 122-123 The limitation on the exercise of a human right is not necessarily synonymous with violation of the mentioned principle.
- p. 123 The evolution of the right to marriage in relation to children and adolescents has the essential purpose of increasing the degree of protection of various human rights. This protection includes the best interests of the minor and the right to the free development of minors' personality. In addition, the elimination of the waivers generates a reasonable balance between the fundamental rights at play without overly affecting the efficacy of the right to marriage that originally had been considered accessible to children and adolescents.

p. 126-127 The essential purpose of the group of reforms challenged, especially the elimination of the waivers, is to increase the degree of protection of rights and general protection of children and adolescents. The impact is only temporary, not definitive, and as such it cannot be argued in this case that the principle of progressivity of human rights was infringed, given that there are sufficiently solid reasons for justifying the elimination of the waivers.

#### **V. Possible impact on the rights of children born out of wedlock**

p. 127 The rights of minors to obtain food, to have a family life, to enjoy measures of protection by their family, to an identity, to obtain their own name, to nationality, to enjoy parental authority and care and custody, to inherit, among others, do not result, either directly or indirectly, from marriage, but simply from being a person.

p. 130 To follow the arguments that minors born out of wedlock will be unprotected or lose the mentioned rights would lead to discriminating against those born out of wedlock, without any legally objective reasons for doing so.

p. 131 All children, regardless of the circumstances or civil status of their parents (whether they are married or not), have the same rights, and their fathers, mothers or whoever has the parental authority, guardianship or custody, are obligated to provide them, within their possibilities and economic means, sufficient conditions of life for their healthy development.

#### **VI. Impact on other rights that are accessed through marriage**

p. 131-132 This Court considers that while it is true that the right to marriage brings certain benefits and rights for the couple –such as tax benefits; solidarity benefits; benefits for cause of death of one of the spouses; property benefits; benefits in making subrogated medical decisions; and migratory benefits for foreign spouses; it is also true that premature marriage has repercussions so serious in the development of minors that the mere fact of being able to obtain the cited benefits is insufficient to justify permitting children to marry.

- p. 132-133 In this regard, the possibility of obtaining one or more of the cited benefits cannot be considered sufficient to justify and/or permit exposing a minor to the harmful and prejudicial consequences; especially since children and adolescents, for the simple fact of that status, have access to many more rights and social and family benefits than those the CDHEA refers to, since based on the best interest of the child, this sector of the population enjoys reinforced protection by the State and those who are responsible for their care, which involves guaranteeing the full satisfaction of all their needs in order to achieve their optimum complete development.

### Decision

- p. 133 p.133 This action of unconstitutionality (*acción de inconstitucionalidad*) is valid but unfounded.

The validity is recognized of the decrees 309 and 310, issued by the local Congress, reforming Articles 28, section I; 90 section V; 92; 137; 145; 153, section I; 168; 179; 231; 287; 435; 457; 460; 464; 495; 663 and 755, section I, and derogating the numbers 85; 86; 87; 88; 90, section II; 95, sections II and IV; 138; 146; 148; 149; 150; 151; 152; 153, section II; 169; 184; 260; 261; 262; 263; 465, section II; 473; 521; 647, section II; 660; 665 and 667, all of the CCA, published in the Official Gazette of that state on February 22, 2016.



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## NURSERIES FOR CHILDREN WITH DISABILITIES (REASONABLE ADJUSTMENTS AND EDUCATIONAL LEVELS IN DAYCARE CENTERS FOR CHILDREN WITH DISABILITIES)

### *Amparo en Revisión 166/2019*<sup>29</sup>

**Keywords:** *right of children and adolescents to the free development of their personality, right to marriage, gender violence, rights of children and adolescents, best interest of the child, principle of progressivity of human rights, proportionality test, child marriage.*

#### **Summary**

MMGR asked the heads of the daycare centers of the Mexican Social Security Institute [Instituto Mexicano del Seguro Social] (IMSS) if her son could continue in the Daycare Center in which he was enrolled after he turned 4 years old, given the lag between his chronological age and his neurological and motor development because of the Prader-Willi syndrome he suffers from. The IMSS denied the request arguing that under Article 206 of the Social Security Law and 6.20 of the Standard Regulating the Operation of the IMSS Daycare Service, the Daycare Center cannot provide the service after that age. On April 27, 2017, MMGR filed an injunction

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<sup>29</sup> Decision issued by the First Chamber of Mexico's Supreme Court of Justice (March 26, 2019). Reporting Justice: José Fernando Franco González Salas. Action for Constitutional Relief Through Injunction 166/2019

(*amparo*) in representation of her son before the district courts in Morelia, Michoacán, against IMSS' refusal and the rules referred to, arguing that they violated the rights to equality and non-discrimination for reasons of age or disability, to receive early education and to health. On August 17, 2017, the judge adjudicating the case granted constitutional protection, determined that the challenged rules did not apply to the child and ordered the IMSS authorities to continue providing the service for 9 more months. Nevertheless, MMGR filed an appeal (*recurso de revisión*) indicating that the daycare service should continue until it is determined, through an expert opinion, that her son has a developmental age of 4 years and conditions exist for him to be received in the preschool. The authorities challenged the assessment of the unconstitutionality of Article 206 of the Social Security Law. The collegiate court reviewing the case reserved jurisdiction for this Court since it raised the unconstitutionality of that provision.

### Issue presented to the Supreme Court

Whether given the unconstitutionality of Article 206 of the Social Security Law and the relief offered in the injunction (*amparo*) decision was in accordance with the social model of disability and the right to education.

### Holding and vote

The Court decided to grant the injunction (*amparo*) for the following reasons: people with disabilities should be protected through the social model, according to which the disability should be considered a disadvantage caused by the barriers that society generates by not correctly addressing their needs. Thus, disability should not be assessed exclusively from a medical point of view. Instead, a multidisciplinary analysis should be done that considers the specific situation of each person and their environment. Therefore, the constitutional protection should not be limited to a parameter obtained from a medical analysis, which is exactly the conception that should be overcome for the protection of people with disabilities. This is especially so since the bone age is not decisive in the need to continue receiving Daycare Center services; rather, the measure should be whether the child has reached the full development necessary to enter preschool. It was also indicated that while the General Education Law establishes age requirements for entering preschool and primary school, those limits are flexible, permitting each person

to access and advance grades according to their particular capacities and circumstances. This is because there are individuals who require more time to reach the development necessary to access the different educational levels they are entitled to under Article 3 of the Constitution. Therefore, chronological age is not an absolute condition for students to be registered at a certain educational level, especially if the student has a disability that requires the State to adopt the reasonable adjustments for their inclusion in the exercise of the right to a full and effective education. Thus, a reasonable adjustment should be applied so the child may continue to receive the Daycare Center services, taking into account his actual degree of development based on a comprehensive study of his situation, not just the certification of a medically determined age.

The Second Chamber decided this case unanimously with five votes of the Justices Yazmín Esquivel Mossa, Alberto Pérez Dayán, Eduardo Medina Mora I., José Fernando Franco González Salas and Javier Laynez Potisek.

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### EXTRACT OF THE DECISION

p. 1 Mexico City. The Second Chamber of Mexico's Supreme Court of Justice (this Court), in session of June 12, 2019, issues the following decision.

#### Background

p. 1-2 On April 27, 2017, in Morelia, Michoacán, MMGR, in her own right and in representation of her minor son, filed an injunction (*amparo*) lawsuit against the Daycare Center Guardería Integradora Monarca (the Daycare Center), surrogate of the Mexican Social Security Institute [Instituto Mexicano del Seguro Social] (IMSS); the Office of the Daycare Centers Department of the State of Michoacán of the IMSS; the IMSS Delegate in the State of Michoacán; and the Head of Health Services in Labor, Economic and Social Benefits of the IMSS. The Daycare Center had suspended the daycare services for her son because he turned 4 years of age chronologically, without considering that he is a child with a disability and actually has a lower bone and mental age as a result of suffering from Prader-Willi syndrome.

- p. 3-5 On May 10, 2017, MMGR also mentioned the approval and publication of Article 206 of the Social Security Law, and number 6.20 of the Standard Regulating the Operation of the IMSS Daycare Service; that state that they violate the right to equality and non-discrimination by reason of age or disability, to receive early education and to health, recognized in Articles 1, 3 and 4 of the Federal Constitution. Furthermore, they are contrary to the human rights set forth in international instruments, such as the Convention on the Rights of the Child. The legal provisions challenged determine the right of a child to remain in an IMSS daycare or one of its surrogates based solely on a parameter of chronological age, and therefore they violate the human rights of the minor because they do not address his particular human characteristics. She added that the rights to substantive equality, the protection of health and social security and the inclusion of children with disabilities and adolescents were violated. She stated that the fair outcome would be for that Institution to accommodate children through the processes of quantitative and qualitative changes from 45 days after birth to 4 years of age developmentally around disability.
- p. 5-6 On August 17, 2017, the District Judge issued a decision granting constitutional protection requiring the authorities to: remove the minor from the application of Article 206 of the Social Security Law and number 6.20 of the Standard Regulating the Operation of the IMSS Daycare Service; invalidate the official notices of the Head of the IMSS Daycare Centers Department and of the Head of Health Services in Labor, Economic and Social Benefits of the IMSS and issue an order to allow the child to remain at the Daycare Center for 9 months after he turns 4 on April 23, 2017, as redress for the infringement of his rights.
- p. 8 The Judge established that Article 206 of the Social Security Law, through which it was determined to discharge the minor from the Daycare Center because he turned 4, is unconstitutional to the extent that he is unable to meet the criterion of the rule requiring minors to continue with their preschool basic education instruction because of his functional diversity resulting from Prader-Willi syndrome. That purpose is also not accessible to

the child given the lack of educational centers in the state of Michoacán for children with disabilities.

- p. 9 On December 4, 2017, MMGR filed an appeal (*recurso de revisión*). On the 14th of that month and year, the authorities of the Regional Delegation of the IMSS filed an appeal (*recurso de revisión*), as did the Director of Economic and Social Benefits of the IMSS on December 19, 2017.
- p. 10 A Collegiate Court in Administrative and Labor Matters heard the appeal and on February 8, 2019, it ruled on the procedural and validity aspects, reserving jurisdiction for this Court over the claim of unconstitutionality of Article 206 of the Social Security Law. On March 13, 2019, this Court assumed its original jurisdiction and turned the case over to Justice José Fernando Franco González Salas.

### Study of the merits

- p. 14 The dispute in this case is limited to analyzing the substantive grievances relative to the constitutionality of Article 206 of the Social Security Law, as well as the redress for the unconstitutionality found by the court.

The IMSS authorities attempt to demonstrate that Article 206 of the Social Security Law is not unconstitutional and to challenge the probatory assessment done by the court that concluded that it was unconstitutional. The grievances are inoperative.

- p. 15 According to Article 87 of the Amparo Law, in the case of an injunction (*amparo*) against general rules, only the bodies of the State entrusted with their issuance or promulgation may challenge the decision.

The appellants are the authorities of the Michoacán Regional Delegation of the IMSS, and the delegate of the Director of the Economic and Social Benefits of that Institute, who are administrative authorities that issued various acts applying the article in question that are invalidated as a result of the unconstitutionality determined by the court, but they are not a State

body that issued the legal provision analyzed. It is recognized that one of those acts is section 6.20 of the Standard Regulating the Operation of the IMSS Daycare Service. However, this standard has a lower rank than the challenged legal provision and was subject to the granting of the injunction (*amparo*) as a result of the invalidity declared by the court with respect to the former.

Therefore, the IMSS authorities lack standing to bring substantive grievances regarding the constitutionality of the general rule. Thus, there is a technical impediment to reviewing the merits of the grievances stated on those questions, and therefore they are inoperative.

- p. 16 The complaint of MMGR and her son challenges the redress granted by the court to reinstate their enjoyment of the right to the daycare services due to the unconstitutionality of Article 206 of the Social Security Law. In particular, they challenge the court's determination to limit the providing of that service to a period of 9 months, only taking into account the bone age of the minor. This grievance is operative.

As held in numerous precedents of this Court, the protection of persons with disabilities should be reviewed based on the social model, according to which the disability must be considered a disadvantage caused by the barriers that civil society generates by not adequately addressing the needs of people with functional diversity.

- p. 16-17 In relation to the application of the social model in the area of social security, when deciding the Action for Constitutional Relief (*Amparo Directo en Revisión*) 2204/2016, the Second Chamber of this Court established that undertaking this model involves considering two aspects: on the one hand, it is not people with disabilities who should adapt to their environment; on the contrary, it is society that should accommodate its structures and eliminate barriers that limit their integration; and on the other hand, since all human beings have equality in dignity, people with disabilities cannot be treated as mere objects of assistance.

- p. 17 In that precedent it was held that, consistent with this model, the verification of the disability should not be assessed exclusively from a medical focus; rather, a multidisciplinary analysis should be done that considers the specific situation of each person and their environment, which provides certainty on the disability a person has considering the impact that decision will have on the proceeding in question.

Then, based on that criterion, MMGR and her son are right that the constitutional protection should not be limited to a parameter obtained from a medical analysis, referring to the bone age of the minor, and therefore limiting the service to 9 months based on a medical model is precisely the limitation that should be overcome for the protection of people with disabilities. This is especially so since the bone age is not decisive in the need to continue receiving the services of the Daycare Center, but rather whether the child has developed the skills necessary to enter preschool education.

- p. 17-18 Indeed, when deciding the Action for Constitutional Relief (*Amparo en Revisión*) 462/2017, the Second Chamber of this Court considered that although Article 65, section I, second paragraph, of the General Education Law, and the regulations applicable in the area, establish a certain minimum age as of December 31<sup>st</sup> of the school year of entry as a prerequisite to entering preschool and primary school, that regulatory system is flexible, making exceptions to the age limits that permit each individual to access and advance in the educational grades and levels according to their particular capacities and circumstances.

- p. 18 It was also determined that the provisions in the General Education Law that indicate a minimum age limit for entering preschool and primary school seek to unify the school grades at those educational levels, and to ensure fulfillment of the educational goals through the establishment of homogenous groups regarding children's chronological and generalized development, but inclusive and with diversity.

In that precedent, it was concluded that the regulatory system of education does permit the early entry into different educational grades and levels in

cases where students, based on their particular or special characteristics, should enter a higher grade or level than the one corresponding to them according to the general rules established by the system.

The same logic behind early entry for those who already have the skills to study at a higher educational level should apply to those who require more time to reach the necessary development to be ready for the educational levels guaranteed to them by Article 3 of the Constitution. Thus, chronological age should not be imposed as an absolute condition to require children to be enrolled at a certain educational level, above all if the child has a disability that obligates the State to adopt reasonable adjustments to achieve their inclusion in the exercise of the right to a full and effective education.

It should be noted that since only MMGR and her son raise the issue of the period granted for the continuation of the services, that period cannot be less than the 9 months already established in the appealed decision.

### Decision

- p. 19 Therefore, the relief granted in the injunction (*amparo*) should be modified, with the first three guidelines prevailing, but ordering that a new determination be issued requiring as a reasonable adjustment the continuation of the Daycare Center services for the time necessary for the child to be ready to receive a preschool education, taking into account his actual degree of development based on a comprehensive study of the situation of the child, without limiting the opinion to a medically determined age, on the understanding that the period cannot be less than 9 months. Therefore, MMGR and her son are covered and protected for the purposes explained.

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## LEGITIMATE INTEREST OF CHILDREN IN THE DEFENSE OF THE ENVIRONMENT

### *Amparo en Revisión 659/2017*<sup>30</sup>

**Keywords:** *right to a healthy environment, right to access to justice, rights of children and adolescents, principle of the best interest of the child, legitimate interest, interest in the amparo proceeding, childhood, mangroves, economic, social, cultural and environmental rights.*

#### **Summary**

113 children filed a two-stage judicial review relieving an unremediated breach of rights through injunction (*amparo indirecto*) against the construction of a project in Cancún and the permits granted by the federal environmental authorities and those of the state of Quintana Roo, because it was causing the destruction of a mangrove zone. They argued that the construction violated their right to an adequate environment for their development and well-being. A federal judge there discontinued the proceeding for lack of legitimate interest, since they did not

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<sup>30</sup> Decision issued by the First Chamber of Mexico's Supreme Court of Justice (March 14, 2018). Reporting Justice: Margarita Beatriz Luna Ramos. Action For Constitutional Relief Through Injunction 659/2017

prove the impact on the environment and how their legal sphere is affected, nor did they demonstrate with appropriate evidence that they were inhabitants of the city. Eighteen children filed an appeal (*recursos de revisión*) against the judge's decision which Mexico's Supreme Court of Justice (this Court) heard through the exercise of its power to assert jurisdiction.

### Issue presented to the Supreme Court

Whether in a two-stage judicial review relieving an unremediated breach of rights (*amparo indirecto*), filed by children, is solely up to them to prove they have a legitimate interest to challenge acts presumptively violating their human right to a healthy environment; or whether the judge is authorized or obligated, through a specific requirement or ex officio, to seek the means necessary to analyze such situation.

### Holding and vote

The appealed decision was revoked for essentially the following reasons. This Court noted that to evidence a legitimate interest the existence must be recognized of a constitutional norm that protects a diffuse interest in benefit of a specific class; that this diffuse interest is affected, individually or collectively, and that the person belongs to that class. In addition, upon analyzing the admission of a two-stage judicial review relieving an un-remediated breach of rights (*amparo indirecto*) claim, the impact from the act of authority must be identified, and with that, the type of interest in question. If this is not clear, the claim must be admitted, requiring the person to try to clarify it during the trial, even up to the issuance of the decision. It was also noted that the principle of the best interest of the child implies that the matters where their interests are affected entail a stricter scrutiny to determine the constitutionality of the measures. In this case, the judge failed to request and process evidence or take the necessary measures that would demonstrate the legitimate interest the children claimed they have. Therefore, this Court ordered the proceeding to be reinstated, so the federal judge could request the children to prove they live in the city of Cancún; this is in order that they may demonstrate their legitimate interest to file the injunction (*amparo*) lawsuit and the claim can be processed.

The Second Chamber decided this matter by a majority of three votes of the Justices Margarita Beatriz Luna Ramos, Javier Laynez Potisek and José Fernando Franco González Salas. The Justices Alberto Pérez Dayán and Eduardo Medina Mora I. voted against.

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### EXTRACT OF THE DECISION

p. 1 Mexico City. The Second Chamber of Mexico's Supreme Court of Justice (this Court), in session of March 14, 2018, issues the following decision.

#### Background

p. 1-2 113 children filed an injunction (*amparo*) claim, on August 27, 2015, against multiple environmental authorities, for the issuance of the authorization ruling of the Environmental Impact Statement granted by the Environmental Impact and Risk Office [*Dirección General de Impacto y Riesgo Ambiental*] (DGIRA), dated July 28, 2005, in favor of "FONATUR", with respect to a project in Cancún, Quintana Roo, as well as any other ruling, permit or authorization that has been issued and that permitted the destruction of mangrove.

p. 9-10 A district judge located in the same city discontinued the proceeding on September 23, 2016, for lack of legitimate interest, upon considering that there was no evidence of an impact on a healthy environment or a legally relevant harm that this generated in the sphere of the rights of the children.

p. 10-11 Eighteen children filed appeals (*recursos de revisión*) on October 10 and 11, 2016. In addition, FONATUR presented a joinder of appeal (*revisión adhesiva*) on December 9, 2016. A collegiate court with the same residence was to hear the matter.

p. 11 On November 29, 2016, the guardian of one of the children requested this Court to exercise its power to assert jurisdiction. On June 21, 2017, that power was exercised and the case file was turned over.

### Study of the merits

- p. 13 This matter involves an appeal (*recurso de revisión*) filed against the resolution issued in a two-stage judicial review relieving an un-remediated breach of rights (*amparo indirecto*), in which the violation was claimed of the rights recognized by Articles 4, paragraphs five and nine, 14 and 16 of the Federal Constitution, 3 and 12 of the Convention on the Rights of the Child, 38, 39, 48, 49, subsection B, of the General Law on the Rights of Children and Adolescents, in essence for the destruction of mangroves of the Laguna Nichupté, in Quintana Roo.
- p. 26 In this matter the problem to clarify is whether in a two-stage judicial review relieving an un-remediated breach of rights (*amparo indirecto*) filed by children, is solely up to them to prove they have a legitimate interest to challenge acts they say violated their human right to enjoy a healthy environment and, if they do not demonstrate it the suit is discontinued or whether, on the contrary, if the judge is authorized or obligated, whether through a specific requirement toward these minors or *ex officio*, to seek the means necessary to analyze such question.

One of the grievances is well-founded and sufficient to revoke the appealed decision, specifically in relation to the fact that the Judge, based on the greater interest of the child, must collect and process *ex officio* the evidence or take the measures necessary to permit minors to demonstrate whether they have the legitimate interest they say they have.

### - Concept of legitimate interest

The Plenary of this Court ruled on the classification of interest –which is based on the level of impact or intensity of relationship with the legal sphere of the person–, upon resolving the Conflicting Lines of Precedent (*Contradicción de Tesis*) 111/2013, from which the concepts of interest are obtained, which are:

- p. 26-27 Simple interest implies the recognition of legitimation for any individual for the sole fact of being a member of the community, while legal interest is

what has been identified with holding a subjective right, which means the possibility of making or wanting a particular circumstance and the possibility of requiring others to respect it. In other words, a simple interest concerns all members of society, and therefore the degree of intensity in the legal sphere is not qualified as personal or direct, and constitutes the premise contrary to a legal interest, in which the impact on the legal sphere refers to a specific quality: the holding of a subjective right.

- p. 27 A legitimate interest implies a link between a person and a claim, such that the annulment of the act that is challenged produces a positive benefit or effect in their legal sphere, whether that be current or future is certain; in other words, it is an actual and real interest, not hypothetical, since the latter would refer to a simple interest. Therefore, for a legitimate interest to exist, the existence of an impact on a certain legal sphere must exist, appreciated under a parameter of reasonability, and not just a simple possibility, and therefore, a possible constitutional protection decision would imply obtaining a particular benefit, an immediate result of the ruling.

Thus, a legitimate interest consists of a differentiated and broader category, but also does not involve a generic interest of the society as occurs with a simple interest, which means it is not the generalization of a popular action, but of access to the competent courts given possible legal injuries to legally relevant interests and, therefore, protected.

- p. 30 For its part, the Second Chamber of this Court has held, in Action for Constitutional Relief (*Amparo en Revisión*) 553/2012, that this concept presumes the existence of a legal protection of the interest on which the petitioner's claim is supported, which alleges the impact of a subjective right the petitioner holds. It added that it presumes that the necessary legal protection corresponds to the petitioner's "special situation in the legal order", which is to say a norm that establishes a diffuse interest in benefit of a class, identified and identifiable, which obligates the petitioner to demonstrate that they belong to it.

### - How to evidence legitimate interest

- p. 32 To prove legitimate interest it must be shown that: a) there is a constitutional norm establishing or protecting a diffuse interest in benefit of a particular class; b) the challenged act violates that diffuse interest, whether individually or collectively; and, c) the petitioner belongs to that class. This is because if the legitimate interest presumes a legal impact on the petitioners, they must demonstrate that they belong to the specific group that suffered or is suffering the harm that is claimed in the injunction (*amparo*).
- p. 34 Regarding the elements constituting this procedural concept, for purposes of the validity of the injunction (*amparo*), it has been said that affected parties must convincingly prove the interest, legal or legitimate, that they have and not infer it based on presumptions; this means that they must show they belong to the group whose diffuse interest is protected by a constitutional norm, and is said to be affected by the challenged act; in other words, they must demonstrate belonging to the specific group that suffered or is suffering the harm that is alleged in the injunction (*amparo*) claim.

### - Powers of the judge to determine the validity of the injunction claim

As provided in the Amparo Law, once the claim is filed, the injunction (*amparo*) judge is obligated to study it to determine if it is appropriate to formulate an instruction to clarify it, admit it for processing or dismiss it outright for invalidity if a cause of invalidity is manifest and unquestionable.

- p. 35 A manifest reason should be understood to mean that additional demonstration is not required, since it is clearly and directly seen from the claim and its annexes. Unquestionable invalidity exists when there is certainty and full evidence.

While there are various causes for the invalidity of the injunction (*amparo*) lawsuit, the exercise of the constitutional action by private parties who consider their fundamental rights to have been violated should not be limited or obstructed.

- p. 37 Therefore, the legislator established the possibility of dismissing the claim when any of the causes established in the Amparo Law materializes manifestly and unquestionably. That law lists a series of actions with respect to which there cannot be a ruling on the merits in relation to its constitutionality or unconstitutionality.
- p. 37-38 In that context, according to the provisions of Articles 107, section I, first paragraph, of the Federal Constitution, in relation to Article 5, section I, of the Amparo Law, the exercise of the constitutional action is solely reserved for those who suffer a relevant legal harm as the result of an act of authority, which is to say a direct or indirect impact that empowers its holder to go before the appropriate judicial body demanding that the transgression cease.
- p. 38 Thus, if there is no interest over the challenged act (legal or legitimate, not simple), the injunction (*amparo*) lawsuit will be invalid pursuant to Article 61, section XII, of the Amparo Law.
- p. 38-39 Therefore, in each matter the interest that applies according to the nature of the act must be analyzed, as a prerequisite for validity, in order to determine if in fact a legally relevant impact exists.
- p. 39 That interest must be evidenced either with direct proof or through logical inferences, for which it is essential to give an opportunity to those affected to argue the elements necessary to prove their claim; which reveals that, in principle the absence of interest in the challenged act does not constitute a reason for manifest or unquestionable invalidity, since those elements may be introduced even up to the constitutional hearing, in order to satisfy the prerequisite.
- p. 41 When resolving Conflicting Lines of Precedent (*Contradicción de Tesis*) 331/2016, the Second Chamber of this Court reached the conclusion that, upon deciding the injunction (*amparo*) claim, the judge may verify if the situation of the petitioner in relation to the act of authority implies a harm or not and, furthermore, the type of impact, to determine if it implies a legitimate interest or a simple interest; thus, in the event that it is not feasible

to determine these situations with clarity or it is possible that the petitioner holds that legitimate interest, the claim should be admitted so that, through the processing of the suit, the circumstances are clarified with certainty. However, if from the facts and the reasons explained and/or proven in the claim, it is clearly and unquestionably seen that the situation of the petitioner with regard to the act of authority implies a mere simple interest, then the judge may determine the manifest and unquestionable occurrence of the cause of invalidity and, therefore, dismiss the injunction (*amparo*) claim.

- p. 44 In this case, the claim was filed by children who, according to the Judge, did not demonstrate with appropriate evidence that they inhabit or reside in the city of Cancún, Quintana Roo, and therefore he discontinued the proceeding, without taking into consideration that in this case there were various forms of proving legitimate interest; in other words, to verify that the children do live in that city, which could be corroborated, for example, through utility receipts of their parents or guardians, birth certificates of the children, school documents, etc.

However, the judge failed to request this of them, notwithstanding that before admitting the claim, he requested them to verify other questions, such as the representative capacity of those who claimed to be their guardians, but he did not request that they provide valid evidence to demonstrate their residence in the city in which the acts indicated as violating the right to a healthy environment were executed, which could also be proven with evidence collected *ex officio*, based on the group to which the petitioners belong as children.

- p. 45-48 The above is based on and with respect to the best interest of the child, since any damage caused to the environment by the challenged act will be affecting them; the Judge should carry out a more detailed scrutiny to determine the existence of a possibility, at least, that the petitioners evidenced the legitimate interest they assert they have, above all because they could be affected directly with the decision made, as the Plenary of this Court held in the Action on the Grounds of Unconstitutionality (*Acción de*

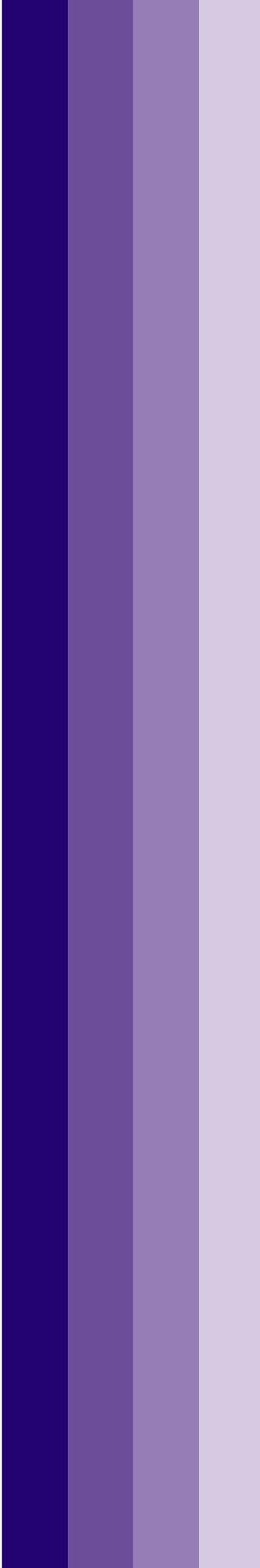
*Inconstitucionalidad* 8/2014 and the Second Chamber of this Court in the Injunction Under Review (*Amparo en Revisión*) 203/2016.

- p. 48 From the arguments explained, this Court concludes that the Judge should request the children to prove their residence in the city in which they asserted the challenged acts were executed, since it would only take the presentation of certain documents to demonstrate that they normally inhabit the city and, with that, prove their legitimate interest.

### Decision

- p. 48-49 Therefore, the challenged decision is revoked and it is ordered to reinstate the proceeding so that the Judge may request them to prove the legitimate interest they claim, specifically so that they may demonstrate their habitual residency in the city in which the acts are executed and, if it is considered that the request is complied with, with full jurisdiction process the claim and decide according to the law.
- p. 50-51 This Court considers it important to specify that it considers the criterion held in this final decision applicable only to this case, by virtue of the right that it is considered violated, which is the defense of a healthy environment, as a fundamental right that affects society in general.





## VII. RIGHTS OF INDIGENOUS PEOPLES AND COMMUNITIES



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## INDIGENOUS RIGHTS, NORMATIVE SYSTEMS AND JURISDICTION OF INDIGENOUS PEOPLES AND COMMUNITIES

### *Amparo Directo 6/2018*<sup>31</sup>

**Keywords:** *indigenous law, normative systems and jurisdiction of indigenous peoples and communities, legal pluralism, limits on the exercise of indigenous special jurisdiction, constitutional and conventional obligations of the States, principles that govern the indigenous special jurisdiction.*

#### **Summary**

The matter arose when Juan was grazing his livestock in a protected area of an indigenous community in Oaxaca. Members of the community had complained to the authorities several times. The authority in question sanctioned Juan for the damages caused. Consequently, Juan and his wife María went before the Public Prosecutor to sue the municipal authorities, an investigation was opened and then it was taken to the courts before a control judge. The members of the indigenous community asked the criminal authorities to refrain from hearing the matter,

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<sup>31</sup> Decision issued by the First Chamber of Mexico's Supreme Court of Justice (November 21, 2019). Reporting Justice: Juan Luis González Alcántara Carrancá. *Direct Injunction 6/2018*

arguing that the sanctions they issued did not fall under the criminal sphere since they were issued according to their usage and customs on the land. The judge and the prosecutor dismissed the petition of the community. The representatives of the community filed a lawsuit on indigenous rights [*Juicio de Derecho Indígena*] (JDI) before the Indigenous Justice Chamber and Criminal Chamber of the Superior Court of Justice of the State of Oaxaca (Indigenous Chamber) in an attempt to validate their determination. The Indigenous Chamber issued a decision in which it recognized the jurisdiction of the community and validated the internal normative system and its procedures. Juan filed a direct injunction (*amparo directo*) arguing that his rights had been violated which was heard by the First Chamber of the Mexico's Supreme Court of Justice (this Court).

### Issue presented to the Supreme Court

To determine whether the Indigenous Chamber has the legal competency by reason of time and subject matter to hear the events judged by the indigenous community and, if so, to determine if it was correct for the Indigenous Chamber to consider that the events judged by the indigenous community correspond to the special indigenous jurisdiction.

### Holding and vote

The injunction (*amparo*) was denied essentially for the following reasons. It was decided that the guarantee of non-retroactivity of the law was not violated, since it involved procedural norms, applicable at the time a proceeding is activated. In addition, the fundamentals of the special indigenous jurisdiction were addressed and it was determined that the Indigenous Chamber was competent to treat the subject matter. Then the parameters were developed that must be observed to differentiate indigenous forum cases, created in compliance with the constitutional and conventional obligation that the State has to promote, respect, protect and guarantee the free determination and autonomy of the indigenous peoples and communities; from these guidelines, it was affirmed that the matter corresponded to that forum. Therefore, the decision of the Indigenous Chamber was considered correct regarding dismissing the actions taken by both the public prosecutor and the judge, in relation to the original events, in order to respect the autonomy of the community authorities. Therefore, this Court decided to deny the injunction (*amparo*) filed by Juan.

The First Chamber decided this matter by a majority of three votes of the Justices Norma Lucía Piña Hernández (issued her vote against considerations), Alfredo Gutiérrez Ortiz Mena and Juan Luis González Alcántara Carrancá. Justice Jorge Mario Pardo Rebolledo voted against (issued a dissenting opinion). Justice Luis María Aguilar Morales was absent.

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### EXTRACT OF THE DECISION

p. 2 Mexico City. The First Chamber of Mexico's Supreme Court of Justice (this Court), in session of November 21, 2019, issued the following decision.

#### Background

p. 2 On June 10, 2015, members of the Commissionship of Communal Assets of San "X", Oaxaca, went to a reforested and prohibited zone of the community, in response to a local complaint. There they observed a herd of approximately fifty goats belonging to Juan.

p. 2 The Municipal Council decided to sanction the infringer with a fine, and to warn him that if he repeats the infraction a complaint would be filed against him before the Federal Environmental Prosecutor.

p. 3 On June 22, 2015, the members of the Commissionship found María -wife of Juan- grazing a herd of 100 goats in the aforementioned reforested area.

María admitted, before the municipal Comptroller, that she had grazed their goats in the prohibited area and had assaulted the representatives of the community. Therefore they imposed a fine on her. She stated that she did not have any money and refused to sign a promissory note for the respective amount and the corresponding administrative act. At that same time, María verbally assaulted the Municipal Comptroller and threatened physical assault. The municipal council ordered the arrest of María for twenty-four hours, according to the norms that sanctioned infractions committed by members of the community.

p. 3-4 On June 27, 2015, neighbors informed the Office of the Commissioner of Communal Assets that there were goats causing damages in the reforestation zone. It was confirmed that the goats were destroying trees and vegetation in general.

p. 4 The General Assembly of the Indigenous Community established that the goats would be held by the municipal authorities while they sought advice to denounce the infringer before the corresponding authority and a solution to the conflict was found.

On January 23, 2016, Juan and his wife María were summoned into order to urge them to comply with their obligations in the town and communal assets. They were warned that if they did not appear at the summons in question, a new assembly would be called to sell the goats being held and the proceeds obtained to cover the cost of the municipal enclosure and the expenses generated by the care of their animals.

Finally, on February 13, 2016, without the attendance of Juan and María, the communal authority held a new session in which they determined to impose sanctions on Juan: two hundred forty-nine thousand nine hundred twenty pesos (\$249,920.00 MN). This amount was the result of adding the use of land, crops and damages caused to eighty-four tree plantings; and if they did not pay it, the municipal authority was authorized to sell the goats.

p. 5 Simultaneously with the above, María presented a complaint in an Agency of the Public Prosecutor's Office of Oaxaca (PP) in a filing on July 1, 2015, against the President, Comptroller and Third Councilman, respectively; as well as various members of the Commissionership and a member of the Oversight Board; all authorities of the municipality of San "X". They were accused of the crimes of abuse of authority, illegal deprivation of personal freedom, unlawful entry, theft of livestock and those resulting therefrom, in relation to the facts.

During the preliminary investigation, the municipal authorities requested the declaration of invalidity and the closing of the investigation. When they

did not receive a response, they insisted, indicating to the prosecutor that the events involved a conflict that corresponded to the indigenous community to resolve, according to their internal normative system, and therefore they asked the PP agent to decline his competency in favor of the community. The PP dismissed their request and took the investigation to the courts before a control judge to be able to bring charges.

- p. 6 The municipal president and Comptroller filed a lawsuit around Indigenous rights [*Juicio de Derecho Indígena*] (JDI), which was heard by the Indigenous Justice Chamber and Criminal Chamber of the Superior Court of Justice of the State of Oaxaca (Indigenous Chamber). Juan and María were defendants, and the PP agent and the *Amparo* Judge were also informed of the proceeding.
- p. 6-7 The Indigenous Chamber issued a decision on September 9, 2016, in which it declared itself legally competent to hear and resolve the proceeding. It validated the internal normative system and the indigenous judicial proceeding that resolved the dispute. Juan filed a direct injunction (*amparo directo*) against that determination, which was admitted by the Collegiate Court.
- p. 8 The municipal Comptroller and the Commissionership requested that this Court exercise *ex officio* its authority to assert jurisdiction. This Court decided to exercise its authority to assert jurisdiction and sent the case to Justice Juan Luis González Alcántara Carrancá.

### Study of the merits

- p. 18-19 In this case the legal competency by reason of time and subject matter of the Indigenous Chamber will be examined, seeking to determine whether or not such authority had competency to validate the determination of the cited community; then, in order to respond to whether or not the hearing of the events originating this matter truly corresponded to the special indigenous jurisdiction, this Court will develop the elements that potentially activate such jurisdiction, the principles of interpretation that support its resolution and the limits thereof.

This Court will develop for the first time the constitutional doctrine by which it will give content and scope to the indigenous special jurisdiction, establishing the criteria, principals and rules that will guide the rest of the courts of the country when they resolve any future conflicts of norms and forums, which may arise from the content and scope of the constitutional protections contained in Article 2 of the Constitution.

**- Constitutional and conventional obligations for the Mexican State in matters of indigenous special jurisdiction**

- p. 23 Various constitutional and conventional provisions obligate the Mexican State to implement efficient mechanisms or proceedings, with the judicial bodies to hear them, that recognize the right of indigenous communities to be governed by their customary legal systems, which means by their own law and to obtain the validation of their decisions by the authorities of the central State, it being essential that the law establish the corresponding cases and procedures for validation.
- p. 25-26 All states of our country have the obligation constitutionally and conventionally to establish in their secondary norms effective proceedings through which, individually or collectively, indigenous peoples have the real and effective possibility of achieving the validation of their decisions issued under their normative systems. This means that they are able to enforce those decisions, through mechanisms that the secondary laws should establish, so that it can be determined that certain events or conflicts will not be heard by the ordinary jurisdiction but by the special indigenous jurisdiction.
- p. 27-28 The indigenous special jurisdiction is the authority or right that indigenous peoples or communities have to judge their internal conflicts according to their own indigenous law. This is understood as the group of traditional norms and customary practices, not necessarily written or codified and different from the law in force in Mexico, that organize the internal life of the indigenous peoples or communities. Indigenous peoples or communities, according to Article 2 of the Constitution, are those who descend from

populations that inhabited the country at the beginning of colonization and that keep their own social, economic, cultural and political institutions, or part of them.

- p. 28-29 The indigenous special jurisdiction is not only an individual right to be judged according to the usage and customs of the indigenous community to which the person belongs, but also constitutes a collective right in favor of indigenous groups, due to their need for survival. It is a consequence of the autonomy that the Constitution grants to the indigenous communities to resolve their internal disputes according to their worldview and understanding of rights and how they should be guaranteed to ensure that the community endures. Both jurisdictions –indigenous and ordinary–, are part of the recognition of the legal pluralism that characterizes the Mexican nation.
- p. 30 The above allows this Court to hold that the absence of those mechanisms obstructs the recognition by the central State authorities of the usage and native customary laws of the indigenous communities, as well as their right to exercise their own jurisdiction, which ultimately results in a violation of the human rights. This omission has resulted in abuses in the administration of justice, specifically in the application of criminal norms, when it is not possible to differentiate the ordinary jurisdiction from the indigenous special jurisdiction.
- p. 34 The Indigenous Chamber is a body specialized in indigenous justice matters within the Superior Court of Justice of the State of Oaxaca, initiated on March 1, 2016 with competency to hear, among other matters, those issues related to the decisions made by the authorities of the indigenous peoples and/or communities in exercise of their judicial function upon applying their normative systems; in other words, to validate decisions issued by the indigenous communities when judging or hearing particular facts or events.

The above is in order to verify that the principles and human rights protected in the Federal Constitution, the international treaties and the particular State Constitution have been respected in the respective proceeding, and

therefore for purposes of such functions the Indigenous Chamber can validate the determinations issued by the indigenous authorities when judging a specific fact or matter or, with justification, entirely or partially invalidate their decision, and order the community to issue a new decision if appropriate.

- p. 34-35 The creation of the cited Indigenous Chamber and the JDI constitutes compliance with the constitutional and conventional mandate that requires not only the recognition of legal pluralism, but the creation of the judicial bodies that make it possible to validate such determinations, through the corresponding legal mechanisms or proceedings, thereby guaranteeing and ensuring that such recognition is not dead letter.

**- Legal competency by reason of time and subject matter of the Indigenous Chamber**

- p. 36-37 Does the Indigenous Chamber of Justice lack competency by reason of time and subject matter to hear the events judged by the indigenous community? The response to such question must be no, since it was the indigenous community that judged the events according to its normative systems, and therefore the Indigenous Chamber only issued a determination where it partially validated, through the corresponding mechanism, its decision, with respect to which it did have legal competency by reason of time and subject matter, and therefore the violation alleged by Juan does not exist.

- p. 37 This Court, first of all, does not see any violation of the principle of legality regarding the non-retroactivity of the norm, since the Indigenous Chamber is legally competent to decide the community dispute heard originally through the JDI and the municipal authorities. Secondly, the Indigenous Chamber does not lack legal competency by reason of subject matter to hear and decide the JDI.

**- Legal competency by reason of time**

- p. 45-46 The decision the Indigenous Chamber issued in the JDI, where it explained whether or not it validated the determinations reached by the indigenous

community according to its usage and customs, with respect to events prior to the initiation of the judicial functions of the above referenced Chamber, did not imply that the principle of legality regarding the non-retroactivity of the norm established in Article 14 of the Federal Constitution was violated in prejudice of Juan.

- p. 46 This is so first of all because the one who first judged the events was the indigenous community according to its usage and customs and its own normative systems. The Indigenous Chamber, as a body of the central State and court of second instance on the organizational chart of the Federal Judicial Branch of the State of Oaxaca, through the indigenous rights proceeding, issued a resolution in which it reviewed whether or not the determinations made by the indigenous community could be validated. In other words, it analyzed whether the decisions adopted by the indigenous community on the events in dispute, with their respective sanctions, should be validated or not.
- p. 46-47 Secondly, although the Indigenous Chamber was created subsequent to the majority of the events and decisions the indigenous community made regarding such events, the validation proceeding before the Indigenous Chamber was developed in light of procedural provisions in force at the time the JDI was filed. The non-existence of the Chamber and Indigenous Rights Proceeding at the time the first events took place and decisions were issued by the indigenous community, does not imply, in light of the constitutional doctrine, a violation of the principle of legality in relation to non-retroactivity of the norm, since such principle only applies to the norms or measures that define the types of crimes and penalties or their scope, not to procedural norms that govern the proceeding. The latter is taken as a reference the moment when the procedural act commences or activates, and not the date on which the events occurred, and therefore in this respect there has not been any violation of Article 14 of the Constitution.
- p. 47 Thirdly, the JDI and the creation of an Indigenous Chamber were a response to the historic debt the Mexican State owes the indigenous peoples regarding

the recognition of their usage and customs, as well as their normative systems, which existed long before the events in dispute occurred.

- p. 50 Therefore, this Court determines that the principle of legality, regarding the non-retroactivity of the norm, established in Article 14, first paragraph of the Federal Constitution, was not violated in prejudice of Juan, since in light of the constitutional doctrine the Indigenous Chamber is legally competent by reason of time to resolve the original community dispute.

**- Legal competency by reason of subject matter**

- p. 54-55 The responsible Indigenous Chamber also has competency by reason of subject matter to hear and resolve the JDI, in accordance with the Organic Law of the Judicial Power of the Free and Sovereign State of Oaxaca [Ley Orgánica del Poder Judicial del Estado Libre y Soberano de Oaxaca] (LOPJESO). The competency is the power a judicial body has to exercise its jurisdiction in specific matters within a certain territory; the subject matter is a factor that determines the competency based on the legal nature of the dispute, which is based on the legal aptitude that is attributed to a judicial body to hear the disputes related to a specific branch of law.
- p. 56-57 The desire of the local lawmaker was to establish the jurisdiction of the Indigenous Chamber to hear matters related to decisions issued by the authorities of the indigenous peoples and communities in exercise of their judicial function when applying their normative systems. Similarly, the purpose of the Chamber is to verify that the principles and human rights protected in the Federal Constitution, the international treaties and the particular Constitution of the state of Oaxaca were respected in the proceeding. The specialized Chamber can also validate the determination issued by the indigenous authority or, if appropriate, order it to issue a new decision. According to the above, it is clear that the Indigenous Chamber is competent by reason of subject matter to hear and decide the original dispute.
- p. 60-61 In that regard, it is determined that the JDI is valid when it is the authority of the community itself that validates or confirms its own determination.

Therefore, the responsible Indigenous Chamber is legally competent with regard to subject matter in this case, since it has competency to hear any matter related to a decision issued by the indigenous authorities, regardless of whether or not it is the indigenous authority itself that goes before the central justice to validate its decision or determination, since that requirement is not established in the LOPJESO.

- p. 62-63 A systematic interpretation leads to the conclusion that the JDI is an efficient or effective mechanism for the authorities of the central State to recognize and execute the decisions of the authorities of the indigenous communities in exercise of their special jurisdiction. Thus, this Court concludes that the Indigenous Chamber is legally competent by reason of subject matter to hear the JDI, and that the municipal authorities could present the decisions adopted by the authorities of the indigenous communities regarding the events in dispute to be validated or confirmed by the Indigenous Chamber.
- p. 63 Now that this Court has decided that the Indigenous Chamber is legally competent by reason of forum and subject matter, it must be asked whether it was correct for the Indigenous Chamber to consider whether the events judged by the indigenous community correspond to the indigenous special jurisdiction? The response to such question must be yes.
- p. 63-64 This Court finds that the Indigenous Chamber did not violate the rights of Juan when determining that the events submitted to JDI are among those to be heard by the indigenous special jurisdiction. Therefore, it acted correctly when ordering the Control Judge and the PP to be prevented from hearing those events, and as a result, that such judge dismiss the criminal cause of action.
- p. 65-67 It is recognized that one of the principal problems related to the system of justice of indigenous peoples is the applicability and recognition by the central State authorities of the rights the indigenous peoples or communities have to a special jurisdiction. Therefore, in order to eliminate the barriers impacting indigenous groups historically, both individually and collectively,

the elements, principles and limits will be developed that in the judgment of this Court govern the indigenous special jurisdiction, which, in addition, will permit the central State authorities to evaluate when they have a case that should be heard by the indigenous special jurisdiction instead of the ordinary jurisdiction.

**- Factors judges should consider when determining that the indigenous special jurisdiction is competent to hear certain events or disputes**

- p. 70 This Court determines that the criteria or factors that should be analyzed in a specific case by the authorities of the central State –ordinary jurisdiction– in order to determine that we have a case that should be heard by the indigenous special jurisdiction are the following: a) personal, b) territorial, c) objective and d) institutional.

**a) Personal factor**

- p. 70 The judge must first study whether or not the person to whom an act or crime is attributed belongs to an indigenous community or people. It must also be determined whether or not all the persons involved belong to the indigenous community.

- p. 72 For this purpose, the following central points will guide the operators of justice when making these determinations: 1) the usage and customs of the cultures involved, 2) the degree of isolation of the indigenous person and/or of the community in relation to the majority culture, and, 3) the effect of the sanction on the individual. These parameters must be evaluated in detail by the judges within the limits of equity, reasonability and healthy criticism.

When, in a dispute or conflict, an indigenous person or community and a non-indigenous subject are implicated, this element will be evaluated by the judges in concordance with the rest of the factors and according to the following circumstances, among others: whether the situations of fact are protected in both legal systems, whether the non-indigenous subjects implicated in the dispute have basic knowledge of the customs of the

indigenous community in which the events occurred and finally, whether the non-indigenous subject wishes to submit to a special jurisdiction when the conduct is regulated in both jurisdictions.

#### **b) Territorial factor**

- p. 72-73 This element implies evaluating whether the events in question occurred within the territorial sphere of an indigenous peoples or community, since to determine the judicial power of the indigenous authority, the particular connection the people have with their territories is also decisive.
- p. 73-74 The territory is the geographic space where the indigenous communities or people have standing to exercise their authority, and therefore this comprehends the entirety of the region that the people occupy or use in some way and, including territorial rights to lands that are not exclusively occupied by them, but to which they have had access for their traditional and subsistence activities. The notion is not exclusively the geographic aspect, but must be understood as the sphere where the indigenous community displays its culture. This means that the vital space of the communities in some situations will not coincide with the geographic limits of their territory and therefore an act that has occurred outside of those limits could also be decided by the indigenous authorities for cultural reasons.

#### **c) Objective factor**

- p. 74-75 This factor considers whether the legal asset presumptively affected is related to an interest of the indigenous community or one of its members or to the majority society or one of its members.

#### **d) Institutional factor**

- p. 76 This factor involves studying the existence of authorities, usage of resources and customs, as well as the traditional proceedings within the indigenous

community. In other words, the judge must verify that there is customary indigenous law in force in the community.

- p. 77 The judge must take into consideration that the institutional factor has three fundamental aspects that must be taken into account in each case: 1) the existence of the norms of customary law; in order to preserve due process in benefit of the person accused of engaging in certain conduct; 2) the conservation of the ancestral customs and instruments of each community in matters of resolving conflicts and, 3) the satisfaction of the rights of victims.
- p. 77-79 Such elements or factors must be evaluated jointly by the judges and be proven in the specific case. This Court, in the Action for Constitutional Relief Under a injunction (amparo) (*Amparo Directo en Revisión*) 5465/2014, when evaluating the applicability of indigenous customary law to a specific case, held that it was necessary for the judicial authority to document, through an anthropological expert or any licit means, the culture of the persons, people or communities involved; the form in which they are governed; the norms that govern them; the institutions that support them; the values they hold; the language they speak and its meaning, in order to be able to apply them in the respective proceedings. Such guidelines are applicable for determining whether or not a case is within the competency of the indigenous special jurisdiction.

**- Principles or criteria of interpretation that govern the indigenous special jurisdiction**

- p. 79-80 The following criteria will assist the judges in finding legitimate solutions to jurisdictional conflicts without incorporating principles of the central State: i) Principle of greater autonomy of the usage of resources and customs of the indigenous communities; ii) The human rights established in the Federal Constitution and the international treaties in such matter constitutes the mandatory minimum for deciding each specific case and; iii) Principle of maximization of indigenous autonomy or of minimum restrictions on their autonomy.

### - Limits on the exercise of the indigenous special jurisdiction

- p. 81 From the content of Article 2, part A, sections II and VIII, of the Federal Constitution, it is seen that such jurisdiction is limited to respecting the general principles contained in the Federal Constitution, its individual rights, the human rights and, especially, the dignity and integrity of women.
- p. 82-83 When deciding the Action for Constitutional Relief Under a injunction (amparo) (*Amparo Directo en Revisión*) 5465/2014, it was determined that indigenous law can be applicable in specific cases. These include those processed in the central State jurisdiction when it establishes a broader protection and does not violate any human right contemplated in the Federal Constitution or any international treaty. It was specified that the only exception or limit on the applicability of indigenous law by the central State authorities is when the usage and customs of such people directly threaten the human rights of the *ius cogens*, such as torture, forced disappearance, slavery and discrimination; or that eliminate the possibility of access to justice of its members. Therefore, if any of such threats exist with respect to certain facts or events, it would not be the indigenous special jurisdiction that decides or judges such events, but rather the ordinary jurisdiction.
- p. 83-84 In effect, the application of the usage and customs of the indigenous peoples, as well as their normative systems, or the exercise of their special jurisdiction, cannot be an excuse for intensifying oppression, including inside the communities, of those members traditionally excluded, such as women, children or people with disabilities; among other historically disadvantaged groups.
- p. 89-90 From the facts of the case and the evidence in the case file, which were correctly evaluated by the authority, including an anthropological opinion, in this case it can be held that all the factors this Court considers must concur to activate the indigenous special jurisdiction exist.
- p. 102 In this regard it is shown that the matter is related to various events that occurred in the Municipality of San “X”, Oaxaca (territorial element), that gave rise to a conflict between a member of its community –Juan “N”–

(personal element) and the community authorities, which was resolved by the Community General Assembly based on the solution through methods recognized by the community (objective element), in light of the rules contained in the Police Band and Good Government of the Municipality of San “X” Oaxaca, which law contains the minimum elements for the right to due process, in the right dimension (institutional element).

Due to the above, this Court determines that the responsible Indigenous Chamber was correct in determining that the events under debate corresponded to the indigenous special jurisdiction, since they resulted from an event between persons of an indigenous community, in a territory that corresponds to those people, which has traditional authorities, who exercise their authority in a specific territorial scope; based on existing traditional usage and practices, both substantive and procedural; and, that these usages and practices are not contrary to the human rights and the guarantees for their protection established in the Federal Constitution and the international human rights instruments that the Mexican State is party to.

- p. 106 This Court also considers the determination of the Indigenous Chamber to order the dismissal of the criminal cause of action was correct.
- p. 106-107 With this outcome the international human rights standards for systems of justice, both ordinary and indigenous, and the recommendations directed especially to the Mexican State are met. Those recommendations indicate that it must be guaranteed that the criminal justice system is not used to criminalize the indigenous peoples or the organizations that assist them in the legitimate defense of their rights, which is accomplished with the indigenous justice system, from a pluralistic perspective, in the case of indigenous jurisdiction that should not be judged by the central authority.
- p. 112 Regarding the principle of maximization of the autonomy of the indigenous communities, it is concluded that the challenged decision was correct to consider that the PP agent was mistaken when that central authority overlooked the characteristics of the internal normative system of the

community applied to the original conflict that Juan initially accepted, and therefore the fact that he no longer agreed with the sanction imposed should not lead to a failure to recognize the system that governs the community to resolve conflicts such as this one.

### Decision

- p. 114 Since the concepts of violation stated by Juan are unfounded, it is appropriate to deny the injunction (*amparo*) requested against the act attributed to the Indigenous Justice Chamber.



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## CHERÁN CASE: RIGHT TO CONSULTATION OF INDIGENOUS PEOPLES IN LEGISLATIVE PROCESSES

### *Controversia Constitucional 32/2012*<sup>32</sup>

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

#### **Summary**

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 peoples living in the Municipality of Cheran, located in the state of Michoacan de Ocampo (Michoacan) have the right to choose their authorities through their procedural ways and customs. On January 22, 2012, the High Council of Communal Government (Cheran Council) was elected through procedural ways and customs as the definitive municipal authority of Cheran, which election was validated by the Electoral Institute of the State of Michoacán. Then, on March 16,

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<sup>32</sup> Decision issued by the First Chamber of Mexico's Supreme Court of Justice (May 29, 2014). Reporting Justice: Margarita Beatriz Luna Ramos. Constitutional Challenge 32/2012

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 constitutional challenge (*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 Supreme Court

Whether the Federal Constitution or the international treaties on human rights established 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 constitutional challenge (*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 as is stated in the San Andrés Larraínzar Agreements, 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 standard of constitutional review, 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 did not respect that obligation, given that, although the Cheran Council noted that while 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.

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### EXTRACT OF THE DECISION

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 ways and customs, 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 constitutional challenge (*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 and because constitutional challenges (*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 ways and customs 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 constitutional challenge (*controversia constitucional*) in order 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 constitutional challenge (*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.

This, 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 Cheran 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 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 constitutional challenge (*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 Cheran 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 Michoacan, 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 constitutional challenge (*controversia constitucional*). 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 Constitutional Challenge (*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 Cheran 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 Larráinzar 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 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 those 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 constitutional challenge (*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. This 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

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. 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 constitutional challenge (*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 Constitutional Challenge (*Controversia Constitucional*) 19/95. It is also 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.

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## ACTIONS RETURNING LAND AND ACCESS TO JUSTICE FOR INDIGENOUS COMMUNITIES

### *Amparo en Revisión 990/2016*<sup>33</sup>

**Keywords:** *indigenous communities' rights, rights of access to justice, right to effective legal protection and an effective recourse, reversion action, expropriation, territory, indigenous community, agrarian community.*

#### **Summary**

On May 14, 2014, representatives of the Commissariat of Common Property of San Juan Jaltepec de Candayoc (Community of San Juan), filed an injunction (*amparo*) against the Ejidal Promotion Fund of the Ministry of Agrarian, Territorial and Urban Development (FIFONAFE), for the refusal to put the reversal of communal lands before the competent unitary court the because they were not used for the purpose for which they were expropriated. As such, they demand the corresponding indemnity. Various provisions of the Agrarian Law and its Regulation were also challenged. A district judge granted the injunction (*amparo*) against the

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<sup>33</sup> Decision issued by the First Chamber of Mexico's Supreme Court of Justice (May 24, 2017). Reporting Justice: José Fernando Franco González Salas. Action For Constitutional Relief Through Injunction 990/2016

norms and the refusal. The President of the Republic and the FIFONAFE filed an appeal (*recurso de revisión*) against that decision, which was heard by a collegiate court in administrative matters. That body ordered the case record be sent to Mexico's Supreme Court of Justice (this Court). On October 6, 2016, competency was assumed to hear the appeal (*recursos de revisión*).

### Issue presented to the Supreme Court

Whether the norms that establish that the FIFONAFE is the only one legitimated to exercise the reversion of expropriated property and prevent the communities from exercising the action itself, are constitutional. Also, to determine what entity should work with and give advice to the indigenous communities and ejidos.

### Holding and vote

The injunction (*amparo*) was granted for essentially the following reasons. The provisions of the Agrarian Law, upon establishing that the FIFONAFE is the only entity legitimated to exercise the reversal of expropriated assets, protects a procedural prerequisite that impedes the communities considered affected by the expropriations from being able to directly exercise the reversal of actions before the agrarian courts, which is an unjustified restriction on the right to effective legal protection. In effect, the community should be permitted to go before the agrarian unitary court directly to assert the actions it considers relevant, to defend the rights derived from the return of lands and the payment of the indemnity alluded to in its petition. It was also determined that it is the Agrarian Ombudsman that possesses the powers to guide, advise and collaborate with the community in the preparation of the reversal claims, not the FIFONAFE as the district judge asserted. Therefore, the effects of the granted injunction (*amparo*) were modified to permit the community itself to go before the agrarian unitary court, with no need for the intermediation of the FIFONAFE.

The Second Chamber decided this matter by the unanimous vote of the four Justices Alberto Pérez Dayán, Javier Laynez Potisek, José Fernando Franco González Salas and Eduardo Medina Mora I. Justice Margarita Beatriz Luna Ramos was absent.

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### EXTRACT OF THE DECISION

p. 1 Mexico City. The Second Chamber of Mexico's Supreme Court of Justice (this Court), in session of May 24, 2017, issues the following decision.

#### Background

p. 1-2 On May 14, 2014, the President, Secretary and Treasurer, respectively, of the Commissariat of Common Property of San Juan Jaltepec de Candayoc (community of San Juan), filed an injunction (*amparo*) lawsuit against the Legal Affairs Director of the Trust Fund for Ejidal Promotion of the Ministry of Agrarian, Territorial and Urban Development [Fideicomiso Fondo de Fomento Ejidal de la Secretaría de Desarrollo Agrario, Territorial y Urbano] (FIFONAFE), for the refusal to put before the competent agrarian unitary court the return of 2,050 hectares of communal lands owned by the community because they were not used for the purpose for which they were expropriated. They form part of the 18,000 hectares expropriated by decrees issued on March 16, 1956 and June 11, 1958, and to demand the indemnity to the complainant community for the expropriation of 12,549 hectares of communal land.

p. 2 The community of San Juan stated in its claim that it was an indigenous community (in addition to an agrarian community) and to evidence this it exhibited documents issued by the National General Archive.

p. 2-3 A district judge in administrative matters in Mexico City admitted the claim. On August 6, 2014, the community of San Juan expanded its claim indicating the Chamber of Deputies and the Chamber of Senators of the Congress of the Union and the President of the United Mexican States and the FIFONAFE as new authorities; it challenged Article 97 of the Agrarian Law, Articles 91 and 92 of the Regulation of the Agrarian Law and their application with the official notice DAJ-SCONT-DJCO-DREV-35/2014, issued by the FIFONAFE.

- p. 4 The respective decision was issued and the injunction (*amparo*) was granted against the norms and the challenged act of application.
- p. 5-6 The President of the Republic and the FIFONAFE filed an appeal (*recurso de revisión*) against the decision, which was heard by a collegiate court in administrative matters in Mexico City. On September 22, 2016, the mentioned court issued a decision and ordered the case record be sent to this Court.
- p. 6 On October 6, 2016, the president of this Court determined that it assumed original competence to hear the appeal (*recursos de revisión*), ordered its placement in the Second Chamber of this Court, and sent the case record for its study to Justice José Fernando Franco González Salas.

### Study of the merits

#### - Grievance in which the President of the Republic refers to the declaration of unconstitutionality of the challenged provisions.

- p. 31-32 The President of the Republic argues that the challenged provisions do not violate the right to an effective recourse. That grievance is unfounded, since the fact that the challenged provisions establish that it will be the FIFONAFE -and not the indigenous or agrarian center or community affected- who will exercise the necessary actions to demand the partial or total reversal of the expropriated assets, is a violation of the right to effective legal protection and an effective recourse.
- p. 32 The right to effective legal protection, also called access to the administration of justice, has been fully analyzed by the Chambers and the Plenary of this Court, which have considered that such right is recognized in Articles 1 and 17 of the Federal Constitution, as well as in Article 25 of the American Convention on Human Rights (ACHR).
- p. 32-33 This Court has held that effective access to justice or to effective judicial protection is the subjective public right that every person has, within the

periods and terms the laws set, to promptly access independent and impartial courts to file a claim or defend against one. In order for a process to advance in which certain formalities are respected the claim or the defense is ruled on and any decision is executed.

- p. 33 This Court has determined that this right does not have the effect of circumventing the procedural requisites necessary for the validity of the judicial routes available to those governed, since that would be equivalent to the Courts ceasing to observe the other constitutional and legal principles that govern their judicial function, thereby provoking a state of uncertainty.

To determine if any norm somehow violates or affects such right, it is important in each case to verify there are no legal or factual impediments that lack rationality, proportionality or are discriminatory.

Not all the requisites established to have access to the judicial processes can be considered to violate the right in question, such as those that, respecting the content of that fundamental right, are intended to preserve other rights, assets or interests constitutionally protected and safeguard adequate proportionality with the end pursued, like compliance with legal deadlines, or exhaustion of ordinary recourses to exercise certain types of actions or the prior appropriation of bonds or deposits.

- p. 33-34 The Plenary of this Court, when deciding the case *Varios* 1396/2011, held that according to the parameter of constitutional regularity, the Mexican State must guarantee the fundamental right of indigenous peoples to have full access to legal protection. This requires it must implement and conduct processes sensitive to their customs and cultural specificities and always assisting them with interpreters that have knowledge of their language and culture.

- p. 34 From there it is seen that the rights of access to justice or to jurisdiction and to effective legal protection have greater scope when indigenous persons or communities are involved.

It should be kept in mind that in this case, the district judge considered that the community of San Juan was right because the articles challenged, upon establishing the exercise of a reversion action, impede the centers (agrarian or indigenous) affected by an expropriation from being able to directly exercise that action and require them to go before the FIFONAFE for it to decide whether or not to exercise the action.

p. 35-36 The provisions in question, by establishing that the FIFONAFE is the only legitimate entity for exercising the reversion of expropriated assets, establish a procedural prerequisite that impedes the communities that are considered affected by the expropriations from being able to directly exercise the reversion action before the agrarian courts.

p. 36 While the cited provisions do not completely prohibit the right of access to justice –to the extent that the reversion action can be asserted by the FIFONAFE in defense of the interests of the affected community– such right is restricted in prejudice of the cited communities, since they do not permit them to be able to judicially file directly a reversal action.

To determine if such restriction has a constitutionally valid justification, it is necessary to look to the legislative processes that gave rise to the current text of Article 97 of the Agrarian Law.

p. 42-44 The legislator considered that given the complexity of the variety of situations that arise de facto as a result of the reversal of the expropriations with respect to lands that originally belonged to agrarian or indigenous communities, it was necessary to legitimize just one entity -the FIFONAFE, as specialized technical body in the administration and defense of the agrarian hubs. It was elaborated that only that agency would prevent lands returned as the result of a reversal from being awarded without legal basis to unrelated persons or persons that did not have rights in relation to the lands to be reverted.

p. 44-45 This Court considers that while the restriction on the right to effective legal protection has a purpose that could be considered constitutionally valid, such measure is disproportionate for reaching that goal.

p. 45 This is so because if the intention of the legislator was to help scale up the conflicts arising from expropriations and prevent lands returned as a result of a reversal from being awarded without legal basis to unrelated persons or persons who did not have rights in relation to the expropriated lands, then it could have been chosen to recognize the legitimation of the indigenous and agrarian communities for purposes of claiming the reversal and permit the court to clarify if such entities had, in each case, rights with respect to the lands in question.

This is especially so since the court proceedings can clarify which communities were affected as a result of the respective expropriation, and thus to achieve the legislator's purpose. Those communities must be able to directly file the reversal action and offer the evidence they consider necessary to prove their claim.

p. 45-46 To consider otherwise would imply overlooking the principle of autonomy of indigenous peoples and communities and the right of full access to jurisdiction recognized in Article 2, part A, section VII of the Federal Constitution. As well as Article 28 of the United Nations Declaration on the Rights of Indigenous Peoples, according to which indigenous peoples have the right to reparations, through means that may include restitution or, when that is not possible, a fair and equitable indemnity for the lands, the territories and the resources that they have traditionally possessed or occupied or utilized and that have been confiscated, taken, occupied, utilized or damaged without their free, prior and informed consent.

p. 46 Therefore, the grievances against the arguments supporting the unconstitutionality of the provisions are unfounded.

**- Grievances in which the FIFONAFE challenges the effects of the injunction (*amparo*).**

p. 49 The FIFONAFE indicates that the Judge misinterpreted its attributes, since according to the Amendment to the Original Contract of the Trust, it only has competence to be, in some cases, an administrator of the economic funds resulting from the payment of indemnities for impacts on lands, but

not to guide, assess or collaborate with the communities in the preparation of the reversal and indemnity payment claims.

- p. 49-50 It adds that the Agrarian Ombudsman is the organization responsible for the defense of the rights of the communities through the application of the attributes that the Agrarian Law confers to it.
- p. 50 Those arguments are well-founded and sufficient to modify the effects of the injunction (*amparo*).
- p. 51 Articles 134 and 135 of the Agrarian Law state that the Agrarian Ombudsman, as a decentralized organization of the Federal Public Administration, has social service functions and is responsible for the defense of the rights of the ejido members, communal landholders, successors of ejido members or communal landholders, ejidos, communities, small land owners, settlers and agricultural day workers, through the application of the attributes conferred to it by the Agrarian Law and its regulation, when so requested or ex officio in terms of that law.
- p. 51-52 Its powers are established in Article 136, which include assisting and, if appropriate, representing the persons referred to in the above paragraph, in agrarian matters and before agrarian authorities; advising on the legal consultations made by those persons in their relations with third parties that have to do with the application of the law; promoting and procuring the conciliation of interests among the mentioned persons, in disputes related to the agrarian laws; preventing and reporting to the competent authority the violation of the agrarian laws in order to ensure respect for the rights of those it assists and urging the agrarian authorities to carry out their functions and issue the recommendations it considers relevant; advising and representing the persons indicated in their filings and procedures to obtain the regularization and title to their agrarian rights before the corresponding administrative or judicial authorities.
- p. 52 Finally, Article 138 of the Agrarian Law provides that all the federal, state and municipal authorities, as well as the agrarian social organizations, are obligated to assist the Ombudsman in the exercise of its functions.

- p. 52-55 While the FIFONAFE, according to the Regulations of the Agrarian Law, has powers of investigation in relation to the reversal proceedings and to exercise the reversal judicially (aspect declared unconstitutional in the previous section), such powers are prior to the proceeding; and it is not stated that the trust has the obligation to assist, during the proceeding, the communities involved.
- p. 56-57 According to the General Organization Manual of the FIFONAFE, the purposes of the Trust are, among others, to handle the conveyance into the trust property of the reverted lands or of the money resulting from the execution of judicial or extra-judicial agreements, and to provide free advice to the ejidos and communities and the small farmers in general that request it, to assist with the protection of community life, encouraging their development and improving their ability to attend and satisfy the demands of their members.
- p. 57 However, it does not have the specific obligations that the district judge entrusted it with, consisting of guiding, advising and collaborating with the communities for the preparation of the reversal claims.

Thus the grievances are well-founded and, therefore, the effects of the injunction (*amparo*) must be modified.

### Decision

- p. 58 The Community of San Juan is covered against Articles 97 of the Agrarian Law and 91 and 92 of its regulation, as well as against the act of their application. As a result of the injunction (*amparo*) the complainant must be permitted to go before the agrarian unitary court directly to assert the actions to defend the rights resulting from the reversal of lands and the payment of the indemnity it alluded to in its request, without needing the intermediation of the FIFONAFE.



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## USE OF INDIGENOUS LANGUAGES IN COMMERCIAL RADIO CONCESSIONS (MULTICULTURALISM: PROTECTION OF INDIGENOUS LANGUAGES)

### *Amparo en Revisión 622/2015*<sup>34</sup>

**Keywords:** *indigenous peoples, indigenous languages, national language, access to telecommunications media, right to speak and preserve indigenous languages.*

#### **Summary**

MCM filed an injunction (*amparo*) lawsuit against Article 230 of the Federal Telecommunications and Broadcasting Law, considering that it restricted his rights as an indigenous person. The district judge dismissed the case. MCM filed an appeal (*recurso de revisión*). The Collegiate Circuit Court overturned the dismissal and referred the case to Mexico's Supreme Court of Justice.

#### **Issue presented to the Supreme Court**

Whether Article 230 of the Federal Law on Telecommunications and Broadcasting is unconstitutional for violating the right of indigenous persons to speak and preserve their language.

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<sup>34</sup> Decision issued by the First Chamber of Mexico's Supreme Court of Justice (January 20, 2016). Reporting Justice: Arturo Zaldívar. Action For Constitutional Relief Through Injunction 622/2015

### Holding and vote

The injunction (*amparo*) of was granted for the following reasons. It was recognized that our Constitution protects the right of indigenous persons and peoples to use and preserve their language. Additionally, it was indicated that this right requires both negative and positive actions to preserve the indigenous languages of our country. Thus, it was decided that Article 230 was unconstitutional for contravening the linguistic rights of indigenous peoples, since our legal system recognizes both Spanish and indigenous languages as national languages. Therefore, imposing a differentiated broadcasting system that gives exclusivity or preferences to Spanish is contrary to the multicultural composition of our country.

The First Chamber of the Supreme Court decided this case with the unanimous vote of the five Justices Norma Lucía Piña Hernández, Arturo Zaldívar Lelo de Larrea, José Ramón Cossío Díaz, Jorge Mario Pardo Rebolledo and Alfredo Gutiérrez Ortiz Mena.

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#### EXTRACT FROM THE DECISION

- p. 1 Mexico City. Resolution of the First Chamber of Mexico's Supreme Court of Justice, corresponding to January 20, 2016.
- p. 1 On July 14, 2014, the decree issuing the Federal Telecommunications and Broadcasting Law (hereinafter, "LFTR") was published, which entered into force on August 13, 2014.
- p. 1-2 MCM filed an injunction (*amparo*) lawsuit before a district court claiming the unconstitutionality of the first paragraph of Article 230 of the LFTR, which is transcribed below:

Article 230. In their transmissions the concessionaires' radio stations must use the national language. This is without prejudice that the social use concessions include the use of a given language of the corresponding indigenous peoples. (...)

- p. 2-3 MCM stated in his lawsuit that he is an indigenous person originally from A, Veracruz, and that he is a poet, actor and journalist in Spanish and Nahuatl. MCM argued that Article 230 restricted the use of indigenous languages to concessions for social use intended for that purpose, imposing the “national” language – understood as Spanish – on all other concessions. According to MCM, this reduced the means of communication in which he could express himself as a poet, actor and journalist in the Nahuatl language. It also prevented him from receiving information and content in his native language. Consequently, MCM considered that Article 230 of the LFTR violated his freedom of expression, his right to equal treatment and non-discrimination, and his right to participate in cultural life. Finally, he also pointed out that the rights of indigenous communities to self-determination, autonomy and to preserve and enrich their original languages, knowledge, culture, and identity were collectively violated.
- p. 2 The district judge hearing the case dismissed the injunction (*amparo*) as invalid for various reasons. MCM filed an appeal (*recurso de revisión*) challenging this decision. The Collegiate Circuit Court decided in favor of MCM, reversing the dismissal and referring the case to Mexico’s Supreme Court of Justice.

### Study of the merits

- p. 10-11 In his injunction (*amparo*), MCM originally claimed the unconstitutionality of Article 230 of the LFTR, considering that this provision violates his rights to non-discrimination, freedom of expression, and linguistic rights of indigenous peoples.
- p. 11 This unconstitutionality stems from the article establishing that in radio station transmissions the national language must be used – understood as the Spanish language – while the use of indigenous languages is limited to social concessions. This unduly restricts the right of indigenous peoples to express themselves in their native language. In the opinion of the First

Chamber of the Supreme Court, that argument is well founded and sufficient to grant constitutional protection to MCM.

- p. 11 To justify this decision, the following points will be developed: (i) the linguistic rights of indigenous peoples, and (ii) the analysis of the constitutionality of the challenged provision.

### **I. Linguistic rights of indigenous peoples**

- p. 11 Even though MCM claims violations of various rights, the Supreme Court understands that such impacts find protection in a more specific right, the right to express oneself in his or her indigenous language, recognized in international treaties on human rights, in international law, and in the Constitution.
- p. 12-13 In our country, with the intention of recognizing and protecting the multicultural composition of the Nation, Article 2 of the Constitution established various rights of indigenous peoples and persons, among them, in part A, section IV, the right to self-determination and autonomy to preserve and enrich their languages, knowledge and all the elements that constitute their culture and identity. Part B, section VI of the same article requires the authorities to establish conditions for indigenous peoples and communities to acquire, operate and manage means of communication.
- p. 13 Thus, the Constitution recognizes the multiculturalism of our country and, as an aspect thereof, the right of indigenous peoples to preserve and enrich their languages. It also requires the State to take positive measures to protect this right.
- p. 13 To this end, the General Law on the Linguistic Rights of Indigenous Peoples (hereinafter “LGDL”) was issued, Article 3 of which recognizes that the plurality of indigenous languages is one of the main expressions of the multicultural composition of the Mexican Nation. Thus, this Law establishes the right of all Mexicans to communicate in the language they speak without restrictions, in the public or private sphere, in oral or written form, in all

their social, economic, political, cultural, religious and any other activities. The right of indigenous peoples and communities to have access to the courts of the State in their language and respecting their culture is also recognized, as well as the right to bilingual and intercultural education.

- p. 14 Consequently, from Article 2 of the Constitution, the LGDL and international treaties; the right of indigenous peoples to preserve and use their language can be considered a human right.
- p. 14 Although this right is recognized in the Constitution as a right of indigenous peoples, it also has an individual aspect, i.e., it constitutes both a right of peoples and a right of indigenous persons. Indeed, language is an essential component of the identity of peoples and individuals, in particular since it is one of the main factors of identification. It is, therefore, a social or cultural right with individual and collective impact.
- p. 14 In addition, the right to language of indigenous peoples and individuals is connected with the exercise of other rights, such as the right to non-discrimination and the right to freedom of expression. It also reflects the recognition of the multicultural composition of our Nation.
- p. 14 As explained, the recognition of the multiculturalism of the Mexican Nation implies the right to preserve and enrich identity and culture.
- p. 15 Thus, respect for multiculturalism includes the understanding of others as culturally diverse and holders of fundamental rights.
- p. 15-16 The purpose of the recognition of multiculturalism in the Constitution was also to increase awareness of the situation of vulnerability that the indigenous peoples of Mexico have historically suffered. Thus, emphasis was placed on the prohibition of all forms of discrimination based on ethnic origin. In order to promote complete and effective equality for persons belonging to indigenous peoples in all economic, social and cultural areas, the State was tasked with adopting the necessary conditions to protect and promote the culture of indigenous peoples.

- p. 16 Therefore, the right to language also fulfills the function of recognizing difference and demands both negative and positive actions to avoid discrimination and promote full equality among Mexicans. The recognition of the different languages that coexist in the country also implies respect for diversity; in that regard, language should not be a factor of discrimination. On the contrary, the State must take all the necessary actions to protect it and allow its development.
- p. 18 With regard to the specific duties that must be undertaken to promote access to the dissemination of indigenous languages, Article 2, part B, section VI of the Constitution specifically mentions the need to integrate communities through the construction and expansion of communications networks and telecommunications, and to establish conditions for indigenous peoples and communities to acquire, operate and administer media outlets, in the terms that the applicable laws determine.
- p. 18-19 Article 6 of the LGDL indicates the duty of the State to adopt and implement the necessary measures to ensure that the mass media disseminate the reality and linguistic and cultural diversity of the Mexican Nation, and to allocate a percentage of the time available in the concessioned mass media, in accordance with the applicable legislation, for the broadcast of programs in the various national languages spoken in their areas of coverage, and cultural programs in which literature, oral traditions and the use of the national indigenous languages of the various regions of the country are promoted.
- p. 20 Therefore, linguistic rights protect the right of indigenous peoples and individuals to found or use communications media. This right must be exercised under conditions of non-discrimination, and through the adoption of measures by the State that ensure cultural diversity in these media.

**- Analysis of the constitutionality of Article 230 of the LFTR**

- p. 24 In light of the above, it must be determined whether Article 230 of the LFTR is constitutional. For this purpose, its regulatory framework will be established briefly and then its content will be developed.

- p. 25 In title four, the LFTR regulates the regime of concessions to provide the public service of telecommunications and broadcasting. Thus, to provide the service, a person must acquire a concession according to the use it will be given. Communication concessions can be used for public (exclusively for government entities), private (for private communication, experimentation, etc.), commercial (for profit) and social (cultural, educational, or scientific non-profit) purposes. Social use concessions can be subdivided into indigenous social use and community social use concessions. Indigenous social use concessions seek the promotion, development and preservation of the language, culture, and knowledge of indigenous peoples.
- p. 25 Article 230 is inserted in that context, which provides that:
- In their transmissions, the concessionaires' radio stations must make use of the national language. This is without prejudice that the social use concessions for indigenous populations make use of the language of the corresponding indigenous peoples. (...)
- p. 26 This provision contains two elements: on the one hand, that the transmissions of the concessionaires' radio stations must be in Spanish; and on the other hand, that the transmissions of the radio stations for indigenous social uses must be in the language of the corresponding indigenous peoples.
- p. 26 The first part of the provision may be interpreted as referring to the Spanish language, since it refers to a single national language, as opposed to the indigenous languages provided for in the second part of the article. Thus, it would seem that two different regimes are established: one for the transmission of content in Spanish, and another for the transmission of content in indigenous languages.
- p. 26 It must be determined what type of use the challenged rule refers to; i.e., whether it is a single or exclusive use or a preferential use. Thus, there could be two interpretations, the first is that the concessions may not broadcast in indigenous languages, nor may the concessions of indigenous social uses be broadcast in Spanish. The second, understanding is that

concessions can broadcast in indigenous languages, but must prefer the Spanish language, while indigenous concessions may broadcast content in Spanish, but they must make use mostly of indigenous languages. In spite of the above, this decision will refer indistinctly to the two types, “exclusive” or “preferential” use, because as will be developed below, both interpretations are unconstitutional.

- p. 26-27 The first part of the provision establishing the exclusive or preferential use of Spanish in broadcasting concessions is unconstitutional because the Constitution expressly protects indigenous languages and does not recognize a single language as the national language. Moreover, this part of the article contravenes the linguistic rights of indigenous peoples by imposing a barrier on the use of indigenous languages without any justification. This is determined based on the following arguments.
- p. 27 As explained, the Constitution does not establish that Spanish is the national language; indeed, it accommodates for and fully recognizes the indigenous languages. In the national legal order, the LGDL points out that both Spanish and indigenous languages are national languages.
- p. 27 Multiculturalism demands the coexistence of all national languages, without establishing exclusive regimes or giving preponderance or preference to any of them. Some clarifications should be made on this aspect.
- p. 27-28 The fact that certain provisions establish that different procedures must be carried out in Spanish does not mean that this is the language of the Nation. A distinction should be made between the concept of official language and national language. The first refers to the language in which State communications are normally issued. The national language, on the other hand, denotes the language in which a country bases its identity and cultural roots. Thus, even if some procedures before the State are carried out in Spanish, it is not the only language of the Nation.
- p. 28 On the other hand, the use of languages under conditions of equality does not imply that affirmative action cannot be established to promote and

protect those groups that have historically experienced discrimination and vulnerability.

- p. 28-29 In addition, the part of Article 230 that states that the radio stations of the concessionaires must make use of the national language in their broadcasts contravenes the linguistic rights of indigenous peoples, because although the legislative statement of purpose indicates that its purpose was the promotion, development and preservation of indigenous languages, such a purpose is not achieved through imposing a broadcasting scheme in which the Spanish language is used “exclusively or preferentially”, but through providing additional spaces for indigenous peoples to disseminate their languages. In fact, the norm and its purpose are opposed since the exclusivity or preference in the use of Spanish imposes a barrier for indigenous peoples to access commercial concessions.
- p. 29 Indeed, multiculturalism is achieved through the integration of minority languages -in the Mexican case, indigenous languages- into national spaces. Integration, as opposed to assimilation, is considered a legitimate aim of the State, to which both the majority and the minority contribute. This should be understood as a process of social cohesion in which diversity has a place.
- p. 29 Thus, the provision to which we have referred generates an effect contrary to social integration and cohesion, since it establishes a limited and differentiated scope for the exercise of linguistic rights in the media.
- p. 29-30 Consequently, the part of Article 230 that states that: “In their transmissions, the radio stations of the concessionaires must make use of the national language” is unconstitutional since it establishes the use of a single national language –understood as Spanish– in the radio stations of the concessionaires, given that the Constitution protects and recognizes indigenous languages in the same way.

### Decision

- p. 30 Hence, the injunction (*amparo*) is granted to MCM against Article 230 of the LFTR, so that the aforementioned part of that provision will not be applied to him when accessing the broadcasting concessions.



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## INDIGENOUS COMMUNITIES' RIGHT TO THE ENVIRONMENT (SOCIAL EVALUATION OF AN ENERGY PROJECT IN YUCATAN)

### *Amparo en Revisión 953/2019*<sup>35</sup>

**Keywords:** *right to a healthy environment; standing in the environmental injunction (amparo); precautionary principle in environmental matters; in dubio pro natura principle; principle of citizen participation; rights of access to information and public participation in environmental matters; social impact assessment in energy projects; rights of indigenous communities to self-determination and prior, free and informed consultation.*

#### **Summary**

In October 2016, the Ministry of Energy issued a technical opinion and a resolution on the social impact assessment (SIA) of a wind and photovoltaic project to be developed in the state of Yucatan. Ejido S, whose members describe themselves as indigenous Mayan, filed an injunction in the form of a two-stage judicial review relieving an un-remediated breach of rights (*amparo indirecto*) against these acts

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<sup>35</sup> Decision issued by the First Chamber of Mexico's Supreme Court of Justice (May 6, 2020). Reporting Justice: Alberto Pérez Dayán. Action for Constitutional Relief Through Injunction 953/2019

and Article 120 of the Electricity Industry Law (LIE). This was done under the consideration that they affect various constitutional and conventional rights that are recognized for indigenous peoples and communities. This includes their right to a healthy environment and to prior, free and informed consultation. A district judge in Yucatan dismissed the lawsuit on the grounds that the plaintiffs did not have standing to file it. The Ejido S brought an appeal (*recurso de revisión*) challenging that determination. The Supreme Court decided to assert jurisdiction to resolve the case.

### Issue presented to the Supreme Court

Whether or not the legal sphere of the members of Ejido S, who consider themselves as indigenous Mayan, is currently and actually affected -either directly or by their special situation in the legal system- by the resolution issued by the Ministry of Energy that declared the evaluation of the wind and photovoltaic project to be developed in Yucatan completed. If it is resolved that Ejido S can challenge that act of the Ministry of Energy through the injunction (*amparo*) proceeding, the Supreme Court must then decide: (i) whether Article 120 of the LIE is unconstitutional; and (ii) whether the resolution of the Ministry of Energy contains an adequate characterization of the social, environmental and cultural impacts of the project being evaluated.

### Holding and vote

The injunction (*amparo*) was granted to Ejido S for the following reasons: The right to a healthy environment and other constitutionally and conventionally recognized rights in favor of indigenous peoples and communities were violated. One criterion to prove standing to file an injunction (*amparo*) is: whenever possible violations of the human right to a healthy environment are argued, the relationship of the person who uses or inhabits the area of influence of the ecosystem at risk with its environmental services is taken into consideration. Regarding the Article 120 of the LIE, this was determined as not unconstitutional because it establishes the obligation of the Ministry of Energy to act with due diligence to protect the rights of indigenous peoples and communities in the evaluation and decision-making processes of energy projects. The authority is legally required to issue a resolution regarding a social impact assessment and make the

respective recommendations. These recommendations must ensure that the indigenous peoples and communities located in the area of direct and indirect influence of the project are duly identified and consulted in advance, in a free and informed manner. Also, the identification of these indigenous communities is not complete with the presentation of the resolution under consideration by the SIA. The authorities responsible for the consultation and authorizing the project have the duty to ensure that the communities are fully identified and so may not be affected. On the other hand, the right to a healthy environment of the members of Ejido S was violated because the precautionary principle that governs environmental matters applies when there is uncertainty of the risk to the environment and it requires the State to take positive actions in the absence of information. So, the precautionary and *in dubio pro natura* principles, and therefore, the human right to enjoy a healthy environment by the members of Ejido S were violated with the resolution of the SIA of Project C. The project was approved with the knowledge that the company B-Yucatán 1 had not identified the changes or environmental risks related to the “Yucatan Peninsula” aquifer. Regarding the indigenous communities’ right to consultation, this is especially important in the context of sustainable development since economic development without a vision consistent with human rights can lead to the loss of our indigenous peoples and traditions. Consultation processes cannot be mere formalities; they must be effective and the indigenous communities must always be consulted by the authority prior to the authorization stage of any project.

**Note:** The Second Chamber of the Supreme Court decided this case unanimously by 5 votes of the Justices Yasmín Esquivel Mossa (reserved her right to issue a concurrent opinion), Alberto Pérez Dayán (reserved his right to issue a concurrent opinion), Luis María Aguilar Morales (reserved his right to issue a concurrent opinion), and José Fernando Franco González Salas (voted with reservations).

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#### EXTRACT FROM THE DECISION

p. 1 Mexico City. The First Chamber of Mexico’s Supreme Court of Justice (this Court), in session of May 6, 2020, issued the following decision.

## Background

- p. 6 In December 2015, the company B-Yucatán 1 submitted to the Ministry of Energy (SENER) the Social Impact Assessment (SIA) to develop a wind and photovoltaic project (Project C), consisting of the construction of a wind farm with 125 wind turbines in a municipality of Yucatán. On October 26, 2016, SENER issued the technical opinion on the SIA and on October 31, 2016, the resolution validating this assessment.
- p. 1-4 Ejido S, whose members consider themselves to be indigenous Mayan, filed an injunction (*amparo*) lawsuit against the technical opinion on the SIA (hereinafter the opinion) and the resolution on the SIA of Project C, considering that these acts violated their rights to an adequate environment, health, property, heritage, existing resources as well as the continuation of culture by the Mayan indigenous community and its members. The unconstitutionality of Article 120 of the Electricity Industry Law (LIE) was also claimed. A district judge in Yucatan dismissed the injunction (*amparo*) lawsuit on the grounds that Ejido S had no standing to file it. Ejido S then filed an appeal (*recurso de revisión*), asking this Court to assert jurisdiction, which was approved by its Second Chamber, where the case was decided.

## Study of the merits

### - Standing of ejido S to file an injunction (*amparo*)

- p. 18 The members of Ejido S, in relation to their human right to a healthy environment, argued that they had standing to claim, through the injunction (*amparo*), an impact on their natural resources because SENER authorized a project without identifying the impacts related to the bodies of water (cenotes) in the “Yucatan Peninsula” aquifer. The cenotes cover an area of 124,409 square kilometers and is a source of subsistence for their indigenous community. They also stated that the opinion on the SIA of Project C issued by SENER contravenes the rights of self-determination of indigenous communities, as well as the right to prior and informed consultation.

p. 18-19 To analyze whether the dismissal declared by the district judge in Yucatan was correct because the members of Ejido S had no standing to file the injunction (*amparo*) lawsuit, the Second Chamber of this Court considers it must address the special configuration of the right to a healthy environment and the special principles that govern it in order to determine the essential core of protection, the purposes it pursues and how it is inserted into the legal sphere of the person. This will make it possible to identify how this right may be violated. This decision of this Court is based on a precedent resolved by its First Chamber, Injunction Under Review (*Amparo in Revision*) 307/2016, which reviewed the theoretical and legal framework of the human right to the environment.

**- Theoretical and legal framework of the human right to the environment**

p. 19 Various countries and international instruments have incorporated the right to live in a healthy environment as a genuine human right that entails the power of anyone to demand the effective protection of the environment in which they live. For example, in *Advisory Opinion 23/17*, the Inter-American Court of Human Rights established that the right to a healthy environment protects components such as forests, rivers, seas, and others, as legal interests in themselves.

p. 20 Considering this *Advisory Opinion*, in Injunction Under Review (*Amparo in Revision*) 307/2016, this Court has established that the human right to the environment has a double dimension: I) ecocentric or objective dimension, and II) anthropocentric or subjective dimension. The first deals with the defense and restoration of nature and its resources regardless of their repercussions on humans and the second conceives that the protection of this fundamental right constitutes a guarantee for the realization and validity of the other rights recognized in favor of the person. The violation of either of the two dimensions mentioned constitutes an impact on the human right to the environment.

p. 21 Likewise, this Court has declared that the right to a healthy environment has both individual and collective connotations. In its collective dimension

it is a universal interest that is owed not only to present generations, but also to future ones. In its individual dimension, the violation of the right to a healthy environment can directly or indirectly affect people because of its connection with other rights such as health, personal integrity or life.

### - The human right to the environment in Mexico

p. 21 In Mexico, the right to the environment is contemplated in Article 4 of the Constitution, as well as Article 1 of the Constitution and Article 11 of the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights, “Protocol of San Salvador”, according to which “everyone has the right to live in a healthy environment and to have basic public services” and “states parties shall promote protection, preservation and the improvement of the environment”.

p. 22 For this Court, the legal interest protected by the human right to the environment is the “natural environment”, understood as the environment in which the person operates, characterized by the set of ecosystems and natural resources that allow the integral development of their individuality. This implies that Mexico is obliged to guarantee both dimensions of this right.

### - Guiding principles

p. 22 The specialized literature states that to provide content to the right to environment, the guiding principles, which aid constitutional judges in their interpretative work, must be consulted. Although environmental law is based on various principles that are fundamental to guide the judicial work, for the issue to be resolved in this case, this Court addresses only the precautionary, *in dubio pro natura* and citizen participation principles.

### - A) Precautionary principle

p. 22 In the *Advisory Opinion 23/17*, the Inter-American Court said that the precautionary principle in environmental matters refers “to the measures that must be taken in cases where there is no scientific certainty about the impact that an activity could have on the environment.”

Similarly, principle 15 of the United Nations Declaration on Environment and Development states that “in order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”

- p. 23 Article 26, section III, of the General Law on Climate Change also contemplates the precautionary principle. Thus, the Mexican State recognizes its application and binding nature in environmental matters.

For this Court, precaution and prevention are the cornerstones of environmental law. When there are damages there is an obligation to make reparations, while when there is risk there is an obligation to prevent damage. In accordance with the precautionary principle in environmental matters, an *ex-ante* solution should be sought rather than opting for the remedy as an *ex-post* solution, which necessarily entails the obligation to implement an environmental impact assessment with respect to any activity, work or project that is likely to have a significant negative impact on the environment and which is subject to the decision of a competent national authority.

- p. 24 The precautionary principle has different scopes: it operates as an interpretative guideline when faced with the limitations of science to establish with absolute certainty the risks to nature and, in relation to public administration, it implies the duty to warn, regulate, control, monitor or restrict certain activities that are risky for the environment. In this regard, this principle may serve as a reason for decisions that would be considered contrary to the principle of legality or legal certainty. Finally, for legal operators, precaution requires incorporating the uncertain nature of scientific knowledge into their decisions.
- p. 24-25 A key concept in environmental matters and the precautionary principle is “environmental risk”. An environmental impact statement is an environmental risk assessment based on which work or a project is accepted or rejected.

Thus, for this Court, an environmental risk assessment is a *necessary* condition for the implementation of any project with an environmental impact and its absence constitutes in itself a violation of this principle and, therefore, of the human right to a healthy environment.

- p. 25 The Court notes that the assessment of environmental risks and impacts as a general rule are subject to scientific or technical uncertainty, since information on environmental risks or damages may be uncertain for various reasons, which requires a rethinking of the rules for weighing evidence.

In the opinion of this Court, the precautionary principle may reverse the burden of proof born by the responsible agent, and provide judges with a tool for obtaining all the necessary evidence to identify the environmental risk or damage. This is reinforced by the provisions of Article 8.3 subsection e) of the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (Escazú Agreement), which recognizes the obligation of States to have measures to facilitate the production of proof of environmental damage when appropriate and applicable, such as the reversal of the burden of proof and the dynamic burden of proof.

#### **- B) Principle *in dubio pro natura***

- p. 26 The principle *in dubio pro natura* is inextricably linked to the prevention and precautionary principles because when in doubt about the certainty or scientific accuracy of environmental risks, the decision must favor nature. This means that if there is a collision between the right to enjoy a healthy environment and other interests, and the damage or risks cannot be elucidated due to lack of information, all necessary measures must be taken in favor of the environment.

#### **- C) Principle of citizen participation**

- p. 27 Principle 10 of the United Nations Declaration on Environment and Development (Rio Declaration) recognizes the principles of access to information and public participation in environmental matters.

- p. 27-28 The principle of citizen participation has also been developed more specifically in the Escazú Agreement, Article 4.6, which states the duty of States parties to guarantee an enabling environment for the work of persons, associations, organizations or groups that promote environmental protection by recognizing and protecting them. Article 8.2 of the same international instrument, on access to justice in environmental matters, regulates the obligation of States parties to ensure, in the framework of their domestic legislation, access to judicial and administrative mechanisms to challenge and appeal. This is established with respect to substance and procedure, regarding any decision, action or omission related to access to environmental information or public participation in decision-making processes regarding environmental matters, or any other decision, action or omission that affects or could affect the environment adversely or violate laws and regulations related to the environment. This means that the enabling environment for citizen participation in the protection of the environment must also be guaranteed through forms of broad active legal standing, as also required by Article 8.3 of the Escazú Agreement.
- p. 28 This Court insists that the authorities must, within the scope of their jurisdiction, encourage citizen participation, or ensure an enabling environment for the protection of the environment. The principle of citizen participation contains that of public initiative, which recognizes the proactive role of the State in the protection of the environment in the terms of our Constitution. Thus, the fulfillment of environmental purposes cannot depend solely on citizens.

#### **- Standing in environmental matters**

- p. 30 In this decision, this Court advances the delineation of the concept of standing for the defense of the environment as a human right in light of Articles 1 and 4 of the Constitution.

For this Court, the recognition of standing does not imply the generation of a protection of the common or simple interest because it is not a question of protecting a generic interest of society, but of guaranteeing access to justice

in the face of legally relevant and protected impacts. Therefore, whoever claims to have standing must be in an identifiable legal situation, arising from a specific relationship with the alleged object of protection, that allows the petitioner to assert a differentiated impact from the rest of the members of society.

- p. 30-31 Therefore, the Court considers that the standing to file an injunction (*amparo*) in environmental matters depends on the special situation that the person or community has with the ecosystem that is considered affected, particularly with its environmental services. The concept of environmental services is fundamental to guarantee the effective protection of the human right to the environment since these determine the benefits that the ecosystem gives to the human being. Environmental services are defined in Article 3, section XXXVI of the General Law of Ecological Balance and Environmental Protection, as the tangible and intangible benefits generated by ecosystems for the survival of the natural and biological system as a whole, and to provide benefits to human beings.
- p. 34 This Court notes that environmental services are defined and measured through scientific and technical evidence that, as is usual in this field, is neither exact nor unambiguous.
- p. 35 Thus, to analyze whether a person has standing to file an injunction (*amparo*) in defense of the environment, environmental services must be evaluated according to the precautionary principle. This principle requires us to seek, in each case, the tools or methods necessary to understand the functioning of an ecosystem, as well as the environmental services it provides, with a view of guaranteeing its conservation in direct application of the principle *in dubio pro natura*.
- p. 36 It should also be borne in mind that each ecosystem has different areas of influence depending on the environmental services it provides, so the identification of this geographical space allows us to understand that any person who uses or inhabits the area of influence of an ecosystem is a beneficiary of its environmental services and, therefore, has standing to file an injunction (*amparo*) in his or her defense.

In the opinion of this Court, the area of influence or “adjacent environment” is a conceptual tool that helps legal operators define standing in the proceedings of an environmental injunction (*amparo*), since the main stakeholders, in defending a certain ecosystem, are not only those who live territorially near where it is located but also those who use the area of influence that is positively impacted by the environmental services provided by the ecosystem. The definition of the area of influence of each ecosystem should be resolved on a case-by-case basis as it will depend on the type of ecosystem and the environmental services it provides.

- p. 36-37 This Court proposes building a methodology that serves as a tool for legal operators to decide if a natural person has standing to file an injunction (*amparo*) to protect the right to a healthy environment.

The questions that legal operators must ask to determine the above are the following: (1) What type of ecosystem is to be protected? (2) What environmental services does the affected ecosystem provide? (3) What is the area of influence or adjacent environment of the ecosystem? and (4) Does the person who files the environmental injunction (*amparo*) inhabit or use the area of influence that is positively impacted by the environmental services provided by the ecosystem?

#### - Standing in this case

- p. 37 What type of ecosystem is to be protected? In this case, the ecosystem that the Ejido S wants to protect is a coastal ecosystem, composed of different biological systems, including the cenotes, which are located in the coastal zone and can include marine, aquatic or terrestrial portions.
- p. 38 What environmental services does the affected ecosystem provide? In general, coastal/marine ecosystems moderate the impacts of storms, provide habitats for wildlife, maintain diversity, dilute or treat waste, provide ports or transportation routes, provide habitats and employment for humans and provide aesthetic enjoyment and entertainment opportunities.

- p. 39 One of the most important environmental services provided by cenotes is that they are a source of groundwater and water can be obtained from wells or artificial openings. In addition, the physical properties of the limestone rock that allow the formation of the cenotes determine the existence of an unbounded aquifer, which intercommunicates all the existing bodies of water in the region. Additionally, the Yucatan Peninsula aquifer has many groundwater abstractions, since this is the only source of supply for all uses in the region.
- p. 40 What is the area of influence or adjacent environment of the “Yucatan Peninsula” aquifer? This Court concludes that the area of influence of the coastal aquifer ecosystem called the “Yucatan Peninsula” that Ejido S seeks to defend covers at least an area of 124,409 square kilometers, comprising the entire state of Yucatan and almost all of the states of Campeche and Quintana Roo.
- p. 41 Does the person who files the environmental injunction (*amparo*) inhabit or use the area of influence that is positively impacted by the environmental services provided by the ecosystem? If the area of influence that is positively impacted by the environmental services provided by the ecosystem of the “Yucatan Peninsula” aquifer covers the entire state of Yucatan and the affected parties demonstrated they live in a municipality in that state, it is clear that they benefit from the environmental services provided by the mentioned ecosystem.

For these reasons, the Second Chamber of this Court finds that the members of Ejido S have standing to file the injunction (*amparo*) lawsuit against the resolution issued by SENER in relation to the SIA of Project C.

### **Analysis of the grounds of violation**

- p. 43 Having resolved the questions on the validity of this injunction (*amparo*), this Court studies the grounds of complaint raised by Ejido S in relation to two issues: a) the unconstitutionality of Article 120 of the LIE and b) the

improper characterization of the social, environmental and cultural impacts of Project C.

## **XII. Constitutionality of Article 120 of the LIE**

- p. 43 Ejido S argued that Article 120 of the LIE is unconstitutional because it transfers to third parties the State's obligation to identify and characterize indigenous peoples and communities in relation to actions and projects that may affect their rights.

For this Court, Article 120 of the LIE is not unconstitutional because ultimately, it is the authority itself that must act with due diligence when assessing, modifying or approving the identification or characterization by the promoters of an energy project of the indigenous communities that could be affected.

- p. 46 For the Second Chamber of this Court, the legal obligation to issue a resolution regarding the SIA, and, where appropriate, to make the respective recommendations, means that the authority is ultimately responsible for ensuring and verifying that the indigenous peoples and communities that are located in the area of direct and indirect influence of the project are duly identified and therefore consulted in advance in a free and informed manner.

Additionally, for the Court, the identification of these indigenous communities is not exhausted by the declaring resolution presented by the SIA. After that, the authorities responsible for the consultation and authorization of the project have the duty to ensure that the indigenous peoples and communities that may be affected by the development of the respective energy project are fully identified and, on that basis, to ensure that they can be consulted about the consequences it could have on their communities, way of life, environment or health.

- p. 48 This Court also specifies that the interpretation of Article 120 of the LIE must be framed within the obligations of the State regarding the special

protection owed to indigenous persons and communities under its jurisdiction, consisting of guaranteeing the full exercise of their rights, especially with respect to the enjoyment of their property rights in order to ensure their physical and cultural survival.

In this regard, the State duty of guaranteeing the “survival” of indigenous persons and communities must be understood as their capacity to “preserve, protect and guarantee the special relationship that they have with their land”, in such a way that they can “continue to live their traditional way of life and that their cultural identity, social structure, economic system, distinctive customs, beliefs and traditions are respected, guaranteed and protected.”

### **XIII. Improper identification of social impacts**

- p. 49 This Court now analyzes Ejido S’s argument that its right to a healthy environment for its development and well-being was violated with the authorization by SENER of a project in which the possible impacts related to the bodies of water of the “Yucatan Peninsula” aquifer were not identified, thereby failing to comply with its obligation to guarantee respect for that right, as established in Article 4 of the Constitution.
- p. 50 The Court declares that the argument put forward by the Ejido S is well founded since even though SENER stated that the SIA opinion did not authorize the realization of any wind energy project, in accordance with the precautionary principle this should not be understood as an impediment to deciding that its fundamental right to a healthy environment was violated.
- p. 51 This is so because the precautionary principle that governs environmental matters operates because of the uncertainty of the risk to the environment and requires that there be positive actions of the State in the absence of information. For this reason, in environmental matters, it is not required that visible and verifiable damage to nature has already been caused to consider that the right to a healthy environment has been violated. Violations of the precautionary principle and the right to a healthy environment may

result from failure of the authority to obtain sufficient information—whether it comes from the company or is obtained *motu proprio*—to enable it to take necessary action to determine whether the project is viable or to provide for appropriate mitigation measures.

This Court also notes that Chapter II of Title Four of the LIE, which addresses issues related to social impact and sustainable development, establishes that infrastructure projects in the public and private sectors must comply with the principles of sustainability and respect for the human rights of the communities and peoples of the regions in which they are to be developed. The Second Chamber of this Court thus concludes that the provisions contained in Article 120 of the LIE for the identification, characterization, prediction and assessment of social impacts must include the environmental impacts of projects.

- p. 54 For the Second Chamber, SENER violated the precautionary and *in dubio pro natura* principles and, therefore, the human right of Ejido S's members to enjoy a healthy environment, with the ruling on the SIA of Project C, because it approved it even knowing that the company B-Yucatán I had not identified the changes or environmental risks related to the “Yucatan Peninsula” aquifer.
- p. 55 The Court understands that even though the information presented in the SIA is not definitive because it does not constitute the authorization to carry out a project, the injunction (*amparo*) must be granted to Ejido S because the special configuration of the right to the environment and the particularity of the principles that govern it allow people to resort to the injunction (*amparo*) at any time when they consider there is a risk of irreparable impact on an ecosystem that provides environmental services of which they are beneficiaries.

In conclusion, this Court declares the arguments of Ejido S to be well founded regarding the violation of their right to a healthy environment, and therefore the resolution on the SIA of Project C must be invalidated, since

SENER did not demand or ensure that there was complete information that analyzed the environmental risk and determinations could be reached aimed at protecting the environment.

**e) Theoretical and legal framework of the right to consultation of indigenous communities and peoples**

- p. 56-57 The members of Ejido S argued that Project C affects their rights as an indigenous community, including that of prior consultation, because broadly speaking, the SIA approved by SENER lacks an adequate characterization of the areas of influence that will be affected. There are no properly measured and mitigated impacts, indigenous communities in project C's area of influence were not adequately identified, and the compensation and shared benefits to which indigenous communities are entitled are not contemplated.
- p. 57-59 The Plenary of this Court and each of its Chambers, through case law, have recognized that the right to consultation of indigenous communities and peoples arises from an interpretation of Article 2 of the Constitution and the Indigenous and Tribal Peoples Convention (Convention 169). This right consists of the obligation of the State to consult indigenous peoples and communities before adopting an action or measure likely to affect their rights and interests. Likewise, there is consensus that for the consultation to comply with the national and international standard it must be prior, free, informed, culturally appropriate, given through its representatives or traditional authorities, and in good faith.
- p. 60 Consultation with indigenous communities and peoples is particularly important in the context of the sustainable development of States, since economic development without a vision consistent with human rights can entail, among other things, the loss of our indigenous peoples and traditions. It is in this sense, as stated in Article 7 of Convention 169, that the affected peoples and communities have “the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use”.

- p. 61-62 It is essential that consultation processes be effective and not become mere formalities for the company or the authority, so the communities can in fact influence the project, public policy, legislation or decision that is being consulted. Therefore, in such processes both parties must work in good faith to reach a consensus; in this sense, neither party has the right to unilaterally impose its will.

#### **f) Procedure for the approval of an Electric Energy project**

- p. 67 The LIE and its Regulations establish three requirements for a company such as the promoter of Project C to generate electricity from wind: that it has authorization or permission from the Energy Regulatory Commission (CRE); that it has a positive SENER resolution on the SIA presented; and that it has reached an agreement or has the consent of the affected indigenous communities, derived from the respective consultation process. What is not clear from the LIE and its Regulation is how these three requirements are concatenated.
- p. 69 In this case, the members of Ejido S consider that SENER's ruling on the SIA has the nature of a final decision authorizing the realization of Project C.

#### **g) The technical opinion and approval of the Social Impact Assessment is preliminary in nature**

- p. 69-70 As the LIE and its Regulations do not define the temporal concatenation of the three requirements that must be met by those who wish to operate as power generators, it is difficult for this Court to elucidate whether the Resolution of the SIA challenged by Ejido S has a definitive or preliminary nature. By "*definitive*" the Court understands that the information could not be modified or corrected at a later stage of the procedure to obtain permits or authorizations to develop projects in the electricity industry. On the other hand, "*preliminary*" means that the information contained in the SIA could be modified or corrected at later stages.
- p. 71-72 This Court considers that the only viable interpretation is that indigenous communities must always be consulted prior to the authorization stage

by the CRE. For this Court to maintain otherwise would imply agreeing that the consultations of the electric energy projects do not need to meet the requirement of being prior, since they would not occur at the first planning stages.

p. 72 p.133 The Court concludes that, through an interpretation consistent with the right to consultation with indigenous communities, the first requirement that must be met by anyone interested in obtaining a permit or authorization to generate electricity is the approval of the SIA by SENER referred to in Article 120 of the LIE. Secondly, once such approval has been acquired and if potentially affected indigenous communities have been identified, SENER must ensure that the indigenous communities that may be affected by the project are consulted with. And finally, once an agreement or a consensus has been reached with the indigenous communities, the interested company may request permission or authorization from the CRE.

p. 73 As a result of the above, this Court considers that both the opinion and the resolution of the SIA are preliminary in nature; therefore, they should not yet affect the rights of the indigenous communities and peoples.

The right to consultation must be meaningful and not a simple “informative consultation”, but a real negotiation where information is exchanged and where the affected indigenous communities are heard regarding their concerns and the impact that the project will generate on their rights.

p. 77 The authorities responsible for the consultation and authorization of the project have a duty to ensure that there is complete and timely information on the impact of the project on the affected communities and on the environment. In addition, they have to give that information to the communities from the beginning of the consultation processes and give them sufficient time and tools.

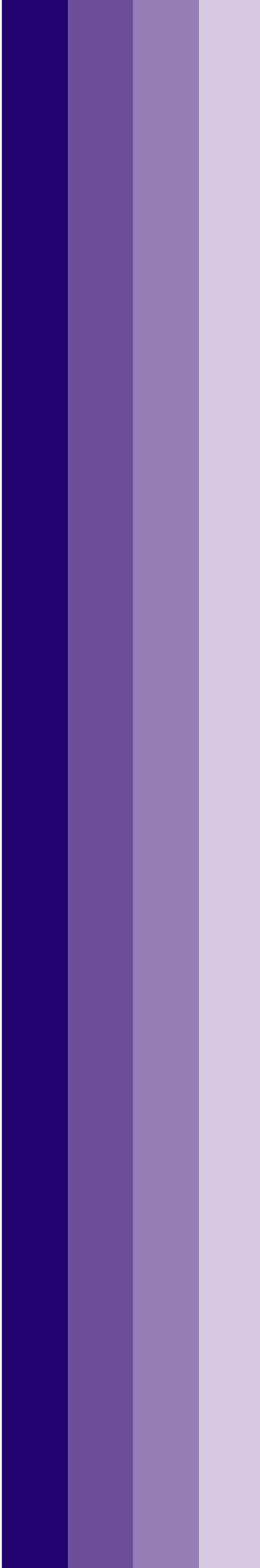
Therefore, if once the consultation stage has begun, this information is not provided or there is no real procedure for exchanging it among the company,

the authority and the affected communities, in accordance with the standards that this Court has set, the affected parties may resort to file an injunction (*amparo*) to claim the violation of their right to consultation. However, the Court concludes that so far there has been no impact on the right to consultation or the other rights that communities have as indigenous communities, since the information contained in the challenged acts can still be modified when the consultation stage that the responsible authority must provide begins.

### Decision

- p. 78-79 The decision appealed is overruled and Ejido S is granted the injunction (*amparo*) against SENER's resolution on the SIA of project C, for the following purposes: (I) SENER must cancel the mentioned resolution and issue another one in which it reiterates the issues that were not subject to constitutional protection; (II) taking into account the content and obligations imposed by the right to a healthy environment developed in this decision, the energy company is required to identify and present the information concerning the changes or environmental risks related to the bodies of water (cenotes) including the groundwater of the "Yucatan Peninsula" aquifer; (III) once this is done, SENER must assess in light of the rights involved whether the SIA of Project C is considered in compliance.





VIII. ECONOMIC,  
SOCIAL, CULTURAL  
AND ENVIRONMENTAL  
RIGHTS



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## COCKFIGHTS AND THE RIGHT TO CULTURE

### *Amparo en Revisión 163/2018*<sup>36</sup>

**Keywords:** *right to culture, right to cultural participation, right to equal protection, right to private property, right to choose an occupation and right to engage in work, animal protection, proportionality test, animal cruelty and mistreatment.*

#### **Summary**

On December 6, 2016, in his own right and as President of the Mexican Cockfighting Promotion Commission (the Commission), Efraín Rábago Echegoyen (the petitioner) filed an injunction (*amparo*) before a district court in Veracruz against the Congress and the Governor of the same State for the issuance of a decree published on November 10, 2016, which reformed various articles of the Animal Protection Law for the State of Veracruz. These articles established that animal fights were prohibited because they were acts of cruelty and mistreatment. Bullfighting shows, *faena campera*, horse racing, and activities related to the sport

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<sup>36</sup> Decision issued by the First Chamber of Mexico's Supreme Court of Justice (October 31, 2018). Reporting Justice: Arturo Zaldívar. Action For Constitutional Relief Through Injunction 163/2018

of rodeo or *charrería* and *jaripeos* were excluded from the application of these prohibitions. The petitioner and the Commission considered that these rules violated their right to culture and to property, the right to choose an occupation and engage in work, as well as the right to equal protection and non-discrimination. On June 5, 2017, a district judge issued a decision in which he decided to deny the injunction (*amparo*), so the petitioner and the Commission filed an appeal (*recurso de revisión*) and the Supreme Court reassumed its original jurisdiction to hear the matter.

### Issue presented to the Supreme Court

Whether the ban on cockfighting violates the right to participation in cultural life and to property, the right to choose an occupation and engage in work, and the right to equal protection and non-discrimination

### Holding and vote

The decision challenged was upheld essentially for the following reasons. The Supreme Court considered that any practice involving the mistreatment and unnecessary suffering of animals cannot be considered a cultural expression protected by the right to participate in cultural life. The right to property and right to choose an occupation and engage in work are prerogatives whose exercise is limited by the prohibition of cockfighting. This is an appropriate measure necessary and proportional to the valid constitutional purpose it seeks, which is the protection of animal welfare. Finally, the Supreme Court determined that the challenged rules establish two expressly differentiated legal regimes, consisting of a prohibition regime for animal fights and a permissive legal regime for bullfighting shows, *faena campera*, horse racing, and activities related to the sport of rodeo (*charrería*) and *jaripeos*. However, the fact that some of these activities also lead to mistreatment of animals and are also objectionable does not make the ban on animal fighting arbitrary, nor the animal fights permissible or legitimate.

The First Chamber decided this case unanimously with the vote of the five Justices Norma Lucía Piña Hernández (reserved the right to issue a concurring opinion), Arturo Zaldívar Lelo de Larrea, José Ramón Cossío Díaz (reserved the right to issue a concurring opinion), Jorge Mario Pardo Rebolledo and Alfredo Gutiérrez Ortiz Mena.

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**EXTRACT FROM THE DECISION**

p. 1 Mexico City. The First Chamber of Mexico's Supreme Court of Justice (the Supreme Court), in session of October 31, 2018, issues the following decision.

**Background**

p. 1-2 On December 6, 2016, in his own right and as President of the Mexican Cockfighting Promotion Commission (the Commission), Efraín Rábago Echegoyen (the petitioner) filed an injunction (amparo) lawsuit before a district court in Veracruz against the Congress and the Governor of the same State, for the issuance of a decree published on November 10, 2016, which reformed the second paragraph of Article 2, Article 3 and sections V, VIII and X of Article 28 of the Animal Protection Law for the State of Veracruz.

p. 3 In the view of the Commission and the petitioner, these rules violated their rights to culture and to property, the right to choose an occupation and engage in work, as well as the right to equal protection and non-discrimination.

p. 2 These articles established that animal fights were prohibited because they were acts of cruelty and mistreatment. Holding fights between animals, the use of animals in the celebration of clandestine rites and patron saint festivities that could affect animal welfare and in general, any act or omission that could cause pain or suffering that endangered the life of the animal or affected its welfare were to be sanctioned. However, these rules established that bullfighting shows, faena camperas, horse racing, and activities related to the sport of rodeo (charrería) and jaripeos were excluded from the application of these prohibitions.

p. 3 On June 5, 2017, the district judge issued a decision in which he decided to deny the injunction (amparo) and protection requested.

Therefore, on June 15, 2017, the Commission and the petitioner filed an appeal (recurso de revisión) against this determination.

- p. 4 The Collegiate Circuit Court asked the Supreme Court to exercise its original jurisdiction to hear the appeal (*recurso de revisión*), so the First Chamber heard the case.

### Study of the merits

## II. Impacts on the right to culture, right to choose an occupation and engage in work and the right to property

### A. Analysis of the impact of the challenged legislative measure on the *prima facie* content of the rights

#### 1. Right to culture

- p. 25 The ban on cockfighting in the challenged articles is a legislative measure that does not involve an intervention in the right to culture.
- p. 25-26 This is because the First Chamber of the Supreme Court, whilst resolving the direct injunction (*Amparo Directo*) 11/2011, determined that the right to culture provided for in Article 4 of the Federal Constitution has at least three aspects: 1) as a right that protects access to cultural goods and services; 2) as a right that protects the use and enjoyment thereof; and 3) as a right that protects intellectual production, making it a universal, indivisible and interdependent right.
- p. 26 The Supreme Court considered that the challenge is based on the right to participate in cultural life provided for in Article 15.1 a) of the International Covenant on Economic, Social and Cultural Rights.
- p. 27 This aspect of the right to culture is not a social right but rather, what is traditionally known as a right to freedom. Indeed, the right to participate in cultural life allows individuals to freely enter into a wide variety of activities individually or collectively but at the same time imposes a duty on the State not to engage in arbitrary interference in such cultural practices.

p. 28 If the challenged norms constitute a prohibition on animal fighting, what the Supreme Court has to determine at this stage of the constitutionality review is whether cockfighting constitutes a “cultural expression” protected at least *prima facie* by the right to participate in cultural life.

p. 30 First, it is indisputable that certain “cultural expressions” derived from custom or tradition cannot be covered under a constitution such as Mexico’s that assumes the democratic values of pluralism and respect for the dignity and autonomy of individuals. In this regard, it should be considered that there is a constitutional mandate to eradicate many of these cultural expressions, such as gender-based violence, discrimination, or religious intolerance, to mention just a few of them.

p. 31 In this particular case, the cultural expression under consideration does not directly affect people but rather, the animals used in it.

The Supreme Court understands that cockfighting is indeed an expression of a certain culture.

p. 32 However, the fact that cockfights generate the interest of social sciences as an object of study does not imply that they are a cultural expression worthy of constitutional protection. Regardless of the deep meaning that anthropologists attribute to this social practice, cockfights can be described as a duel to the death between animals organized for sport, entertainment or simply cruelty.

Thus, for the Supreme Court, cockfighting does not find coverage in the right to participate in cultural life. While it cannot be considered to be an activity that directly violates any constitutional provision, this does not imply that it should be considered protected by the Constitution as a “cultural expression”.

In this regard, no practice involving the mistreatment and unnecessary suffering of animals can be considered a cultural expression protected either *prima facie* or definitively by the Constitution.

- p. 33 In accordance with the foregoing and taking into account the scope of the right to participation in cultural life, the Supreme Court considers that the normative portions challenged constitute a legislative measure that does not intervene in this aspect of the right to culture.

## 2. Right to property

- p. 35 Article 27 of the Federal Constitution provides as a guarantee that the State may only limit private property if the modalities it imposes pursue an end that may be considered to be in the public interest.

The Plenary of this Court held in the Injunction Under Review (*Amparo en Revision*) 6408/76 that a modality of private property must be understood as the establishment of a general and permanent legal norm that essentially modifies the form of that right.

- p. 37 In addition to the above, it should be remembered that our Constitution does not contain any provision from which it can be deduced that the legislator is constitutionally obligated to issue rules that protect animals from mistreatment, nor is there a constitutional duty to establish rules that go beyond the legal status of animals as “objects” or “things” that can be appropriated and advance the process of “de-commodification” of animals.

- p. 38 This does not imply that legislations adopting this type of regulation are unconstitutional. Enacting rules with this content is undoubtedly a legitimate objective for the legislator.

- p. 36 Therefore, it is necessary to determine whether the challenged rules of the Animal Protection Law for the State of Veracruz represent an intervention in the right to property.

- p. 39 Thus, two questions must be ascertained: whether the measure is established in a general norm with an intent of permanence; and whether it affects any of the attributes of private property: use, enjoyment and disposition.

In this specific case, the Supreme Court considered that both requirements are met. On the one hand, the challenged measure is laid down in several general norms intended to be permanent. And on the other hand, the articles challenged indirectly impose a modality on the property rights over fighting cocks, since the prohibition of holding animal fights is a limitation on the owner's use of the birds and also a limitation on the benefits they could obtain from those assets, since the ban also legally precludes the making of profits from cockfighting.

- p. 41 Thus, in accordance with the aforementioned, this Court considers that the challenged normative portions do constitute an intervention in the guarantee established in the third paragraph of Article 27 of the Constitution, since in pursuing the public interest certain attributes of the right to property are limited.

### 3. Right to choose an occupation and engage in work

- p. 42 In order to determine whether the challenged norms actually infringe the right to choose an occupation and engage in work, it is necessary to establish the scope of this fundamental right.
- p. 42-43 The right to choose an occupation and engage in work is a right clearly linked to personal autonomy, insofar as it allows individuals to engage in the professional activity that best suits their life plan.
- p. 43-44 With regard to the right to choose an occupation and engage in work, the Supreme Court has reiterated its well-known *dictum* that fundamental rights are not absolute. In effect, the Plenary of this Court, in resolving the *Action of unconstitutionality* 10/1998, held that the individual right enshrined in Article 5, first paragraph, of the Constitution, is not absolute, in that it balances the legality of the activity in question as well as the rights of third parties and of society in general, thus setting limitations on said right based on fundamental principles that must be taken into account in order to enforce and protect it.

p. 44 That precedent also explained that the right to choose an occupation and engage in work is not unrestricted and unlimited but conditioned on the satisfaction of certain fundamental prerequisites: a) that it is not an illegal activity; b) that the rights of third parties are not affected; and c) that the rights of society in general are not affected.

In this precedent it was explained that the Legislative Branch, in its function of enacting laws, may restrict the right to choose an occupation and engage in work in a general, impersonal, and abstract manner, determining that an activity is illegal, but it may not establish restrictions on that right in relation to a particular individual.

p. 45 Once the scope of the right has been established the courts must determine whether the challenged norms affect the right to choose an occupation and engage in work.

In this regard, the Supreme Court understands that the Legislative Branch has broad discretion to pursue legitimate objectives through legislation. These objectives may include changing the legal status of an activity.

p. 46 However, if in this specific case the challenged norms establish a prohibition that legally prevents the Commission and the petitioner from engaging in cockfighting, since the effect of the prohibition is that such activity must be considered illegal once the new enacted reforms are enforced, then it must be concluded that the challenged normative portions do in fact affect the right to choose an occupation and engage in work.

## **B. Proportionality analysis of the challenged legislative measure**

### **1. The legitimacy of the purpose pursued with the measure**

p. 47 This section of the analysis will identify the purposes pursued by the challenged measure in order to be able to examine its legitimacy from the perspective of constitutionality.

p. 49 In the explanatory memorandum of the reforms to the challenged law, it is emphasized that the prohibition of animal fights is intended to protect the welfare of animals in the State of Veracruz. In relation to this point, our Constitution does not contain any provision from which a mandate directed to the legislator to protect animals beyond the protection of wildlife could be derived from the right to a healthy environment provided for in Article 4 of the Constitution can be inferred. However, the protection granted by this right cannot be equated with the protection of animal welfare.

p. 50 Although the protection of animal welfare is not constitutionally mandated, this does not imply that it should be understood as constitutionally prohibited. There is no rule in the Constitution that expressly prohibits the democratic legislator from advancing measures to fulfill this purpose.

p. 51 Thus, the question that this Court has to determine in this step of the proportionality test is whether under the normative conditions set forth above, the protection of animal welfare is a purpose that can legitimately justify the limitation of fundamental rights of individuals, such as the guarantee to property provided for in Article 27 of the Constitution and the freedom to work provided for in Article 5 of the Constitution.

This Court considers that the protection of animal welfare is a purpose that can legitimately limit the fundamental rights of the plaintiff and the Commission, because it is a purpose that is fully compatible with the values of a constitutional democracy. Thus, this Court understands that in a “free and democratic society” the protection of animal welfare can justify a limitation to fundamental rights.

p. 52 In this specific case, the mediate purpose of the ban on animal fighting is the principle of protecting animal welfare. The immediate purpose is the state of affairs required to achieve that principle, which in the case of the challenged norms can be identified with the welfare of animals, is understood as a condition in which they are generally not mistreated and specifically not treated with cruelty.

## 2. The appropriateness of the measure

p. 53 In this specific case, it must be determined whether the ban on animal fighting is appropriate for animal welfare.

This Court reiterates that prohibitive norms cannot be unconstitutional because they are ineffective in motivating people's conduct.

p. 54 Therefore, the correct way to examine the appropriateness of such a rule of conduct is to verify whether the prohibited conduct actually harms what the prohibition intends to protect.

In this case, the prohibited conduct consists of holding animal fights. Thus, the empirical question that must be answered is whether animal fights organized by human beings actually affect the welfare of animals, this is understood as a condition in which they do not suffer mistreatment in general, or acts of cruelty in particular. As can be seen, this case can be answered without the need to resort to specialized knowledge from science or technology, since it is enough to rely on the general knowledge widely shared in society in relation to what happens in animal fights.

p. 54-55 In the specific case of cockfights, it is widely known that these are duels between two birds that are spurred on by humans and are equipped with sharp weapons in order to ensure the lethality of the fight. In this regard, it is an observation based on common sense to state that the fights cause significant physical harm to the birds that participate in them, with the aggravating factor that in most cases that harm consists of the death of one of the contending animals.

p. 55 In accordance with the foregoing, the Supreme Court considered that the prohibition of animal fights is an appropriate measure to protect animal welfare, since the prohibited conduct actually causes physical harm to the animals involved in such fights.

### 3. The need for the measure

Unlike the degree of suitability, in which the causal effectiveness of the challenged measure is analyzed, the examination of necessity is configured as an analysis of efficiency: it is necessary to determine the capacity of the challenged measure, in comparison with alternative measures, to achieve the proposed purpose with the least possible impact on the rights involved.

- p. 56 In this case it must be determined whether the ban on animal fighting is a necessary measure to achieve the welfare of animals, understood as a condition in which they are not mistreated in general or specifically subjected to acts of cruelty by people.

A first option as an alternative measure would be the liberalization of the activity subject to prohibition, which in this case would presume that animal fighting would not be prohibited.

However, that option must be quickly rejected because, although it is an alternative measure which is less restrictive of the Commission's rights, it is totally unsuitable for advancing the purpose pursued by the challenged measure. If the Commission were allowed to continue to have cockfights these animals would continue to be treated in a cruel and undignified manner.

- p. 57 A second possibility as an alternative measure would be to reduce the scope of the regulation of the norm exclusively to those specific aspects of the activity that actually affect animal welfare, such as establishing a norm that would only prohibit cocks from being fitted with knives for fights. In this respect, it would undoubtedly be a measure less restrictive of the rights of the Commission and the petitioner, since they would be able to continue using their cocks for fights.

However, it is also clear that this alternative measure does not promote animal welfare with the same intensity as the challenged measure, because

even without these sharp instruments, there would be no guarantee that the cocks involved in the fights would not suffer significant physical injuries or die. Consequently, an alternative measure such as this is not equally suitable as the challenged measure.

Furthermore, other measures that do not seek to prohibit this cultural expression but rather to transform it through public policies with “educational” or “promotional” content must also be ruled out as equally suitable.

- p. 58 This is because it does not appear that such measures can have the same causal effectiveness in the short term.

In accordance with the aforementioned, the Supreme Court considered that the prohibition on holding animal fights is a necessary measure to protect the welfare of animals, since there are no alternative measures that, being less restrictive of the rights of the Commission and the petitioner, may promote that end with the same intensity as the challenged measure.

#### 4. Proportionality in the strict sense of the measure

- p. 59 At this stage of the scrutiny it is necessary to weigh the benefits to be expected from the limitation with the costs that will necessarily be incurred from the perspective of the fundamental rights affected.

In relation to the intervention in the guarantee provided for in the third paragraph of Article 27 of the Constitution, it is pointed out that the owners retain without any restriction the possibility of disposing of the birds, while the use and enjoyment of the same is restricted exclusively in relation to an activity that they can no longer carry out: fighting. On the other hand, in relation to freedom of work, it is argued that the scope of the limitation to freedom of work is also limited, since a wide range of activities is not prohibited, but only to engage in a very specific one: animal fights.

- p. 60 However, the benefits gained from the ban on animal fighting are very high in relation to animal welfare, which is the intended objective. The challenged

measure greatly advances animal welfare because it is indisputable that animal fights cause significant physical harm to the animals involved and cockfighting often results in the death of one of the contending animals.

In accordance with the aforementioned, the Supreme Court considered that the prohibition of fighting passes the proportionality test in the strictest sense. It efficiently achieves the promotion of animal welfare, while the limitations on the right to choose an occupation and engage in work and the right to property of the Commission and the petitioner are not very intense considering the way in which the prohibition affects those rights.

### **III. Analysis of the legislative distinction contained in the second paragraph of Article 2 of the Animal Protection Law for the State of Veracruz.**

p. 65      The First Chamber of the Supreme Court, in resolving Action for Constitutional Relief Through Direct Injunction (*Amparo Directo en Revision*) 3445/2014, pointed out that the right to equal protection and non-discrimination within formal equality or equality before the law entails a mandate addressed to the legislator that requires the equal protection of all people in the distribution of rights and obligations. Along these lines, it was held that normative discrimination exists when two equivalent factual situations are regulated unequally without a reasonable justification for granting such differential treatment, clarifying that the justification for legislative distinctions that distribute burdens and benefits is determined on the basis of an analysis of the reasonableness of the measure.

The mentioned precedent explained that according to specialized doctrine, among the myriad forms that normative discrimination can take, the most common are tacit exclusion and express differentiation.

In this regard, discrimination by tacit exclusion of a benefit takes place when a legal regime implicitly excludes from its scope of application a factual situation equivalent to the one regulated in the normative provision, which usually occurs when a certain group is established as the recipient of

a legal regime without mentioning another group that is in an equivalent situation.

- p. 66 On the other hand, discrimination by express differentiation occurs when the legislator establishes two different legal regimes for equivalent factual situations, such that the exclusion is entirely explicit. In this case, the legislator not only establishes a legal regime from which a group is excluded, but also creates a different legal regime for that equivalent factual situation.

Thus, in the aforementioned precedent, the Supreme Court also explained that when the legislator establishes a distinction that results in the existence of two legal regimes, the distinction must be reasonable to be considered constitutional. It was clarified that showing that the distinction is not reasonable requires indicating why the factual situations regulated by both legal regimes are equivalent or similar and therefore should not be distinguished.

- p. 67 In this case, the legislator eliminated cockfighting from the activities excluded from the application of the Animal Protection Law for the State of Veracruz.

Thus, the effect of removing cockfighting from this regulatory portion in which they were contemplated before the reform, is the configuration of two expressly differentiated legal regimes.

- p. 68 In this specific case the distinction is between prohibited activities (those involving animal fights) and permitted activities (bullfighting shows, *faenas camperas*, horse racing, activities related to the sport of *charrería* and *jaripeos*).

- p. 70 However, the fact that the challenged norm includes within the list of permitted activities an activity which should not be included does not justify the claim that all activities involving mistreatment of animals should be included in the permissive regime. From the perspective of the right to equal protection, the Commission and the petitioner cannot benefit from the legislator's inconsistency in including an activity that should not be included among the permitted activities.

The fact that there are other activities which, because they involve great suffering for animals are also objectionable, does not make the ban on animal fighting “arbitrary, or much less make them permissible or legitimate”.

In accordance with the foregoing, the Supreme Court considered that the distinction between prohibited activities and permitted activities is reasonable, so the right to equal protection in its aspect of formal equality before the law, provided for in Article 1 of the Constitution, is not violated.

### Decision

- p. 71 The Supreme Court considered that the grievances of the petitioner and the commission are ungrounded, so it is appropriate to confirm the decision challenged and deny the injunction (*amparo*).



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## CITY OF ARTS

### *Amparo en Revisión 566/2015<sup>37</sup>*

**Keywords:** *right to culture; economic, social and cultural rights; essential core; principle of progressive realization; progressive realization; principle of non-regression; standing.*

#### **Summary**

In June 2011, the Government of the State of Nayarit and a company entered into a public works contract for the construction of the first stage of the “City of Arts” in Tepic, Nayarit. Subsequently, the Congress of the State of Nayarit approved the request of the State Government to obtain a loan in order to construct the second part of the “City of Arts”. However, in June, 2013, the Decree authorizing the state executive branch to divest and dispose of the real estate where the construction of the second stage of the “City of Arts” was contemplated was published in the state Official Gazette.

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<sup>37</sup> Decision issued by the First Chamber of Mexico’s Supreme Court of Justice (February 15, 2017). Reporting Justice: Arturo Zaldívar. *Action for Constitutional Relief Through Injunction 566/2015*

In July 2013, LABM, OCH, LCPLG, MSVH, MAAC, LDG, RGB, GMQR, CRLS, ADSA, AME, CCS, JOCA, RAAM and JAHG filed an injunction (*amparo*) against the failure to finish the project called “City of Arts”. According to the affected parties, such failure transgresses their cultural rights, since it created the expectation of a future right in terms of the development of the cultural rights of the population of the state. The district court in the state of Nayarit, which heard the case, argued that the affected parties did not prove they had standing, so it decided to dismiss the injunction.

The affected parties filed an appeal, which was admitted by the Collegiate Circuit Court. The affected parties also presented a petition for the Supreme Court to assert jurisdiction over the action for constitutional relief through injunction (*amparo en revision*), but in the absence of the standing of the affected parties, its admission had to be discussed by the Justices of the First Chamber of the Supreme Court, among whom, justice Alfredo Gutiérrez Ortiz Mena asserted jurisdiction. Finally, in March 2015, the First Chamber of the Supreme Court decided to exercise its power to assert jurisdiction regarding the injunction under review and in May 2015 the case was opened in court.

### Issue presented to the Supreme Court

Whether (a) the affected parties had standing to challenge the failure to finish the project called “City of Arts” and (b) the failure to finish the project violates the right to culture of the affected parties.

### Holding and vote

In relation to the affected parties MAAC, LDG, RGB, GMQR, CRLS, ADSA, AME, CCS, JOCA, RAAM and JAHG, the injunction was dismissed because they did not demonstrate their standing.

Regarding LABM, OCH, LCPLG and MSVH, the district court’s injunction decision was amended and the injunction was denied essentially for the following reasons. The right to culture is a social right and those rights generate three types of duties for the State: to protect the essential core of the right, to progressively realize the scope of the right, and not to unjustifiably adopt regressive measures. In this vein, the Supreme Court pointed

out that the failure to complete the “City of Arts” project (a) does not affect the essential core of the right to culture, since the dignity of people is not affected; (b) is part of a public policy that reasonably seeks the full enjoyment of the right to culture and, (c) is not a regressive measure. Therefore, this failure does not violate any of the obligations arising from the fundamental right to culture.

The First Chamber of the Supreme Court decided this case by a three-vote majority of Justices Norma Lucía Piña Hernández, Arturo Zaldívar Lelo de Larrea and Jorge Mario Pardo Rebolledo (issued a concurring opinion). Justice José Ramón Cossío Díaz voted against (issued a dissenting opinion). Justice Alfredo Gutierrez Ortiz Mena was absent.

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### EXTRACT FROM THE DECISION

p. 1 Mexico City. The First Chamber of Mexico’s Supreme Court of Justice (the Supreme Court), in session of February 15, 2017, issued the following decision.

#### Background

p. 1-2 In June, 2011, the Government of the State of Nayarit and a company entered into a public works contract for the construction of the first stage of the “City of Arts” in Tepic, Nayarit. Subsequently, the Congress of the State of Nayarit approved the request of the State Government to obtain a loan in order to carry out the construction of the second part of the “City of Arts”. However, in June, 2013, the Decree authorizing the state executive branch to divest and dispose of the real estate where the construction of the second stage of the “City of Arts” was planned was published in the state Official Gazette.

p. 2-5 and 8 In July 2013, LABM, OCH, LCPLG, MSVH, MAAC, LDG, RGB, GMQR, CRLS, ADSA, AME, CCS, JOCA, RAAM and JAHG filed an injunction against the failure to finish the project called “City of Arts”. According to the affected parties, this failure violates their cultural rights, since it created the expectation of a future right in terms of the development of the cultural

rights of the population of the state. The district court for civil, administrative and labor injunctions matters and federal proceedings in the state of Nayarit, which heard the case, argued that the affected parties did not prove they had standing, so it decided to dismiss the injunction.

- p. 5-6 The affected parties filed an appeal, which was admitted by the Collegiate Circuit Court. The affected parties also presented a petition for the Supreme Court to assert jurisdiction over the injunction under review. In the absence of the standing of the affected parties, its admission had to be discussed by the Justices of the First Chamber of the Supreme Court, among whom, justice Alfredo Gutiérrez Ortiz Mena asserted jurisdiction. Finally, in March 2015, the First Chamber of the Supreme Court decided to exercise its power to assert jurisdiction regarding the injunction under review and in May, 2015 the case was opened in court.

### Study of the merits

- p. 14 Both the Plenary and the First Chamber of the Supreme Court have consistently understood that recognition of standing requires: **(i)** that such standing be guaranteed by an objective right; **(ii)** that the act challenged produces an impact in their legal sphere, in a broad sense, either directly or indirectly, due to the special situation of the affected party before the law; **(iii)** the existence of a link between a person and the claim, in such a way that the annulment of the act produces a present or future but certain benefit; **(iv)** that the impact is assessed under a parameter of reasonableness; and **(v)** that such standing is harmonious with the dynamics and scope of the injunction proceedings.
- p. 14-15 In this case, the affected parties allege that the failure to complete the “City of Arts” affects their right to culture because an expectation was created to have access to an extension of the national film archive, a playroom, a library, the area of the music school and the school of Fine Arts of the State of Nayarit. The affected parties demonstrated that within the property called “City of Arts” various projects are contemplated that together constitute the expectation of a future right of the complainants.

- p. 15-16 LABM, OCH, LCPLG and MSVH proved they had a special interest in culture and had participated in various study, promotion, and dissemination projects or had carried out artistic and cultural activities in Tepic. The completion of the project would bring them a determined, current and certain benefit: access to new cultural spaces that would allow them to continue the promotion and dissemination of culture and the arts. Therefore, these people have a special interest in the completion of the work. Their special position in the legal system results from their interest in cultural activities and their engagement in such activities in Tepic. It could not be considered that these affected parties would obtain a present and certain benefit had they not proved that they could have access to that cultural complex.
- p. 16-17 However, MAAC, LDG, RGB, GMQR, CRLS, ADSA, AME, CCS, JOCA, RAAM and JAHG did not prove to have any relationship with the promotion of culture or its exercise, consequently they only have a simple interest, since they did not show their special position in the legal system nor how the completion of the work would bring them a certain benefit. Therefore, the decision of the district judge to dismiss the injunction with respect to them is upheld.
- p. 17 LABM, OCH, LCPLG and MSVH allege that the failure to finish the City of Arts project: (a) violates their right to culture, since it prevents them from accessing cultural goods of the project and, (b) is regressive, since in the state of Nayarit there are fewer cultural assets.

### - The fundamental right to culture

- p. 17-18 The right to access culture is protected in Articles 4 of the Constitution; 27 of the Universal Declaration of Human Rights; 15.1 of the International Covenant on Economic, Social and Cultural Rights; 26 of the American Convention on Human Rights; and 14.1 of the Additional Protocol to the American Convention on Human Rights in the area of Economic, Social, and Cultural Rights (Protocol of San Salvador).

- p. 18 In Direct Injunction (*Amparo Directo*) 11/2011, the Supreme Court held that the right to culture is a right that contains three aspects: 1) as a right that protects access to cultural goods and services; 2) as a right that protects their use and enjoyment; and 3) as a right that protects intellectual production, making it a universal, indivisible and interdependent right.
- p. 18-19 The Committee on Economic, Social, and Cultural Rights, in *General Comment* No. 21, held that culture has three components: participation, access, and contribution to cultural life. The Committee held that the realization of the right to participate in cultural life requires the presence of cultural goods and services that everyone can enjoy and take advantage of. The Special Rapporteur on Cultural Rights understands that cultural rights protect the right to enjoy and access the arts and knowledge, including scientific knowledge.
- p. 19-20 All these sources consider that from the right to culture emanates a right to have access to cultural goods and services. Therefore, it is true that the affected parties have a right for the State to generate cultural goods and services which they can access, a right that could have been violated with the failure to conclude the project of the “City of Arts”. In order to analyze whether this right was violated, the Supreme Court will proceed to determine the duties that social rights impose on the State, and in particular those that arise from this aspect of the right to culture, as well as to verify whether in the specific case the State complied with those duties. Social rights generate three types of duties for the State: (1) to protect the essential core of the right; (2) to progressively realize the scope of the right; and (3) not to take unwarranted regressive measures.

**- The duty to protect the essential core of the right.**

- p. 20-21 In *General Comment* No. 3, the Committee on Economic, Social, and Cultural Rights has recognized the duty to protect the core of social rights. In the same vein, in *General Comment* No. 21 on the right to culture, the Committee on Economic, Social, and Cultural Rights also argued that there is an essential core of the right to culture.

- p. 21-22 In Action for Constitutional Relief Through Injunction (*Amparo en Revision*) 323/2014, the First Chamber of the Supreme Court held that social rights (in that case, the right to education) have an essential core that must be protected by the State. Likewise, in Action for Constitutional Relief Through Injunction (*Amparo en Revision*) 750/2015 the Supreme Court established that the right to education has a minimum content that must be protected absolutely, although that minimum can be expanded. Furthermore, in Action for Constitutional Relief Through Injunction (*Amparo en Revision*) 378/2014, the Second Chamber of the Supreme Court recognized the notion of an essential core of social rights and determined that the State has a minimum obligation to ensure at least the satisfaction of essential levels of each of the rights contained in the International Covenant on Economic, Social, and Cultural Rights. Similarly, in Action for Constitutional Relief Through Injunction (*Amparo en Revision*) 1219/2015, the Second Chamber of the Supreme Court indicated that the government must comply with certain minimum elements that allow, as far as possible, people to exercise human rights and in order to determine these minimum elements it is necessary to seek and identify the core or essential content of fundamental rights: that part of the content of the right that is absolutely necessary for the legally protected interests that give rise to the right to be real, concrete and effectively protected.
- p. 22-23 Therefore, social rights impose a duty of result: Mexico has a duty to immediately guarantee the protection of the essential core of social rights. This obligation is justified because there are violations of social rights so serious that they not only prevent people from enjoying other rights but also directly attack their dignity.
- p. 23-24 It should be noted that the Inter-American Court of Human Rights (in the cases *Yakye Axa Indigenous Community v. Paraguay*, *Xákmok Kásek Indigenous Community v. Paraguay* and *Villagrán Morales et. al. v. Guatemala*) and several constitutional courts have recognized that in the area of social rights, a vital minimum must be guaranteed to prevent a violation of those rights from affecting the dignity of persons.

- p. 24-25 Therefore, the essential core of social rights is violated when an impact on them affects people's dignity. In this way, the courts must assess on a case-by-case basis whether an impact on a social right is so serious that it may affect people's dignity and if that is the case, they must declare that the essential core of the right is violated and order its immediate protection.
- p. 25 In the case of the right to culture, the Committee on Economic, Social, and Cultural Rights, in *General Comment* No. 21, held that States have the minimum obligation to ensure the satisfaction of at least the minimum essential levels of each of the rights in the Covenant, clarifying that Article 15, paragraph 1 a) of the Covenant entails at least the obligation to create and promote an environment in which people can participate in the cultural expression of their choice.
- p. 26 In this case, it is observed that the failure challenged does not violate the core of the right of the affected parties to access culture. The Supreme Court notes that the failure to build an extension of the national film archive, a playroom, a library, the area of the music school and the school of Fine Arts of the State of Nayarit does not generate such a serious impact on the sphere of those affected that it can be qualified as a violation of their dignity.

**The duty to progressively achieve the protection of the right.**

- p. 26-27 Article 1 of the Constitution stipulates that all authorities, within the scope of their jurisdiction, have the obligation to promote, respect, protect and guarantee human rights in accordance with the principle of *progressive realization*. Article 26 of the American Convention on Human Rights states that the States Parties are committed to *progressively achieve the full realization* of the rights deriving from the economic, social and educational, scientific and cultural norms contained in the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, to the extent of available resources. Likewise, Article 2.1 of the International Covenant on Economic, Social and Cultural Rights and 1 of the Protocol of San Salvador establish that States must adopt the necessary measures, up to the maximum of available

resources and considering their level of development, to *progressively* achieve the full realization of rights.

- p. 27-28 *General Comment* No. 3 of the Committee on Economic, Social, and Cultural Rights provides that the term “progressive realization” refers to the recognition that the full realization of all Economic, Social, and Cultural Rights cannot be achieved in a short period of time. For the Committee, “progressive realization” refers to an immediate obligation to respect and guarantee all relevant rights but taking into account the difficulties that may arise.
- p. 28 Once the essential core has been satisfied, Economic, Social, and Cultural Rights impose on the State an *obligation of purpose*, since these norms establish a goal that the State must achieve through the means it deems most appropriate, starting from the premise that the full enjoyment of social rights cannot be achieved immediately, but progressively. The bodies of the Executive and Legislative Branches must design a public policy through which the full enjoyment of Economic, Social, and Cultural Rights is guaranteed, understanding that the full satisfaction of the right is not required from the State immediately.
- p. 28-29 The duty of progressive realization regarding the satisfaction of the content of social rights implies that there must be a reasonable public policy to achieve the goal imposed by the law in question. The courts must analyze whether the challenged measure is part of a public policy that reasonably seeks to achieve the full realization of social law. The assessment of the reasonableness of the measure in light of the principle of progressive realization should only be made once the State has satisfied the essential core of social law. It should also be borne in mind that while judges may assess the reasonableness of a measure, it is the administrative and legislative authorities who are, in principle, in a better position to determine the appropriate measures to achieve the full realization of social rights. Therefore, when analyzing the reasonableness of the measure, the courts must be deferential to those authorities.

- p. 29-30 The Supreme Court considers that the failure to conclude the project of the “City of Arts” does not violate the obligation of progressive realization in the satisfaction of the right because in this specific case there is a reasonable public policy on the access of people to different cultural goods and infrastructures. The Government of the State of Nayarit concluded the first stage of this project, in which several adequate spaces were built for the residents of Tepic to have access to cultural goods and services. Therefore, the State does have a public policy through which it reasonably seeks to progressively achieve the full realization of the right to culture.
- p. 30 In addition, in the decree by which the Executive was authorized to sell the land where the second stage of the project would be carried out, it was stated that the revenue of the sale will be allocated to the Autonomous University of Nayarit. Therefore, it can be inferred that the decision of the authorities not to finalize the project is also reasonable, since allocating the resources of the sale to a public university will pay to satisfy the right to education, which is a reasonable public policy decision.

#### **- The duty of non-regression**

- p. 30-31 The Economic, Social, and Cultural Rights also impose a duty of non-regression, which can be derived from the mandate of progressive realization protected in Articles 1 of the Constitution, 2.1 of the International Covenant on Economic, Social, and Cultural Rights and 26 of the American Convention on Human Rights. The non-regression mandate means that once a certain level of satisfaction of Economic, Social, and Cultural Rights has been reached, the State is obligated not to retreat, so that the specific benefits granted at a given time constitute the new minimum standard from which further progress must be made towards the full satisfaction of those rights.
- p. 31 This duty of non-regression is also not absolute. The Economic, Social, and Cultural Rights Committee has noted that retroactive measures will require the most careful consideration and should be fully justified. Similarly, the Inter-American Court of Human Rights has pointed out that Article 26

of the American Convention on Human Rights gives rise to a duty of non-regression, which will not always be understood as a prohibition of measures that restrict the exercise of a right.

- p. 31-32 In the case, *Conflicting Lines of Precedent (Contradiccion de Tesis)* 366/2013, the Plenary of the Supreme Court established that the principle of non-regression imposes, as a general rule, that the degree of protection conferred by the legislator for the exercise of a fundamental right must not be diminished. However, it also held that since human rights are not absolute and given their interdependence with various fundamental prerogatives, in order to determine whether a general rule that entails a decrease in the degree of protection of a human right respects the principle of non-regression, it is necessary to determine whether the essential purpose of such a decrease is to increase the degree of protection of a human right held by other persons.
- p. 32 It is therefore up to the State to justify with sufficient information and relevant arguments the need to take a regressive step in the development of a social right. The constitutionality of a regressive measure on Economic, Social, and Cultural Rights depends on passing a proportionality test, which means that the measure must pursue a constitutionally valid, as well as suitable, necessary and proportionate purpose in the strict sense.
- p. 33 In this regard, it is possible to distinguish between two types of regression: one of results and one of regulations. In the first case, there is regression when the results of a public policy worsen the satisfaction of a social right. In the second case, regression exists simply when a subsequent rule suppresses, limits or restricts the rights or benefits that had previously been granted under social law. To prove a regression of results it is necessary to demonstrate that: (i) there is indeed a lower generalized satisfaction of the right; (ii) the persons who file the injunction are affected by this generalized regression; and (iii) the measure is the cause of the regression that harms the affected parties. On the other hand, in order to prove regulatory regression, it is only necessary to demonstrate that some Economic, Social, and Cultural Right, or some benefit the affected parties held, was eliminated, limited or restricted by the content of a normative provision.

- p. 33-34 In this specific case, there is no normative regression because no rule was reformed that would have granted a right to the affected parties that was eliminated or restricted with the challenged measure. Contrary to what was stated in the injunction, the approval of a project does not generate any right in their legal sphere and, therefore, the failure to conclude the project cannot be regressive in that sense. There is also no regression of results, since the construction of the second stage of the project had not even begun, and therefore it cannot be said that the affected parties already had access to cultural goods and services that have later been taken from them.
- p. 34 Omissions as challenged acts affecting social rights generally do not constitute regressive measures. These only exist when the benefits already achieved in the fulfillment of a right are reversed, which usually requires a conduct to do so. The measure at issue here is not regressive and, consequently, it is not necessary to analyze its justification. It should be clarified that this does not mean that omissions can never be in violation of Economic, Social, and Cultural Rights, since the State can violate these rights when it fails to satisfy the essential core of the right or when it does not have a reasonable public policy that seeks to progressively achieve the full realization of the right.

The failure to complete the “City of Arts” project (a) does not affect the essential core of the right to culture, (b) is part of a public policy that reasonably seeks the full enjoyment of the right to culture, and (c) is not a regressive measure. Therefore, this omission does not violate any of the obligations arising from the fundamental right to culture.

### Decision

- p. 34-35 The injunction is dismissed with respect to MAAC, LDG, RGB, GMQR, CRLS, ADSA, AME, CCS, JOCA, RAAM and JAHG. With regard to LABM, OCH, LCPLG and MSVH, since the only ground of complaint stated is unfounded, the decision of the district court is amended and the injunction requested against the failure to finalize the project called “City of Arts” is denied.

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**HUMAN RIGHT TO THE ENJOYMENT OF THE HIGHEST ATTAINABLE STANDARD OF PHYSICAL AND MENTAL HEALTH. THE CASE OF “PABELLÓN 13” (CONDITIONS UNDER WHICH MEDICAL CARE IS PROVIDED TO PATIENTS WITH HIV/AIDS)**

*Amparo en Revisión 378/2014*<sup>38</sup>

**Keywords:** *Right to health, human right to enjoy the highest level possible of physical and mental health, right to life, principle of progressiveness, resources, treatment of illnesses, medical care, HIV/AIDS.*

**Summary**

AHA, LBL and RGPP, patients of the National Respiratory Diseases Institute (INER), filed an injunction with a two-stage judicial review relieving a unremediated breach of rights (*amparo indirecto*). They requested relief from various authorities for the failure to execute the project called “Construction and Equipping of the Clinical Service for Patients with HIV/AIDS and Co-infection by Air Transmission Diseases”, also known as “pavilion 13”, as well as the failure to authorize the transfer of sufficient resources for that purpose. The affected patients argued the violation of their right to health due to the fact that sufficient resources were

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<sup>38</sup> Decision issued by the First Chamber of Mexico’s Supreme Court of Justice (October 15, 2014). Reporting Justice: Alberto Pérez Dayán. Action for Constitutional Relief Through Injunction 378/2014

not destined for the execution of the “pavilion 13” project. In addition, it was in violation of their right to life, since the people infected with the HIV/AIDS virus were exposed to contagions and co-infections of various diseases. The district judge of the Federal District that heard the matter determined not to protect the affected parties, and therefore they filed a motion for review, which the Second Chamber of the Mexico’s Supreme Court of Justice (this Court) heard through its faculty to assert jurisdiction over the case and rule on it directly.

### Issue presented to the Supreme Court

Whether the conditions under which the INER provided medical care to the affected patients were in line with the human right to enjoy the highest level possible of physical and mental health or if, on the contrary, they were unduly exposed to catching other infections, diseases and disorders that could prolong their treatment and even put their health and life at risk.

### Holding and vote

The appealed decision was revoked and the injunction (*amparo*) was granted for the following reasons. The judicial inspection done by the district judge that heard the injunction (*amparo*), in relation to the manifestations of the responsible authorities themselves, revealed that the conditions of the INER pavilion where the affected patients were cared for were not adequate for their treatment, according to the human right to enjoy the highest possible level of health. This determination was based on the fact that the constructions were necessary for the medical care to be considered of good quality, in order to prevent, to the extent possible, patients with HIV/AIDS suffering from other attendant infections, diseases and disorders that could affect the treatment and the care they received, and put their life at risk. Furthermore, it was considered that the responsible authorities only argued that there was insufficient budget for carrying out the measures to ensure the full effectiveness of the human right to enjoy the highest possible level of health of those affected. However, they did not demonstrate that they had made every effort possible to use the resources that were at their disposal. Therefore, it was considered that the authorities violated the obligations established in Articles 4 of the Constitution, 2 and 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Therefore, the injunction (*amparo*) was granted to the affected

parties and it was determined that the INER, in coordination with the National Health Protection Commissioner (the Commissioner) and the Technical Committee of the Health Social Protection Trust (the Technical Committee), should take all the measures necessary to safeguard the human right to enjoy to the highest possible level of health of the affected patients. Considering they were carriers of HIV, they should receive their medical treatment in facilities separated from the rest of the patients in order to avoid the contagion of any illness.

The Second Chamber ruled on this matter by a majority of three votes of Justices Alberto Pérez Dayán, José Fernando Franco González Salas and Luis María Aguilar Morales. Justice Margarita Beatriz Luna Ramos voted against. Justice Sergio Valls Hernández was absent.

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### EXTRACT OF THE DECISION

p. 1 Mexico City. The Second Chamber of the Mexico's Supreme Court of Justice (this Court), in session of October 14, 2014, issues the following decision.

#### Background

p. 5-6 On August 31, 2007, the Technical Committee of the Health Social Protection Trust System (the Technical Committee) held an ordinary session in which, among other matters, it authorized the request of the National Respiratory Diseases Institute (INER) for the development of the project "Remodeling and Equipping Clinical Service 4".

p. 6 INER's request reveals that: it is a body that suffers the greatest consequences of AIDS; each year it hospitalizes around 170 patients with HIV and pulmonary complications; those suffering from HIV/AIDS remain more than four weeks in that institute; and that due to the physical characteristics of the institute, it would not comply with the recommendations of the World Health Organization (WHO), among other bodies.

Thus, they need facilities that generate a balance between the specialized medical care and the appropriate control of microorganisms, through

mechanisms of containment, since the conditions in which it is attending patients that have to be hospitalized with HIV/AIDS are not appropriate.

- p. 7 On June 23, 2008, the Technical Committee analyzed the request of the INER to substitute the project “Remodeling and Equipping of the Clinical Service 4” for the new project “Construction and Equipping of the Clinical Service for patients with HIV/AIDS and Co-infection by Air Transmission Diseases” (pavilion 13), for the same authorized amount.

In this respect, the Technical Committee indicated that the modification reflected the fact that, as a result of the review and discussion of the preliminary design done with the company responsible for the prior master plan, the INER decided would be better to construct a new pavilion in order to avoid disrupting the patient care for a year while remodeling the area where they are currently treated.

- p. 7-8 Thus, on July 3, 2008, the Committee approved the cancellation of the project “Remodeling and Equipping of the Clinical Service 4” and authorized the application of the resources only for the preparation of the master plan of the “pavilion 13” project.

- p. 8 The Financing Office of the National Health Social Protection Commission (the Commission), issued the letters of instruction to transfer funds to the INER for the contracting of the “pavilion 13” master plan and the result was analyzed for viability and compliance with various technical, administrative and budgetary requirements.

- p. 56-57 Once the INER prepared the master plan it again petitioned to the Technical Committee for the amount of the estimated cost. The justifying report rendered by the National Health Social Protection Commissioner (the Commissioner) shows that the main reason the “pavilion 13” project has not been done is due to a lack of resources.

- p. 8-9 AHA, LBL and RGPP, patients of the INER, filed an injunction with a two-stage judicial review for relief of an unremediated breach of rights (*amparo*

*indirecto*) against the various responsible authorities, claiming relief, essentially, for the failure to execute the “pavilion 13” project, as well as the failure to authorize the transfer of sufficient resources for that purpose.

- p. 17-18 A district judge in the Federal District that heard the matter issued a decision on June 21, 2013, in which, in one part, he dismissed the proceeding and, in another, denied the injunction (*amparo*).

### Study of the merits

- p. 25 First this Court should specify the content and scope of the human right to enjoy the highest possible level of health.

### I. General principles on the human right to enjoy the highest level possible of physical and mental health

- p. 27 The right to health established in Article 4 of the Federal Constitution can be understood as the obligation of the State to establish the necessary mechanisms so that all persons have access to health services leading to a particular general wellbeing made up of the physical, mental, emotional and social state of the person, from which one more fundamental right arises, consisting of the right to physical-psychological well-being.

Thus, it is a complex right that deploys a broad series of fundamental legal positions for private parties and for the State. The understanding is that the protection of health and the development of the corresponding health care systems is one of the fundamental tasks of contemporary democratic States and it represents one of the keys of the State of well-being.

- p. 28 Thus, the full realization of the human right to health is a fundamental requirement to ensure that people can develop other rights and liberties. Therefore, the pursuit of social justice cannot ignore the role of health in human life and the opportunities to achieve a life free of avoidable or treatable diseases and, above all, to avoid suffering a premature death.

- p. 28-29 Now, it is essential to limit this study to the legal content and scope of the human right to enjoy the highest possible level of physical and mental health, protected in Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which imposes positive obligations on the States' parties, including – for the particular circumstances of this case – the measures necessary to reduce mortality, treat illnesses and, especially, create conditions that ensure full medical care and medical services in case of illness.
- p. 32 In addition, Article 2 of the ICESCR establishes content obligations – immediate – and resultant obligations – immediate or for progressive completion. The first refer to rights being exercised “without discrimination” and that the State “adopt measures” within a reasonably brief time period, that are deliberate, concrete and oriented as clearly as possible directed to the satisfaction of the convention obligations.
- p. 33 In this regard, the Mexican State has, on the one hand, an immediate obligation to ensure to people at least an essential level of the right to enjoy the highest possible level of health and, on the other hand, an obligation to progressive completion, consisting of achieving its full exercise up to the maximum resources it has.
- p. 34 Thus, when the contracting State, arguing a lack of resources, fails to fully realize the right to the enjoyment of the highest possible level of health, or would not ensure its essential levels. It must not only prove the lack of resources, but also that it has made all possible efforts to use the resources that are at its disposal. The use of its discretion in developing public policies and for the decisions pertaining to the distribution or redistribution of resources must take vulnerable groups into account, as well as situations of risk, in the understanding that it cannot adopt decisions that are arbitrary or discriminatory.
- p. 37 From the above it can be concluded that the right to enjoy the highest possible level of health should be understood as a right to enjoy a range of

facilities, goods, services and conditions necessary to reach a state of general well-being. This understanding implies that there are essential elements that inform the development of the human right to health, which are availability, accessibility, acceptability and quality.

- p. 38 According to General Observation number 14 issued by the Committee on Economic, Social and Cultural Rights (CESCR), the struggle against diseases involves the individual and collective efforts of States to facilitate, among other things, the relevant technologies. This enables that the creation of conditions that ensure medical care and medical services for people who are ill and is not limited to equal access and opportunity to basic preventive, curative and rehabilitation services, but also includes the appropriate treatment of diseases, ailments, injuries and disabilities.

Thus, according to the CESCR, there will be a direct violation of the obligations of the ICESCR when, among other matters, the Mexican State would not adopt all the suitable measures to give full effect to the universal right to enjoy the highest possible level of physical and mental health. This includes the establishment of good quality public goods and services that are acceptable from the cultural, scientific and medical point of view, and that have the relevant technologies to give an appropriate treatment to the illnesses, taking into account that special care must be given to vulnerable or marginalized groups.

## II. General framework of HIV/AIDS

- p. 39 According to the WHO, HIV/AIDS is a global public health problem. The infection is usually diagnosed through blood analysis and, although there is no cure, patients can keep the virus under control and lead a healthy and productive life if they follow an effective treatment with antiretroviral drugs.

The human immunodeficiency virus – HIV – attacks the immune system and debilitates the monitoring and defense systems against infections and some types of cancer.

p. 40 The most advanced phase of the HIV infection is known as acquired immunodeficiency syndrome or AIDS and can take between two and fifteen years to manifest, depending on the patient. AIDS is defined by the appearance of certain types of cancer, infections or other serious clinical manifestations.

To the extent that the infection progressively debilitates the immune system, the patient can present other signs and symptoms. In the absence of treatment, serious illnesses like tuberculosis, meningitis cryptococcosis or different types of cancer can also appear, for example lymphomas or Kaposi sarcoma, among others.

p. 42 People who suffer from HIV/AIDS are especially vulnerable to contagion of opportunistic diseases, which not only delay and complicate the treatment of HIV/AIDS itself, but also can put their life at risk. Therefore, it is indispensable that the clinical establishments have the appropriate measures to prevent, to the extent possible, that patients with HIV/AIDS contract other concomitant infections, illnesses and disorders at the time of receiving the respective treatment.

### **III. Application of the general principles of the human right to enjoy the highest possible level of physical and mental health to this case**

p. 44 The dispute in this proceeding is limited to determining if the conditions in which medical care has been provided to AHA, LBL and RGPP are in line with the right to enjoy the highest level of health possible, and thus are not unduly exposed to suffering other infections, illnesses and disorders, that threaten their personal well-being, and even put their life at risk.

This Court has not forgotten that the responsible authorities themselves have already recognized that the medical treatment that is provided to patients with HIV/AIDS in “pavilion 4” of the INER is inadequate and does not comply with the international quality standards.

p. 51 Furthermore, addressing the conclusions found in the judicial inspection evidence, it can be determined that the conditions of “pavilion 4” are not adequate for the treatment of the affected patients, according to the human right to enjoy the highest possible level of health. It has been shown that construction is necessary for the medical care to be considered of good quality, preventing, to the extent possible, that the patients with HIV/AIDS suffer other concomitant infections, illnesses and disorders of different types that have repercussions on the treatment and care they receive and that may even put their life at risk.

In this regard, it is clear that the adjustment to the infrastructure of the INER is required under Articles 2 and 12 of the ICESCR of the Mexican State since, as the CESCR has indicated, it must have establishments, public health goods and services and healthcare centers that are acceptable from the cultural point of view and that are appropriate from the scientific and medical point of view and are also of good quality.

p. 52 In addition, the CESCR established that the state obligation to create conditions that ensure medical care and medical services for people in cases of illness, which is found in Article 12, paragraph 2, part d), of the ICESCR, is not limited to equal and opportune access to basic preventive, curative and rehabilitation health services, but includes appropriate treatment of diseases, ailments, injuries and disabilities, which of course covers the measures to prevent, to the extent possible, in public health establishments undue exposure of people with HIV/AIDS to the risks of co-infection of opportunistic illnesses that lengthen their medical treatment and that submit them to greater suffering, or could even lead to risks to their life.

p. 54 We can conclude from the above that the need to make structural modifications to the responsible institute has been shown. They will minimize to the extent possible the risks of contagions and co-infections of opportunistic illnesses for the patients who suffer from HIV/AIDS.

#### **IV. The obligation of the Mexican State to adopt measures to the maximum extent of its resources and the inefficacy of the authority's arguments**

The ICESCR recognizes that the State obligation to protect, respect and promote the human right to enjoy the highest possible level of health, cannot ignore the particular situation of each country. Therefore there will not be a violation of economic, social and cultural rights, even if it is shown that a particular right has not been fully achieved or reached an optimum state of efficacy. This is provided that the State has demonstrated that it has used all the resources it has at its disposal in an effort to satisfy the convention obligations. Thus, it is not expected for each State to immediately comply with the full realization of the right to health, but rather for it to take adequate measures that will ensure that objective, as fast and effectively as possible.

p. 57-58 Thus, the simple assertion of budgetary limitations by the Mexican State is not sufficient for demonstrating that it has adopted all the measures to the maximum of its resources to achieve the full realization of the human right to enjoy the highest possible level of health. The State entities are obligated to contribute evidence supporting their claim by proving their financial situation. This is especially relevant because within all matters claiming the violation of the economic, social and cultural rights that make up the constitutional corpus, the national judges must distinguish between the State's incapacity to comply with the human rights obligations that the Mexican State has undertaken and the reticence of such State to comply with those obligations. That will permit the determination of what actions or omissions amount to a violation of those human rights.

p. 58 Thus, the judicial bodies may review whether, in fact, the failure to fully realize the constitutional or conventional right is the result of the lack of state resources or, when the nature of the case permits, that they ensure that such failure to allocate resources is not the result of arbitrary or discriminatory decisions by the State authority.

The above is supported by the fact that, while in principle these courts should not substitute the functions of the Executive and Legislative Powers regarding the preparation of public policies and the allocation of resources, the Federal Constitution itself requires the Judicial Power to compare the actions of such democratic bodies with the standards contained in the Supreme Law and in the human rights treaties that form part of the Mexican legal system and that, of course, are binding on all state authorities.

- p. 60 As a result of the above, this Court considers that the responsible authorities have not demonstrated that they have made all possible efforts to use the resources that are at their disposal to achieve the full effectiveness of the human right to enjoy the highest level of health possible for AHA, LBL and RGPP. They only asserted the lack of budget to take the measures to achieve that objective, but failed to contribute to the proceeding the evidentiary material to support that assertion.

### Decision

This Court considers that in this case the violation of the obligations established in Articles 4 of the Constitution, 2 and 12 of the ICESCR is proven and, therefore, it is appropriate to revoke the appealed decision and grant the injunction (*amparo*) to the affected parties.

- p. 62 In view of the above, this Court determines that the INER, in coordination with the Commissioner and the Technical Committee shall take all the measures necessary to safeguard the human right to enjoy the highest possible level of health for AHA, LBL and RGPP, considering that they are carriers of HIV, and therefore they must receive medical treatment in facilities separated from the rest of the patients, in order to avoid contagion of any disease.
- p. 62-63 Thus, compliance with the decision implies that the responsible authorities should consider what measure would be the most suitable to be able to provide those affected with appropriate medical treatment for their illness.

This includes remodeling Clinical Service 4, where they are currently treated, or by the construction of a new hospital pavilion.

- p. 63 If it is proven that neither of the mentioned options is compatible with the public policies in health implemented by the responsible authorities, then they must take the steps they consider relevant so that AHA, LBL and RGPP, to a reasonable level of satisfaction – qualified by the judge – are cared for in another hospital or the clinics of the health sector where they can receive their treatment in adequate and appropriate conditions for their illness, in order to guarantee their right to obtain the highest possible level of health.

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## RIGHT TO RECEIVE MEDICINE (VULNERABILITY OF PERSONS WITH MENTAL ILLNESSES AND COMPREHENSIVE MEDICAL CARE)

### *Amparo en Revisión 251/2016*<sup>39</sup>

**Keywords:** *right to health, right to receive medications, right to petition, principle of progressiveness in health matters, mental illnesses, disability, outpatients.*

#### **Summary**

In 2011, JEGG was diagnosed with various mental illnesses by the National Psychiatry Institute [Instituto Nacional de Psiquiatría] (hereinafter “the Institute”). Subsequently, in 2013 he asked the Institute for the medications necessary to treat his illness. His request was denied arguing that the Institute was not authorized to provide medications to outpatients (not hospitalized). They recommended that he affiliate with the Federal District Health System, which is the competent authority to follow up on his treatment. In 2015 he made the same request, but it was denied based on the same arguments. Given this denial, JEGG filed proceedings for an injunction with a two-stage judicial review for an unremediated breach of

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<sup>39</sup> Decision issued by the Second Chamber of Mexico’s Supreme Court of Justice (September 3, 2013). Reporting Justice: Javier Laynez Potisek. Action for Constitutional Relief Through Injunction 251/2016

rights (*juicio de amparo indirecto*) alleging that such decision violated his right to the protection of his health. The district judge that heard the case granted the injunction (*amparo*) to the complainant and ordered that the Institute provide him the medications he needed for his treatment. A collegiate court admitted the appeal (*recurso de revisión*) filed by the Institute and requested Mexico's Supreme Court of Justice (this Court) to exercise its authority to assert jurisdiction over the matter. This Court decided to assert jurisdiction over the appeal (*recurso de revisión*).

### Issue presented to the supreme court

Whether the Institute was authorized to refuse to give medications for continuing the treatment of JEGG under the argument that he was an outpatient and was authorized to refer him to another level of care with another health institution.

### Holding and vote

This Court confirmed the decision issued by the district judge essentially for the following reasons: the right to mental health is at the same level of importance as the right to physical health and that within the right to comprehensive health protection is the obligation to provide medications necessary to treat mental illnesses. It also stated that the Institute made a restrictive interpretation of the rule that authorizes the health institutes to provide comprehensive medical attention when it did not provide the medications necessary to treat the illness of Mr. JEGG. Furthermore, it was recognized that the Institute is authorized to refer patients to other levels of care, but in this case, the authorities did not follow the administrative procedure contemplated in the internal rules of the institute. Finally, this Court considered that the Institute did not take into consideration the vulnerability of persons with mental illnesses when refusing to provide medications to Mr. JEGG.

The Second Chamber decided this matter unanimously with four votes of Justices Yasmín Esquivel Mossa, Alberto Pérez Dayán, José Fernando Franco González Salas, and Javier Laynez Potisek. Justice Eduardo Medina Mora Icaza was legally impeded from hearing the matter.

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## EXTRACT OF THE DECISION

- p. 1 Mexico City. The Second Chamber of Mexico's Supreme Court of Justice (this Court), in session of May 19, 2019, issues the following decision.

### Background

JEGG has been a patient of the National Psychiatry Institute "Ramon de la Fuente Muñiz" [Instituto Nacional de Psiquiatría "Ramón de la Fuente Muñiz"] (hereinafter "the Institute") since 2011, where the doctors diagnosed him with various mental disorders and prescribed various medications to treat them.

- p. 2 In 2013, Mr. JEGG requested the supply of the medications that he needed from the General Management of the Institute. The Director of Clinical Services denied the request because, from his point of view, the regulatory framework of the National Health Institute "does not contemplate the giving of medications to outpatients that require pharmacological treatment". It was also suggested that he affiliate with the Health Social Protection System in the then Federal District (Popular Insurance), to be able to obtain the treatment he needs. In 2015 he again asked the General Management to provide the medications prescribed for him by the doctors of that Institute. The Director of Clinical Services again refused to supply the medications.

- p. 2-3 JEGG filed an injunction with a two-stage judicial review for an unremediated breach of rights (*amparo indirecto*) and claimed: a) from the General Director of the Institute, the failure to respond to the document in which he requested the supplying of the medications; b) from the Director of Clinical Services of the Institute, the official letter of 2015 which refused to supply the medications to him, and c) from both authorities, the failure to procure his health and wellbeing, given the refusal to supply him the medications he needs. The district judge granted the injunction (*amparo*) for the Institute to supply the medications to Mr. JEGG.

p. 5-7 The General Director and the Director of Clinical Services of the Institute jointly filed an appeal (*recurso de revisión*). The collegiate court admitted it and asked this Court to exercise its authority to assert jurisdiction over the matter. In the session of February 24, 2016 this Court decided to assert jurisdiction over the appeal (*recurso de revisión*).

### Study of the merits

p. 8 This matter leads us to analyze the mode in which mental health services are provided in the country and the obligations of the authorities in relation to the right to mental health. The matter is also particularly relevant because it reveals the vulnerability and lack of protection of patients that are attended in the mental health system; many of them persons with disabilities.

p. 9 This Court considers it advisable to first develop the perspective and content of the right to health, which the authority considers it did not violate. Taking into account the particularities of the case, the specific context of the mental health systems will be presented in this first part. Secondly, it will be analyzed whether the right to mental health includes the supply of medications and, if so, the conditions in which it should be guaranteed.

### I. The right to mental health and the obligation of providing medications

p. 9-10 The fourth paragraph of Article 4 of the Constitution guarantees the right of every person to health protection. The applicable international treaties and national provisions understand that the “right to health” has implications for both physical and mental wellbeing. Thus, Article 12.1 of the International Covenant on Economic, Social and Cultural Rights refers to the “enjoyment of the highest level possible of physical and mental health”. Similarly, the San Salvador Protocol refers to the “enjoyment of the highest level of physical, mental and social wellbeing”. Furthermore, the General Health Law guarantees a state of physical and mental wellbeing of the person.

p. 10 Given that the national and international legal provisions do not distinguish between the protection the States must give to physical and mental health,

this Court concludes that there is a mandate for the Mexican State to protect the right to physical and mental health with the same intensity and under the same conditions.

- p. 13 Article 12, paragraph 2, part d), of the International Covenant on Economic, Social and Cultural Rights indicates that the States parties are obligated to create the conditions that ensure everyone medical assistance and medical services in case of illness.
- p. 15 Mexico has recognized this right to comprehensive health services. Article 77 bis 1 of the LGS establishes that in order to protect the right to health, the State must guarantee that the medical services “comprehensively satisfy health needs, through the combination of interventions that promote health, prevention, diagnosis, treatment and rehabilitation”. In addition, Article 77 bis 37, establishes the right “to receive comprehensive health services” as one of the rights of the beneficiaries of the Health Social Protection System.
- p. 16 In turn, the LGS establishes that basic health services include the availability of medications and other essential health products. Furthermore, it obligates the Health Ministry to guarantee the permanent existence and availability of the medications that are found in the Basic Table of Products of the Health Sector to the population that needs them.

It is from the above considerations that we can conclude that the proper protection of the right to health involves providing the services necessary for comprehensive protection and that the supply of medications is part of these comprehensive services.

- p. 17 Taking into account that the precedents of this Court indicate that the right to health establishes some obligations that are immediate and others “of results” in which the “principle of progressiveness” must be applied for their compliance, the question of how the State must comply with this obligation arises.

First of all, the principle of progressiveness does not imply that the obligations in relation to economic and social rights can be postponed indefinitely arguing that the resources are limited and insufficient or that the changes needed are complicated. Secondly, in principle, it must be demonstrated that there are plans, policies or legislation, intended to make the necessary changes. Thirdly, there are negative obligations that do not require resources to be implemented. And finally, the obligations must be addressed regardless of the material or technical resources.

- p. 19-20 Addressing the duties imposed on this Court by Article 1, second and third paragraphs, of the Constitution, the conclusion is reached that the progressive obligation of the right to health in relation to the supply of medications implies at least giving them without discrimination to all persons in general, and in particular, to vulnerable groups. This obligation does not imply that any requested drug should be supplied. The international conventions referred to defer to the states' parties to define what are the "essential" or "basic" medications. However, once they have been defined or established by the states, there is a duty to give them equitably.
- p. 20 In our country, the law recognizes the right to receive the medications that are listed in the "Basic Table and Catalog of Medications", and therefore pursuant to the conventional obligations indicated, and specifically the principle of progressivity, the Mexican State cannot regressively deny medications from that Basic Table to someone who needs them, nor much less, supply them in a discriminatory manner.
- p. 21 Taking into account all of these considerations, this Court reaches the following conclusions: first, the right to mental health does include the supply of medications and, second, this obligation requires they be supplied without discrimination, and that programs exist intended to supply them to the entire population and in particular to vulnerable groups.

It is from the above conclusions that we must analyze whether the Institute should have provided the medications requested by JEGG, or if, on the contrary, it was valid to deny them without violating the right to health.

## II. Complete and comprehensive health care

### a) Administrative procedure of referral and counter-referral of patients

- p. 21-22 There is no legal basis that allows us to conclude that the services that the Institute must provide to outpatients are different from those it must provide to hospitalized patients. On this point, the Institute notes in its first claim that the district judge incorrectly understood that the challenged act was not duly grounded in law and fact, even though she justified her response based on Articles 54 to 56 of the National Health Institutions Law.
- p. 22 However, a reading of the legal grounds she provides does not show any legal distinction between a hospitalized patient and an outpatient in relation to the medical care that should be provided to them.
- p. 23 Therefore, given that as a result of the interpretation of the Institute a group of persons were excluded from a fundamental service for adequate health care, it was not sufficient to refer to generic legal provisions since, to validly make such distinction, the authority would have to provide evidence that express legal grounds existed or should have stated a valid reason for denying the supply of medications to a specific group of patients, in this case, outpatients. However, the Institute did not indicate anything in this respect and this Court finds that there is no connection between a person being hospitalized or not and their need to receive medications for their proper treatment. With this in mind, we conclude that this grievance stated by the Institute is groundless, because its interpretation of the applicable rule violates the right to health in relation to Mr. JEGG's right to equality and non-discrimination.
- p. 24 It is true that, as the Institute indicates, the constitutional and conventional obligations in relation to health do not require that each authority provides any service to any patient. For that reason, the legislative and executive authorities have the power to organize the provision of this service in order to make it more efficient, specialize it and offer it to the greatest number of people, in order to comply with their health obligations. In other words, in

principle in the Constitution and in the international treaties there are no obstacles or impediments for the lawmaker, exercising its configurative freedom, to determine that the National Health Institutes will not be competent to supply medications and that, on the contrary, another authority will be authorized to do so.

p. 24-25 However, in the distribution of competency that the lawmaker establishes, it is necessary to ensure that the right of persons to access to the medications they need is not excessively obstructed. This is regardless of what authority supplies them. It should be guaranteed that the person will receive the complete treatment. Otherwise, the right to be provided comprehensive health services would not be guaranteed.

p. 25 In this regard and related to this specific case, it is not acceptable for a health institution to admit a patient, provide him initial medical care and not ensure that he will receive the complete treatment. This is especially true if the need for medications is the result of its own diagnosis through the services it provides. In this case the clinical case file shows that Mr. JEGG was admitted on January 31, 2011 and he was attended through an external consultation. In it they diagnosed him with certain mental disorders and it was determined that the medications he should use were paroxetine, oxcarbazepine and haloperidol.

In other words, the Institute at no time determined that the patient was not a candidate for the services it provides, whether because he belongs to another social security system, because his illness was not one specialized in by that Institute, or for any other reason. On the contrary, he was admitted as a patient and he was provided the service of external consultation. As a result, the Institute itself determined that he needed a series of medications to improve his functionality and recover his physical and mental well-being. However, the Institute failed to give him comprehensive care because: a) it denied him the medications that it itself prescribed; and b) in substitution it did not give him adequate guidance for the authority that it considered was competent to give the prescribed medications.

- p. 26 The Institute argues that in accordance with the second paragraph of section I of Article 54 as well as 55 of the Law of the National Health Institutes, “it has referred patients to other levels of care”, and that it considers that this is what was done “upon informing the Complainant that it was considered advisable that he affiliate with the Social Health Protection System of the Federal District”, which in its judgment is the authority competent to provide them.
- p. 26-27 Those articles establish, first of all, that the Institute must provide health care services relative to the diagnosis and treatment of highly complex diseases, as well as emergencies. In addition, once the third-level problem is diagnosed, resolved or controlled, the patients can be referred to other levels of care, in accordance with the referral and counter-referral system. However, this Court considers that the response of the authority is not admissible, for the following reasons.
- p. 27 The Official Mexican Standard NOM-025-SSA2-2014, for providing the health services in comprehensive hospital medical-psychiatric care units, establishes operating and organizational criteria for the activities of the establishments that provide those services.
- p. 27-28 In terms of that Official Standard, the Institute itself issued the “Procedures Manual of the Assistant Office of External Consultation” which regulates, among other things, the “Procedure for the referral and/or counter-referral of External Consultation patients” (Number 5 of the Manual), for the purpose of informing the medical and paramedical personnel of the indications, treatments and forms that must be covered for the process of referral and/or counter-referral of external consultation patients.
- p. 28 This manual defines referral-counter-referral as the “medical administrative procedure among operative units of three levels of care to facilitate the sending-reception-return of patients, in order to provide timely, comprehensive and quality care”.

- p. 29 Based on the above provisions and according to the specific procedure that should be followed in terms of the administrative procedures for referrals of its external consultation patients, we consider that the Institute, upon suggesting to Mr. JEGG that he affiliate with the Federal District Health Social Protection System, did not make a “referral”, and therefore its grievance is groundless.
- p. 31 In addition, it is important to emphasize that contrary to what the appellant authority alleges; the referral system does not make it impossible to supply medications to the complainant, since as we indicated, Article 54 cited above establishes that the referral and counter-referral is a power of the Institute. In other words, the Institute based its act of authority on a restrictive interpretation of the standard, and with that denied Mr. JEGG the right to health.

#### **b) Condition of vulnerability of the persons with mental illnesses**

- p. 33 National and international provisions emphasize that it is not sufficient that a person that has a deficiency to be considered a person with a disability; rather such condition is derived from the “social barriers” a person faces, which often translate into impediments or obstacles to enjoy a job, safe housing, good health services and membership in communities, among others.

In that regard, the mental deficiencies (usually known as mental illnesses) do not always lead to a condition of disability, since not all persons that have them experience significant social barriers. However, from the scientific evidence it is seen that the great majority of persons who live with one or more mental deficiencies face, on the one hand, the symptoms and obstacles derived from the deficiency itself and, on the other hand, the stereotypes and prejudices toward mental illnesses and the social obstacles that prevent them from enjoying their rights under equal conditions.

- p. 34 Based on this condition Mr. JEGG enjoys a particular legal framework of protection as a result of his condition of special vulnerability and de facto inequality in society and the legal order.

- p. 34-35 In this regard, the authorities have specific obligations toward persons with disabilities, in order to guarantee their rights. For example, it should be prioritized that their actions do not reinforce stereotypes toward persons with psycho-social disabilities. The law and public policies must seek to reduce or eradicate direct and indirect discrimination against them. The authorities that provide them services must provide the reasonable adjustments they need to have access to goods and services on an equal playing field with those that do not have a disability.
- p. 36-37 Finally, it is important to indicate that given the stigmas associated with mental health and disability in general, many persons that meet the conditions to be considered persons with psycho-social disability, are not recognized as such. However, the failure of a person to assign themselves to a group of persons with a disability, should not be an obstacle for the enjoyment of the rights contained in the treaties and legislation regarding persons with disabilities.
- p. 37 In relation to what has been argued to this point, this Court holds that it is essential that the authorities that provide services in relation to mental health and that therefore often work with people with disability, take into account the broad framework of rights those persons hold and, above all, that their protection is through the social model of disability.
- p. 38 In this regard, the right to health has a particular relevance in the case of persons with disabilities because it has direct implications for their condition of disability, whether for their current deficiency or the prevention of the appearance of new deficiencies.

This in no way implies that we are considering that the disability is an illness that must be “cured”. On the contrary, this Court considers it important to emphasize the particular importance of guaranteeing the health services that people need as a result of their disability. In the case of persons with psycho-social disability, the relevance should be emphasized by the supply of the medications they need to treat their mental deficiencies.

This Court concludes that the right to health and specifically the right to the supply of medications to treat the mental deficiency of persons with psycho-social disability needs reinforced protection since, when having a direct incidence in their condition of disability, the lack of medications can have disproportional repercussions with respect to other persons, in the enjoyment and exercise of other rights and in their quality of life.

p. 39 It should be clarified that this Court is not unaware that many persons with psycho-social disability choose not to make use of medications. This is in no way incompatible with the conclusion stated, since asserting that there is a right to receive medications does imply that persons with psycho-social disability are obligated to receive them, nor much less, that they can be supplied to them without their consent.

p. 40 Nevertheless, it is important to this Court to show the possible repercussions of the fact that the Institute has not taken the precautions necessary to ensure that Mr. JEGG receives the medications immediately, under the pretext that “it was not a competent authority” and without guaranteeing that such medications were in fact provided in its absence.

It is also important to specify that to accept the argument of the Institute that it can only supply medications to hospitalized patients would imply validating a policy that predictably would have a negative and indirect impact on a vulnerable group of the population such as persons with mental deficiencies.

p. 42 From what has been indicated here, this Court considers that the fact that the Institute has not supplied the medications or otherwise procured that he will receive them, and that it did not take into account Mr. JEGG's condition of disability, violated the right to the comprehensive provision of the right to health and exposed him to greater vulnerability that could result in subsequent violations of his rights and in a detriment to his quality of life.

**Decision**

- p. 44      In the matter under review, the appealed decision is affirmed. The justice of the Union protects JEGG against the acts and responsible authorities specified in the seventh paragraph of this final enforceable decision, and in the terms specified by the district judge.



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HUMAN RIGHT TO A HEALTHY ENVIRONMENT,  
MODALITIES TO PRIVATE PROPERTY. PRINCIPLE  
OF INTERGENERATIONAL JUSTICE AND  
PROTECTION OF WETLANDS AND MANGROVES  
(RESTRICTIONS ON PROPERTY FOR THE  
CONSERVATION OF NATURAL RESOURCES)

*Amparo en Revision 410/2013*<sup>40</sup>

**Keywords:** *right to a healthy environment, restrictions on property for the conservation of natural resources, intergenerational equity, legal regime for the protection of wetlands and mangroves.*

**Summary**

EBVS, owner of a property in Quintana Roo, obtained an environmental impact authorization for the development of a real estate tourism project from the Ministry of Environment and Natural Resources. After having requested and obtained two extensions of the environmental impact authorization for her project, she was denied a third request for an extension because, among other reasons, the environmental authority considered that various provisions related to the conservation of mangrove ecosystems at the site would be contravened. EBVS filed a two-stage judicial review for an unremediated breach of rights (*amparo indirecto*) lawsuit against the ruling

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<sup>40</sup> Decision issued by the First Chamber of Mexico's Supreme Court of Justice (October 23, 2013). Reporting Justice: José Ramón Cossío Díaz. Action for Constitutional Relief Through Injunction 410/2013

that was decided against her in a district court in Cancun. EBVS then filed an appeal (*recurso de revisión*) that was referred by the Collegiate Circuit Court to Mexico's Supreme Court of Justice because it involved issues related to the constitutionality of the General Wildlife Law.

### Issue presented to the Supreme Court

Whether the grievances set out in the appeal (*recurso de revisión*) filed by EBVS are sufficient to demonstrate the unconstitutionality of Article 60 TER of the General Wildlife Law and other challenged regulatory provisions that refer to the protection of wetlands and mangroves in the country.

### Holding and vote

The injunction (*amparo*) was denied and the constitutionality of Article 60 TER of the General Wildlife Law and the other challenged regulatory provisions related to the conservation of wetlands and mangroves in national territory were upheld for the reasons set forth below. The regulations challenged, in which restrictions are established on property with the purpose of conserving natural resources, are not retroactive or in violation of Article 27 of the Constitution. Article 60 TER of the General Wildlife Law and the official Mexican standard challenged in this case are reasonable according to the purposes established in the third paragraph of Article 27 of the Constitution because they seek to preserve natural resources and the environmental services they provide. They are also proportional since they not only respond to a legitimate constitutional purpose but can additionally limit, both constitutionally and conventionally, the right to property for reasons of social interest. Finally, the regulations challenged do not violate the fundamental right to equality, understood in its specific dimension of analysis of the law's treatment of one person compared with another, because the legal interest they protect is based on the recognition in the Constitution's Article 4 of the right to environment, which responds not only to the social interest or benefit of the individuals who exist in the present, but also of those who will exist in the future. The variant to the principle of equality in the environmental context refers to the commitment to preserve natural resources, in their current version and dynamically, towards the future. In this case, the legislative distinction made by Article 60 TER of the General Wildlife Law

responds to the protection of coastal wetlands and the difference in treatment of those owners that have properties where mangrove ecosystems exist is instrumentally adequate for the protection of the environment, as well as proportional and reasonable with respect to the constitutional objective that is sought to protect.

The First Chamber of the Supreme Court decided this case with the unanimous vote of the five Justices Olga Sánchez Cordero de García Villegas, Arturo Zaldívar Lelo de Larrea, Alfredo Gutiérrez Ortiz Mena, Jorge Mario Pardo Rebolledo and José Ramón Cossío Díaz.

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### EXTRACT FROM THE DECISION

p. 1 Mexico City. The First Chamber of Mexico's Supreme Court of Justice (the Supreme Court), in session of October 23, 2013, issued the following decision.

#### Background

p. 1-2 On June 7, 2002, the Federal Delegation of the Ministry of Environment and Natural Resources in the State of Quintana Roo (SEMARNAT) granted EBVS an environmental impact authorization for a real estate tourism development project (the Project) in Quintana Roo. The authorization was extended twice to develop a comprehensive environmental management program and prepare the site for the construction of the Project. When EBVS requested an extension for the third time, SEMARNAT denied it for procedural reasons and because a reform to the General Wildlife Law (LGVS) for the protection of mangroves came into force, under which legal framework it was considered that the Project was unfeasible.

p. 4 EBVS filed a two-stage judicial review (*amparo indirecto*) lawsuit against the denial of the environmental authority, through which she claimed that her rights under Articles 13, 14, 16 and 27 of the Political Constitution were violated. A judge in the State of Quintana Roo denied the injunction (*amparo*), against which EBVS filed an appeal (*recurso de revisión*).

In her appeal, EBVS stated that the district judge did not analyze all the arguments she made in her injunction (*amparo*) lawsuit and claimed the unconstitutionality of Article 60 TER of the LGVS as well as the Official Mexican Standard NOM-022-SEMARNAT-2003 which establishes the specifications for the preservation, conservation, sustainable use and restoration of coastal wetlands in mangrove areas (NOM-022); considering that her rights to a prior hearing and the non-retroactivity of the law, equal treatment, legality and legal certainty (Articles 1, 14 and 16 of the Constitution) were negatively affected in various ways.

- p. 5 The Collegiate Circuit Court that heard the appeal referred it for review to the Supreme Court to resolve the issues relating to the constitutionality of the LGVS.

### Study of the merits

- p. 9 This First Chamber of the Supreme Court must determine whether, as EBVS argues and contrary to what the trial judge decided, Article 60 TER of the LGVS and NOM-022 are unconstitutional. To resolve this case, the Supreme Court must essentially answer the following questions: 1. Do the challenged norms violate the principle of non-retroactivity of the law? 2. Does the challenged Official Mexican Standard NOM-022-SEMARNAT-2003 violate Article 27 of the Constitution by establishing restrictions on private property? 3. Does Article 60 TER of the General Wildlife Law violate the right to equal treatment under the law?

### Do the challenged norms violate the principle of non-retroactivity of the law?

- p. 24-26 In the (*recurso de revisión*) filed by EBVS it was argued that the denial of an extension by SEMARNAT for carrying out the Project entails a retroactive application of Article 60 TER of the LGVS and NOM-022, because both provisions are of a later date than the date on which she acquired ownership of the land and obtained an environmental impact authorization. In any case, the affected party argued, the district judge should have issued a

substitute compliance and ordered the payment of damages to the affected party because she was prevented from using her property.

- p. 52-53 The Supreme Court noted that the aim of both Article 60 TER of the LGVS and NOM-022 is to ensure the protection of coastal wetlands, recognizing, among other things, the biological, chemical, ecological, economic, cultural, and social value of their hydrological, climate regulation, coastal stabilization, and primary protection functions, through which marine and terrestrial biodiversity, that depends on their functional integrity, is maintained.

In recognition of the importance of these ecosystems, Article 60 TER was added to the LGVS. Similarly, but in the technical aspects, NOM-022 regulates and establishes specifications for the preservation, conservation, sustainable use, and restoration of coastal wetlands in mangrove areas, seeking to eliminate pollution and negative effects generated on wetlands and their biological communities.

Based on the above, the Supreme Court concluded that, since their entry into force, the main purpose of both Article 60 TER of the LGVS and NOM-022 is the regulation of all human interference in coastal wetlands in mangrove areas within national territory to ensure their conservation.

- p. 54-56 Thus, it is considered that the arguments put forward by EBVS regarding the retroactive application of LGVS and NOM-022 are unfounded for the following reasons. On the one hand, the General Law of Ecological Balance and Environmental Protection establishes that certain works and activities –including those that are intended to be carried out in wetlands and mangroves– require an environmental impact authorization. Both Article 60 TER of the LGVS and NOM-022 are relevant in this context, since both provisions must be considered in the environmental impact assessment procedure, as well as when assessing whether or not an extension is granted.
- p. 56-57 On the other hand, it is clear that the authorities cannot prevent without cause the development of works already authorized in mangrove areas

when they have been completed, which is why it could not be said that the challenged rules have retroactive effect. NOM-022 and Article 60 TER of the LGVS, from their entry into enforcement, are of mandatory application and observance by the environmental authority when evaluating the environmental impact statements that are submitted to its consideration, as happened in this case.

Additionally, the Supreme Court did not find that the provisions claimed to be unconstitutional established a temporary scope of validity in which acquired rights or legal situations that occurred prior to their enforcement were affected, since these provisions were applicable and of general observance for situations after their enforcement.

**Does NOM-022 violate Article 27 of the Constitution by establishing restrictions on private property?**

- p. 59-61 In her appeal (*recurso de revisión*), EBVS also argued that NOM-022 established restrictions on property by imposing conditions of use and enjoyment of real estate, with the aim of preventing actions that could affect the mangroves on the site. She stated that a restriction on private property should be understood as the establishment of a general and permanent legal norm that modifies the form of the property right. From her point of view, NOM-022 is unconstitutional as it has not been issued by the body empowered by the Constitution to impose restrictions on her property rights.

To address these arguments, the Supreme Court first considered issues related to the establishment of restrictions on property in accordance with the Constitution. Next, it was analyzed whether all impacts on property must be carried out through a law in a formal and material sense.

As for the first argument, the Court specified that the right to property should not be confused with the possibilities of using it (which EBVS calls “modalities” in reference to the third paragraph of Article 27 of the Constitution).

The “modalities” that may be imposed on the right to property in accordance with Article 27 of the Constitution constitute restrictions on the right to property, but do not imply the deprivation of the right to property nor an expropriation as EBVS argued. The restrictions referred to in Article 27 of the Constitution are simply limiting the exercise of the right to property, but they do not mean its annulment.

- p. 61-62 It is clear that whatever the form by which the property has been acquired, the Nation maintains at all times the “right” -which must be read as competence or power- to impose the restrictions on private property dictated by the public interest, as well as to establish the regulation for the use of natural resources that can be appropriated for public benefit.

The consequence of the foregoing, as established in the second part of the third paragraph of Article 27 of the Constitution, is to dictate the necessary measures for the objectives set forth therein, including the administration of lands, waters, and forests, as well as the preservation and restoration of the ecological balance.

This determination also has its corresponding part in the list of rights established in the Constitution, in the fourth paragraph of Article 4, which establishes the right to a healthy environment and the obligation of the State to guarantee it.

- p. 62-63 Both the right to a healthy environment and the correlative obligation of the State to guarantee it have to be read from the direct constitutional power that establishes the public interest and allows the establishment of restrictions on property, without this being considered an expropriation or confiscation. The above does not imply that when imposing restrictions on property based on Article 27 of the Constitution, the authorities do not have the obligation to reasonably justify the corresponding measures, in order to avoid arbitrariness.

Thus, in a constitutional review trial over norms that impose restrictions on the use of property, the standard of constitutional scrutiny must be guided

by the reasonableness of the measure according to the purpose sought, necessity, and proportionality. The main idea that is maintained here is that it must be controlled, through more demanding constitutional scrutiny, so that the authority does not use arbitrary measures under the pretext of fulfilling a legitimate purpose, such as the protection of the environment.

- p. 64 In this specific case, the purpose of the provisions that are claimed to be unconstitutional (Article 60 TER of the LGVS and NOM-022) is the protection of coastal wetlands. Thus, considering that the legislature is constitutionally empowered to impose the restrictions on property that it deems appropriate and that environmental protection is a constitutionally legitimate purpose, the Supreme Court considered that the analysis of the reasonableness of the measure required only ordinary justification.
- p. 64-66 Under this perspective, the Supreme Court decided that Article 60 TER of the LGVS and NOM-022 are reasonable in accordance with the purposes established in the third paragraph of Article 27 of the Constitution because they seek to preserve the natural resources and environmental services they provide. They are also proportional, since they not only respond to a legitimate constitutional purpose, but can also establish, both constitutionally and conventionally, limitations on the right to property for reasons of social interest, as contemplated in Article 21 of the American Convention on Human Rights.

For these reasons, the First Chamber of the Supreme Court considered that there is no impact on the property of EBVS that can be identified as an expropriation, because this case is only a clear example of regulation through the establishment of restrictions on the use of property, contemplated in the third paragraph of Article 27 of the Constitution.

Consequently, EBVS's arguments regarding the formal and material reservation of the law as a condition for the impact on her property to be considered constitutional are also unfounded. This is because there is no formal legal reservation in the third paragraph of Article 27 of the

Constitution. What this provision refers to with the “necessary measures” is that the Nation may impose the necessary measures for the fulfillment of the purposes established in that same paragraph.

This constitutional power, which is conferred on State agencies to impose the measures or restrictions on property that they deem necessary to grant protection of a collective benefit or social interest, also corresponds with the State’s compliance with the obligation to guarantee the constitutional right that we all have to a healthy environment.

**Does Article 60 TER of the LGVS violate the right to equal treatment under the law?**

- p. 67 In the analyzed appeal (*recurso de revisión*) the affected party also argued that Article 60 TER of the LGVS contravenes the right to legal equality by disadvantaging the owners who have properties in which there are mangroves as compared to those who can take advantage of their land as established in the municipal urban development programs because it does not have mangrove ecosystems.
  
- p. 67-68 The Supreme Court considered that the arguments of the affected party on this question are unfounded, essentially for the following reasons. The principle of equality constitutes the fundamental right recognized by Articles 1 and 13 of the Constitution, which establish that all persons must, in principle, be treated equally before the law and the actions of the State.
  
- p. 69-70 However, it is clear that the difference in the legal treatment given to EBVS, in terms of the use she can give to her lands, is based on the existence of mangrove communities on the site, which is why its factual situation is different from that of other properties. Indeed, the principle of equality implies giving equal treatment to those in equal situations, which in this case does not happen because in the properties that EBVS owns there are mangrove communities, which justifies the granting of a treatment different from those lands where coastal wetland ecosystems have not developed.

Hence, this First Chamber concludes that under this parameter it cannot be considered that Article 60 TER of the LGVS and NOM-022 violate the principle of equality, because the same treatment is given to the owners of properties in which there are coastal wetlands, compared to those in which these ecosystems do not exist.

- p. 70-71 The Supreme Court does not lose sight of the fact that in this case the violation of the principle of equality being claimed comes from the imposition of restrictions for reasons of environmental protection. In this context, it is relevant to address the arguments of EBVS on the content of Article 4 of the Constitution, which establishes the obligation of the State to guarantee the right to a healthy environment. This is because Article 60 TER of the LGVS and the NOM-022 establish differentiations based on the state interest of protecting a human right explicitly established in the Constitution.

In this regard, equality should not only be understood as a condition of equal treatment given to persons, in generic terms, but as a situation that must be verified between those who are in certain specific circumstances; which in this case means the presence of a certain ecosystem that is to be protected and preserved, such as mangroves. The above as ultimate justification, derived from the constitutional text itself, gives rise to the restrictions on property.

- p. 72 The First Chamber of the Supreme Court considered that equality is dynamically applied as a specific criterion; this requires the scrutiny of the person in relation to the constitutional interest that it is sought to safeguard as is established in Article 4 of the Constitution. Therefore, the conditions of treatment of the norm with respect to the person both, on an intergenerational level and within the environment in which they find themselves must be examined. This is because the right to an adequate environment not only responds to the social interest or benefit of existing individuals but must also be understood as a right of individuals who will exist in the future.

The public and social interest, set forth in Article 27 of the Constitution, must be understood as applicable to a changing environment whose needs are modified by its usage, by the specific conditions of its conservation and preservation and, something that is fundamental, by the way of understanding and systematizing these needs and conditions.

- p. 72 The variant to the principle of equality in the environmental context is drawn as a concept in which the commitment to preserve natural resources becomes relevant –not only with a current version, but dynamically, towards the future– which is established from the constitutional text to the norms that are challenged. That is why the criterion on which the distinction between persons is based responds to an objective and constitutionally valid purpose –the protection of the environment– behind which there is a weighing or assessment of the interests to be preserved.
- p. 73-75 According to the criteria that the First Chamber of the Supreme Court has issued regarding the right to equal treatment, it can be said that in this case this fundamental right has been fully complied with. By virtue of the fact that, first, the legislative distinction is due to the protection of the coastal wetland as a fundamental ecosystem for the environment in the area; and second, the difference between properties that have mangroves and those that do not is an instrumental means suitable for environmental protection; and, finally, the act whose constitutionality is challenged does comply with the requirement of proportionality or reasonableness required by the fundamental law, since the mentioned constitutional purpose is not pursued through an unnecessary or excessive impact on the constitutional right to property.

Thus, for this Chamber, the grievances that were raised in the appeal (*recurso de revisión*) are unfounded, since they do not violate the fundamental right to equality, understood in its specific dimension of analysis of the treatment that the law gives to one person as compared with another, as well as a robust criterion that is based on Article 4 of the Constitution due to the legal interest that it protects.

### Decision

- p. 82      The decision under appeal is upheld. EBVS is not covered or protected against Article 60 TER of the LGVS and the Official Mexican Norm. The appeal (*recursos de revisión*) is considered moot and the jurisdiction is reserved to the Collegiate Circuit Court to decide on the questions of legality that escape the constitutional analysis of the Supreme Court.

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LEGITIMATE INTEREST IN THE ENVIRONMENT,  
PRINCIPALS OF PROTECTION (CUTTING OF  
THE MANGROVE OF THE “LAGUNA DEL  
CARPINTERO” FOR CONSTRUCTION  
OF ECOLOGICAL PARK)

*Amparo en Revisión 307/2016*<sup>41</sup>

**Keywords:** *human right to a healthy environment, legitimate interest in environmental matters, prevention principle, precautionary principle, in dubio pro natura principle, citizen participation principle, non-regression principle, environmental services, mangroves, ecosystem destruction, ecological park, Laguna del Carpintero.*

**Summary**

LCCP and DPCP, the petitioners, filed an injunction (amparo) alleging that during the construction work on the “Parque Temático-Ecológico Laguna del Carpintero” (Ecological Theme Park “Carpenter’s Lake”) there was an illegal cutting of mangroves and destruction of the ecosystem. The area intended for preservation and cultural recreation was destroyed. This caused irreparable damage to the wetland and mangrove ecosystems including land and aquatic species as well as to the detriment of the inhabitants of the city of Tampico, Tamaulipas. They also

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<sup>41</sup> Decision issued by the First Chamber of Mexico’s Supreme Court of Justice (November 14, 2018). Reporting Justice: Norma Lucía Piña Hernández. *Action For Constitutional Relief Through Injunction 307/2016*

stated that the project had been carried out without an environmental impact assessment issued by the Ministry of the Environment and Natural Resources [Secretaría del Medio Ambiente y Recursos Naturales (SEMARNAT)]. The district judge of Tamaulipas who ruled on the matter dismissed it considering that LCCP and DPCP did not have a legitimate interest to file the injunction (*amparo*). The petitioners filed an appeal, which was heard by the First Chamber of Mexico's Supreme Court of Justice (this Court), through the exercise of its power to assert jurisdiction over a matter.

### Issue presented to the Supreme Court

Whether petitioners had a legitimate interest to challenge, through an injunction (*amparo*), the planning, preparation, bidding on and execution of the works for the construction of the Ecological Park. The petitioners argue that the destruction of wetlands and mangroves for the construction violated their human right to a healthy environment. Furthermore, the case will determine if the alleged harm to the environment existed.

### Holding and vote

This Court affirmed in part and reversed in part the appealed decision. The dismissal declared with respect to LCCP was affirmed and the injunction (*amparo*) was granted to DPCP, essentially for the following reasons. It was recognized that the environment is collective in nature and, therefore, its defense and ownership is diffuse. However, this Court held that the legitimate interest to file an injunction (*amparo*) in environmental matters depends, among other things, on the special relationship of the person or community with the ecosystem that is considered violated and, specifically, with its environmental services. It was also considered that those who inhabit or utilize the "surrounding environment" or the areas of influence of a particular ecosystem are environmental beneficiaries. In this particular case, it was shown that the Ecological Park was developed in a wetlands zone; that this ecosystem provided multiple environmental services that had regional influence, and therefore any inhabitant of the city of Tampico was located in a special relationship that distinguished his legitimate interest from the generalized interest of the rest of society. On that basis, the legitimate interest of DPCP to file the injunction (*amparo*) was recognized, who in

contrast to LCCP proved he lived in the city of Tampico. After this Court reversed the dismissal declared for DPCP, who was then deemed entitled to file the injunction (*amparo*), this Court studied the merits of the case, ruling that the municipality of Tampico, Tamaulipas did not have the environmental impact authorization that SEMARNAT had to issue before any development of the Ecological Park could take place in the wetlands zone. Therefore, the development of the Ecological Park without an assessment of the risks or damages to the environment, put the ecosystem in question at risk, directly violating the precautionary and *in dubio pro natura* principles. Finally, it was concluded that the lack of the required environmental impact authorization implied, in itself and immediately, the failure to protect the environment and, consequently, the violation of Article 4 of the Constitution. As a result, DPCP was granted the injunction (*amparo*) requiring the responsible authorities to refrain from further development of the Ecological Park that aggravates the risk to the ecosystem and to take all the measures necessary among the responsible authorities, the builder and certain contributing authorities for the recovery and conservation of the ecosystem and the environmental services of the area where the Ecological Park was being developed.

The First Chamber ruled on this matter by five unanimous votes of Justices Arturo Zaldívar Lelo de Larrea, José Ramón Cossío Díaz, Jorge Mario Pardo Rebolledo, Alfredo Gutiérrez Ortiz Mena and Norma Lucía Piña Hernández.

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### EXTRACT OF THE DECISION

p. 1 Mexico City. The First Chamber of Mexico's Supreme Court of Justice (this Court), in session of November 14, 2018, issues the following decision.

#### Background

p. 10 The municipality of Tampico, Tamaulipas, in the ordinary City Council meeting of April 18, 2013, unanimously approved the construction of the project called "Parque Temático-Ecológico Laguna del Carpintero" (Ecological Park), consisting of the preparation of the site and construction of the "Ecological Theme Park "Carpenter's Lake", which contemplated the development of an area of approximately 16 hectares bordering on the wetland "Laguna del Carpintero".

- p. 11 For that purpose and with the environmental impact authorization granted by the Ministry of Urban Development and Environment of the State of Tamaulipas [Secretaría de Desarrollo Urbano y Medio Ambiente del Estado de Tamaulipas (SEDUMAT)], the municipal authorities unduly cut mangroves and destroyed the ecosystem of the area used in the preparation activities for the construction of the Ecological Park, as a result of which LCCP and DPCP (the petitioners) filed an injunction (*amparo*).
- p. 4-5 On November 13, 2014, a federal district court in Tamaulipas issued a decision dismissing the proceeding based on a cause of invalidity invoked by one of the responsible authorities, which was the lack of legitimate interest of the petitioners to file the injunction (*amparo*).
- p. 5-6 LCCP and DPCP filed an appeal with respect to which this Court decided to assert jurisdiction over the matter.

### Study of the merits

- p. 38 To analyze whether the dismissal by the district judge was correct, this Court must analyze first the content of the human right to a healthy environment in order to determine its essential core of protection, its purpose and its impact on a person's legal sphere.

### I. Theoretical and legal framework of the human right to a healthy environment

- p. 39 There are multiple constitutions and international instruments that have incorporated the right to live in a healthy environment as an authentic human right that implies the power of every person, as part of a group, to demand effective protection of the environment in which he or she lives.
- p. 40 The sphere of protection of this human right seeks to regulate human activities in order to protect nature, which implies that its essential core of protection goes beyond the most immediate goals of human beings; this right not only addresses the right of human beings to live in a healthy and decent environment, but also protects nature for its own worth.

The human right to a healthy environment is based on the idea of solidarity which entails an analysis of legitimate interest and not of subjective rights and freedoms; in fact, in this context, the idea of obligation prevails over that of right, since we speak of collective responsibilities more than individual prerogatives.

#### **a. Human right to a healthy environment as an autonomous right**

p. 41 The Inter-American Court of Human Rights (IACHR) has indicated that the connection between environmental protection, sustainable development and human rights has led to many human rights protection systems recognizing the right to a healthy environment as a right in itself.

p. 42 This international court also held that protecting nature and the environment is not only important for its utility to human beings and the protection of their rights such as health, life or personal wellbeing, but also for its value to other living organisms on the planet that also merit protection in themselves.

p. 43 From the doctrine consulted, this Court concludes that the human right to a healthy environment has a double dimension: one objective or ecological premise that protects the environment as a fundamental legal asset in itself, which addresses the defense and restoration of nature and its resources regardless of its repercussions on human beings; and another subjective or anthropocentric, under which the protection of this right constitutes a guarantee for the materialization and validity of the other recognized rights of the individual. Therefore, the violation of either of those two dimensions constitutes a violation of the human right to a healthy environment.

#### **b. Collective nature of the human right to a healthy environment**

p. 44 The IACHR has explained that the human right to a healthy environment has been understood as a right with both individual and collective aspects. In its collective dimension, the right to a healthy environment is a universal interest that is owed to present and future generations. In its

individual dimension, its violation can have direct and indirect repercussions on people due to its connection with other rights, such as the right to health and personal wellbeing, among others.

- p. 45 Specifically, the right to a healthy environment requires the construction of a new and particular focus that addresses both the purposes pursued and their collective nature, since otherwise we are inevitably failing to protect individuals in this sphere.

### **c. The human right to a healthy environment in Mexico**

- p45-46 Article 4 of the Federal Constitution establishes the right to a healthy environment as an authentic human right; it recognizes a specific and particular sphere of protection of the individual, characterized by the safeguarding of the environment that surrounds him or her, which requires the broadest protection according to Article 1 of the Constitution.

- p. 46 For this Court, the thing protected by the human right to a healthy environment in terms of the constitutional text is precisely the “natural environment”, understood as the surroundings of an individual, characterized by the group of ecosystems and natural resources that permit the full development of his or her individuality. In terms of Article 4, in relation to Article 1 of the Constitution, the Mexican state is obligated to guarantee both dimensions of the right to a healthy environment or, similarly, to ensure an autonomous protection of the environment that is not subject to the violation of other rights.

### **d. Guiding principles on the environment**

- p. 47-48 Environmental law is based on very different principles that, because of its recent development, are fundamental for guiding judicial activity. However, given the matter in dispute, the principles of precaution, *in dubio pro natura*, citizen participation and non-regression will be conceptualized in greater depth.

## 1. Precautionary principle

p. 49 The precautionary principle has different scopes; it operates as an interpretive guideline given the limitations of science in establishing with absolute certainty the risks nature confronts. In relation to public administration, it implies the duty to warn, regulate, control, oversee or restrict certain activities that are risky for the environment. In this regard, this principle can act as motivation for those decisions that would otherwise be contrary to the principle of legality or legal security; finally, for the legal agent, precaution requires her to incorporate the uncertain nature of scientific knowledge into her decisions.

p. 50 A central concept of the precautionary principle is environmental risk. An environmental assessment is nothing more than an assessment of risk to the environment based on which a project is admitted or rejected.

In terms of the precautionary principle, an environmental risk assessment is a necessary condition for the implementation of any project with environmental impact and, consequently, its absence in itself constitutes a violation of this principle.

p. 51-52 Environmental or ecological damage, for its part, is not immediately perceptible for the human being, since there may be a prolonged period of time between the act that causes it and its manifestation. In addition, the particularities of the causality of the harm to the environment are difficult to integrate into the regular framework of legal causation, and therefore requires a broad interpretation in light of the precautionary principle.

p. 52 According to the above, this Court observes that the assessment of environmental risks and damages that environmental law presumes is, as a general rule, conditioned on scientific and/or technical uncertainty. The information on environmental risks or damages may be uncertain for various reasons and this requires a rethinking of the evidentiary assessment rules.

In this regard and in light of the precautionary principle, the possibility is recognized of reversing the burden of proof of the potentially responsible agent; in other words, by virtue of this principle, the judge has this tool to gather all the evidence necessary to identify the risk or the environmental damage.

### 2. *In dubio pro natura* (environment) principle

- p. 53-54 This principle is inextricably linked to the principles of prevention and precaution since, when there is doubt on the scientific certainty or precision of the environmental risks, it should be resolved in favor of the environment. In other words, if in a procedure there is conflict between the environment and other interests, and the damages or the risks cannot be elucidated due to a lack of information, all the necessary measures to protect the environment should be taken.
- p. 54 This Court understands the *in dubio pro natura* principle not only linked to the precautionary principle, that is applicable in the face of scientific uncertainty, but also as a general interpretational mandate of environmental justice, in the sense that in any environmental conflict the interpretation that favors the preservation of the environment must always prevail.

### 3. Citizen participation principle

- p. 56 This Court restates its reasoning that the right to a healthy environment implies the duty of all citizens to collaborate in the protection of the environment. In that regard, under Article 4 of the Constitution, citizens are not only holders of the right to have access to a healthy environment, which the State must guarantee, they also have the obligation to protect it and improve it.
- p. 56-57 In correlation, all authorities have the duty, in the scope of their jurisdiction, to promote citizen participation or ensure a context conducive to environmental protection, since the State must assume the institutional initiative of regulating this area, applying the public policies and complying with and enforcing the environmental laws.

#### 4. Non-regression principle

- p. 57 The non-regression principle implies that the public powers cannot decrease or affect the level of environmental protection reached, unless it is absolutely necessary and properly justified.
- p. 58-59 This Court suggests that the non-regression principle is closely related to the natural protected areas, since their level of protection reached is protected with the special declaration of protection. In this regard, the concept of the level of protection reached is fundamental for the application of this principle.
- p. 59 Level of protection reached is understood as the factual and legal line that determines the framework of protection of a sector or natural resource for a particular point in time.

#### e. Environmental services

- p. 59-60 The concept of environmental services is basic for guaranteeing the proper safeguarding of the human right to a healthy environment, since those services define the benefits that nature gives to humans. However, for purposes of this decision, this Court will only define the concept of environmental service from a perspective of conservation.
- p. 60 An ecosystem, understood generally as a system of living and non-living elements that form a functional unit, provides different types of environmental services to humans. In this regard, environmental services are understood as those benefits humans obtain from the different ecosystems.
- p. 62-63 Environmental services are defined and measured through scientific and technical tests that are neither exact nor univocal; this implies that it is not possible to define the impact of an environmental service in general terms, or through the same unit of measurement.
- p. 63 This Court observes that environmental services must be analyzed according to the precautionary principle. This means that the absence of scientific

evidence that specifically reflects the “benefits of nature” cannot be a reason for considering that a particular ecosystem does not provide an environmental service, or that the benefit of the ecosystem does not affect a particular person or community.

- p. 63-64 Some environmental services can be measured directly; others will depend on probable relations that require the passage of long periods of time to manifest themselves. Nevertheless, this Court emphasizes that what the precautionary principle mandates is to seek, in each case, the tools or methods necessary to understand the functioning of an ecosystem, as well as the environmental services it provides, always with the intention of guaranteeing its preservation in light of the *in dubio pro natura* principle.

## II. National and international regulation of wetlands

- p. 64 In the international sphere, one of the principal instruments for guaranteeing protection of wetlands in the Wetlands Convention, signed in Ramsar, Iran, in 1971, to which Mexico is a party. That convention establishes the recognition of wetlands as regulators of hydrological systems and as habitat for characteristic fauna and flora, and therefore they are a resource of great economic, cultural, scientific and recreational value, whose loss is considered irreversible.
- p. 65-66 Based on scientific studies and the manual issued by the Secretariat of the Ramsar Convention, this Court expressly recognizes that the environmental services wetlands provide can only be maintained if their ecological processes are allowed to continue functioning without alterations. However, these ecosystems continue to be among the most threatened in the world; above all as a result of the ongoing draining, conversion, contamination and overexploitation of their resources.
- p. 66 The national recognition and protection of the wetlands is similar to the international sphere. Article 60 of the General Wildlife Law [Ley General de Vida Silvestre] prohibits removal, filling, transplanting, cutting or any construction or activity that affects the complete hydrological flow of the

mangrove; the ecosystem and its zone of influence; its natural productivity, etc., excluding from such prohibition works or activities for protecting, restoring, researching or preserving the mangrove areas.

- p. 72 This Court emphasizes that the protection of the wetlands is a national and international priority that has led our country to strictly regulate this ecosystem. Under that regulation, any analysis done in relation to wetlands, and in particular the mangroves, must be guided by an approach of maximum precaution and prevention

### III. Legitimate interest in environmental matters

- p. 73 As explained above, the environment is collective in nature and therefore, a public good whose enjoyment or harm affects not just one person, but the whole community in general. Its defense and ownership is diffuse and must be recognized individually and collectively.
- p. 74 Thus, for purposes of advancing the delineation of the concept of legitimate interest for the defense of the environment as a human right, the recognition of a legitimate interest does not imply the generalization of a popular action in order to protect a generic interest of the society, but rather it is to guarantee access to justice in light of injuries to legally relevant and protected interests. That is why anyone alleging a legitimate interest is in an identifiable legal situation, arising from a specific relationship with the object of protection, whether of a particular nature or derived from a sectorial or group regulation that allows him to assert an impact on his legal sphere precisely from the expression of a claim differentiated from the rest of the other members of society.
- p. 75 In this regard, this Court considers that the legitimate interest to file a writ of environmental injunction (*amparo*) depends on the special situation of the person or community with the ecosystem that is considered violated, particularly with its environmental services.

Therefore, if a particular ecosystem is put at risk or is affected, the person or community that benefits from or makes use of the environmental services

that such ecosystem provides, has a legitimate interest to file an injunction (*amparo*) in order to demand its protection.

- p. 76 Thus this Court concludes that to determine if the person filing an injunction (*amparo*) in defense of the environment has a legitimate interest, the judge must only determine if the that person benefits from or makes use of the environmental services provided by the ecosystem that is allegedly being harmed.

According to this concept, environmental beneficiaries are those who inhabit or utilize the “surrounding environment” or the areas of influence of a particular ecosystem. The areas of influence refer to the geographic zones or spaces impacted by the environmental services provided by the ecosystems and that benefit the human beings and the environment itself.

- p. 78 The identification or the recognition of this geographic space makes it possible to understand that any person that utilizes or inhabits the area of influence or the “surrounding environment” of an ecosystem is a beneficiary of its environmental services and, therefore, has a legitimate interest in filing the injunction (*amparo*) in its defense.

- p. 79 Therefore, this Court concludes that the legitimate interest is met in a writ of environmental injunction (*amparo*) when it is proven that there is a link between the person who alleges to hold the environmental right and the environmental services that the ecosystem presumably harmed provides. This link can be demonstrated – as one of the elements of identification, but not the only one – when the petitioner proves to inhabit or use the “surrounding environment” of the ecosystem, this is understood as its area of influence in relation to the environmental services it provides.

Consequently, to prove the legitimate interest in environmental matters it is not necessary to demonstrate the environmental damage since, in any case and, based on the precautionary principle, the damage or the risk of damage to the environment will constitute the substantive matter of the injunction (*amparo*).

#### IV. Legitimate interest in this case

- p. 80 LCCP and DPCP allege primarily that the removal, filling in and fragmentation of the mangrove for the execution of the construction works of the Ecological Park involved the alteration of the environmental services that the mangrove located in the Laguna del Carpintero provides, which affected them directly, since they live near it.
- p. 80-81 In order to be able to determine whether or not in this case the petitioners have a legitimate interest to file a suit, the following must be determined: (i) if in the area in which the Ecological Park is developed, there is a wetlands ecosystem with diverse species of mangrove; (ii) if there is, it is important to determine that the environmental services that such ecosystem provides in order to: (iii) identify what is its area of influence and, finally, (iv) review if the petitioners inhabit or utilize such area.
- p. 85 This Court observes that there is sufficient evidence to prove that the area in which the Ecological Park is developed is a wetlands zone in which there are or were different types of mangrove.
- p. 85-86 From the testimony rendered by the expert of the petitioners and the official expert, it is seen that this wetland provides multiple environmental services. In the official expert testimony it is specified that these environmental services represent benefits and well-being for society at the local, regional and global level.
- p. 86 In addition to the above, the wetlands report various economic benefits and possibilities for recreation and tourism.
- p. 87 This Court concludes, first of all, that this ecosystem has various areas of influence that have to do precisely with the multiplicity of environmental services it provides.

Furthermore, this Court considers that the legitimate interest in environmental matters cannot respond to the general interest of all society, but rather it is

necessary to establish an identifiable legal situation that permits the petitioner to assert an impact on their legal sphere precisely from the expression of a claim differentiated from the rest of the members of society.

p. 87-88 In this case, this Court finds that the ecosystem in question has a regional area of influence that includes at least all of the inhabitants of the city of Tampico, Tamaulipas, since the wetland located in the Laguna del Carpintero provides various environmental services that benefit them directly. Consequently, any inhabitant of the city of Tampico is located in a special situation that distinguishes its legitimate interest from the generalized interest of the rest of society.

p. 88-89 From this court record it is seen that DPCP proved he lives in the city of Tampico, Tamaulipas, and therefore it must be concluded that he has a legitimate interest to appear in this injunction (*amparo*) to challenge the acts he attributes to the responsible authorities. However, LCCP did not prove that he lives in the city of Tampico and therefore he does not have a legitimate interest in this case, since there is no other element of proof that, independently of inhabiting or utilizing the zone of influence of this ecosystem, leads to the conclusion he demonstrated that he makes use of or benefits from any of the environmental services of the ecosystem in question.

p. 89 Therefore, this Court reaches the conclusion that it must reverse the decision only with respect to DPCP, in order to recognize his legitimate interest to file the injunction (*amparo*); while it must confirm the dismissal declared by the district judge in prejudice of LCCP, in that his legitimate interest was not proven.

#### V. Application of the standards to the specific case

p. 102 Once the legitimate interest of the petitioner is found, the judge, in the study on the merits, faces the challenge of making a decision under the conditions of technical and scientific uncertainty that characterize environmental risk and/or damage.

p. 103 This Court observes that in these types of disputes there is an imbalance between the responsible authority and the neighbor, citizen, inhabitant, resident, affected party, beneficiary, user, consumer, and therefore in order to ensure that environmental protection is not illusory, and based on the principle of citizen participation, it is necessary to adopt measures that correct this asymmetry.

There are two tools in the process that the judge has to correct the asymmetry the citizen faces in environmental protection: a) the reversal of the burden of proof according to the precautionary principle; and b) the active role of the judge in collecting the necessary evidence.

p. 106 This Court considers that DCPC's arguments are justified because the evidence shows that: (i) there are wetlands in the area where the Ecological Park is developed, and (ii) the project in question is developed in violation of the environmental regulations.

p. 108 Mexican law establishes a special protection of wetlands, particularly of the species of white, red and black mangrove, which requires, among other measures, that SEMARNAT issue in advance an environmental impact authorization for carrying out any construction or activity in those ecosystems and their areas of influence.

In addition to this, according to the non-regression principle, in relation to wetlands, the Mexican State, in terms of the national and international regulations, has traced a line of protection intended to preserve this ecosystem, such that any decision that implies diminishing the level of protection already reached must be duly justified.

p. 108-109 This court record shows that the municipality of Tampico, Tamaulipas did not have an environmental impact authorization issued in advance by SEMARNAT to develop the Ecological Park in the wetlands zone in question, notwithstanding that this Ministry knew that authorization was needed.

- p. 109 This is not overcome by the argument of the authority that it had a General Environmental Impact Authorization issued by the SEDUMAT, since under the cited regulations such authority is not the one competent to issue such authorization.

The development of the Ecological Park in a zone with wetlands without a prior assessment of the risks or damages to the environment, in particular to the mangrove species located there, put at risk the ecosystem in question directly violating the precautionary and *in dubio pro natura* principles.

- p. 110 Furthermore, the development of a project in a wetlands zone without the corresponding authorization violates the principle of non-regression, since it fails to observe a level of protection already reached for this ecosystem, and therefore the absence of the environmental impact authorization violates the principle of non-regression in environmental matters.

Thus this Court determines that the absence of the SEMARNAT authorization for developing a project in a special protection zone is sufficient to conclude that the wetland located in the area is at risk and, therefore, in light of the precautionary, *in dubio pro natura* and non-regression principles in environmental matters, that is sufficient to grant the constitutional protection.

### Decision

- p. 112 This Court concludes that in this case the responsible authorities violated the principle of legality established in Articles 14 and 16 of the Constitution, because they developed the Ecological Park construction works in violation of mandatory environmental regulations, and they also violated Article 4 of the Constitution in detriment to DPCP by putting at risk the ecosystem in question and therefore the injunction (*amparo*) and protection of the law should be granted to DPCP.

- p. 114 In this regard, this Court considers that the constitutional protection should be granted so that the responsible authorities: a) refrain from executing the challenged act of the development of the Ecological Park and b) recover

the ecosystem and its environmental services in the area that is being developed.

- p. 115 In addition, the municipal authorities are ordered to immediately revoke any permit and/or authorization granted to private sector parties for the construction and execution of the Ecological Park.
- p. 115-116 In relation to the restoration of the ecosystem existing in the area, this Court does not have sufficient information to determine the current state of the zone, the impacts on the ecosystem and its services and, in particular, the measures necessary to restore it.
- p. 116 Therefore, this Court requests the National Commission for Knowledge and Use of Biodiversity [Comisión Nacional para el Conocimiento y el Uso de la Biodiversidad (CONABIO)] as contributing authority in fulfilling this final decision, to issue within no more than 30 days a Recovery and Conservation Plan for the mangrove area located in Laguna del Carpintero (CONABIO Plan) where the Ecological Park is being developed.
- p. 116-117 In addition, the National Forestry Commission [Comisión Nacional Forestal (CONAFOR)] is requested as contributing authority to assist in the implementation of the CONABIO Plan.
- p. 117 Based on the CONABIO Plan, SEMARNAT shall determine within no more than 30 days: (i) a work program for the implementation of the CONABIO Plan with specific action guidelines and (ii) a timeline for reaching the goals in the short, medium and long term based on the CONABIO Plan.

For their part, the SEMARNAT, the responsible municipal authorities and the builder developing the project shall agree on a financing mechanism for the CONABIO Plan.

- p. 118 Finally, the Federal Environmental Protection Agency [Procuraduría Federal de Protección al Ambiente] shall ensure compliance with the CONABIO Plan and take the actions necessary to enforce the environmental law.

To ensure compliance with this final court decision, every two months the responsible municipal authorities and the SEMARNAT shall send this Court and the district judge responsible for compliance, a detailed report on the compliance with the CONABIO Plan. The district judge will request CONABIO and CONAFOR to issue their opinion on those compliance reports within a term of 8 days.

- p. 119      Regarding the principle of citizen participation, these compliance reports and specialized opinions shall be published by the related authorities and, specifically, shall be made available to DPCP so he may comment on the actions taken to restore the ecosystem and to comply with this judgment.

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## HOUSING; THE OBLIGATION TO GENERATE INFORMATION ON IRREGULAR SETTLEMENTS (DIGNIFIED HOUSING AND EQUALITY)

### *Amparo en Revisión 635/2019<sup>42</sup>*

**Keywords:** *right to decent housing, right to equality and non-discrimination, exceptions to the principle of relativity of injunction (amparo) trial decisions, standing of non-governmental organizations, informal settlements, inequality, poverty, statistics, population, housing.*

#### **Summary**

A civil association called Un Techo para mi País México (Techo) filed an injunction (*amparo*) against the National Institute of Statistics and Geography (INEGI) for the failure to collect data on informal settlements during censuses. According to the lawsuit, this omission violates the rights to decent housing, equality and non-discrimination because the lack of such information prevents the generation of adequate public policies to address the multiple human rights violations suffered by the unprotected groups that inhabit them. The district court of Mexico City that

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<sup>42</sup> Decision issued by the First Chamber of Mexico's Supreme Court of Justice (June 17, 2020). Reporting Justice: Norma Lucía Piña Hernández. *Action for Constitutional Relief Through Injunction 635/2019*

heard the injunction (*amparo*) decided to dismiss the case. Techo filed an appeal (*recurso de revisión*) and INEGI presented a joinder of appeal (*recurso de revisión adhesivo*). The Supreme Court asserted jurisdiction over the case.

### Issue presented to the Supreme Court

Whether INEGI's lack of statistical information on informal settlements violates the rights to decent housing, equality and non-discrimination. In addition, whether there are exceptions to the principle of relativity of injunction (*amparo*) trial decisions and whether non-governmental organizations have standing to file suit against omissions that impede the work of their corporate purpose.

### Holding and vote

The injunction (*amparo*) was granted for the following reasons. It was first analyzed whether there was an exception to the principle of relativity of injunction (*amparo*) trial decisions and whether the affected organization had standing to file the injunction (*amparo*). The Supreme Court concluded that, according to its precedents, in order to prove the standing of civil associations created to defend a class action lawsuit, the following must be taken into account: a) the nature of the right; b) the corporate purpose of the organization, and c) the alleged impact. This is to be able to assess whether the claim may have significance in the legal sphere of the affected entity. In this case, it was determined that INEGI's omission directly affected the fulfillment of Techo's corporate purpose; which was the defense of decent housing. This is because by not having enough information about the informal settlements, it could not design the necessary public policies aimed at defending the vulnerable population living in those places. It was also determined that the granting of the injunction (*amparo*) would not affect society in general, but a sector of the population, so the principle of relativity of injunction (*amparo*) trial decisions was not violated. With regard to INEGI's obligation to issue information on informal human settlements, it was taken into account that under Article 3 of its governing law, its main attribute is to provide society and the State with quality, relevant, accurate, and timely information in order to contribute to national development. In this regard, the Supreme Court determined that informal settlements are the neediest, most excluded communities and that they are characterized by poverty and

large agglomerations of houses in poor condition that are generally located in the most hazardous areas. In addition to the instability of the right of occupancy, the inhabitants of these settlements do not have infrastructure, basic services, public space or green areas. They are also constantly exposed to eviction, disease and violence. All of the above is directly related to the right to decent housing and the right to equality and non-discrimination. Consequently, the State must adopt public policies to resolve violations of these rights, so it was concluded that INEGI, in the exercise of its exclusive powers, must generate the appropriate, pertinent and effective statistical and geographical information that provides the State with instruments to optimally implement the public policies necessary to improve the conditions of the inhabitants of these settlements.

The First Chamber of the Supreme Court decided this case with the unanimous vote of the five Justices Norma Lucía Piña Hernández, Ana Margarita Ríos Farjat (reserved the right to issue a concurring opinion), Jorge Mario Pardo Rebolledo (reserved the right to issue a concurring opinion), Alfredo Gutiérrez Ortiz Mena (reserved the right to issue a concurring opinion) and Juan Luis González Alcántara Carrancá (reserved the right to issue a concurring opinion).

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### EXTRACT FROM THE DECISION

p. 1 Mexico City. The First Chamber of Mexico's Supreme Court of Justice (the Supreme Court), in virtual session of June 17, 2020, issues the following decision.

#### Background

p. 1-2 The document was filed on the twenty-fourth of July, 2018, before the Common Correspondence Office of the District Courts in Administrative Matters in Mexico City, Techo filed an injunction requiring a two-stage judicial review relieving an unremediated breach of rights (*amparo indirecto*) against INEGI, for the following acts:

p. 2-3 a) The omission consists of not having generated information about the number of informal settlements that exist in the United Mexican States

(Mexico) identifying their locations and the population that inhabits them; b) The omission consists of not having carried out any population census in informal settlements in Mexico, with the aim of producing disaggregated statistics on people residing in informal settlements and their access to basic services which make up the essential core of the right to housing; c) The omission consists of not having generated or obtained all the information about the population in informal settlements as part of the national census in order to know the current state of the exercise of the right to housing, as well as the current state of access to and enjoyment of services among these population centers. This would be necessary in order to contribute to national development in the terms of Articles 1, 6 and 26.B of the Political Constitution of the United Mexican States (CPEUM), as well as in the Law of the National System of Statistical Information and Geography (the Law), Articles 3, 4, 6, 55 and 78. They also did not approach the populations in informal settlements and/or their community leaders to hear their opinions in order to comply with these constitutional purposes; d) The constant and sustained institutional discrimination against the population living in informal settlements in Mexico by excluding them from the population censuses and from all statistical information necessary to produce results indicators for State public policies; and e) The violation of housing rights of the population living in informal settlements in Mexico consists of failing to comply with its obligation to generate statistical information about the public services they have access to so that public policies can be designed and implemented to improve the exercise of the right to housing of that population.

- p. 3-4 The affected party invoked Articles 1, 4, 6 and 26 (B) of the CPEUM as violated provisions; Articles 3, 4, 6, 55 and 78 of the Law, as a law regulating Article 26 (B) of the CPEUM; Articles 11, 12, 13 and 26 of the American Convention on Human Rights, Articles 1, 2 and 11 of the International Covenant on Economic, Social and Cultural Rights; Articles 1 and 25 of the Universal Declaration of Human Rights and Principle 1 of the Fundamental Principles of Official Statistics of the United Nations.

- p. 4 The District Judge decided to dismiss the case, so a main injunction and a joinder of appeal (*recurso de revision adhesivo*) was processed, which the Supreme Court heard through its power to assert jurisdiction.

### Study of the merits

#### Review of validity of the injunction (*amparo*)

##### - Exception to the principle of relativity of decisions

- p. 30 First the Supreme Court reviewed whether the impossibility of giving general effects to a possible granting of the injunction (*amparo*) violates the principle of relativity of the decisions on the means of constitutional control.

In this regard, the district judge who first heard the case considered that the granting of the injunction (*amparo*) would obligate the responsible authority to generate the information that the affected party requested throughout the country which would result in carrying out the censuses corresponding to the entire population. This would have an impact not only on the affected association, but on everyone who lives in the country, since, according to the provisions of the Law, the information would necessarily be public, official and mandatory in national territory, which would violate the principle of relativity of the decisions that governs the injunction (*amparo*) trial, which states that the effects of injunction (*amparo*) decisions apply only to the parties involved in each particular case.

- p. 34-35 To resolve this issue, the Supreme Court applied a precedent that establishes that in cases in which the injunction (*amparo*) is filed by human rights organizations. This ground for invalidity cannot be applied when standing to defend social rights is alleged, since the judge must consider the nature of the act challenged and the right questioned, as well as the claim made. This is because the constitutional reform in human rights modified both the traditional concept of standing and the principle of relativity, so it is essential to take into account the new constitutional parameters to resolve the injunction (*amparo*), as well as the effects of their granting.

- p. 35 In this regard, the Supreme Court must verify whether the authorities failed to comply with obligations established by law, which is why any granting of the injunction (*amparo*) would obligate them to carry out such acts in respect of the right to housing.
- p. 35-36 The lack of statistical information affects not only the organization filing the injunction (*amparo*), but also those it defends; i.e., those who, due to their social status of marginalization have not been favored with the enjoyment of the fundamental right to housing. For this reason, the benefit that would eventually be generated with the granting of the injunction (*amparo*) would not radiate through the entire population.

**- Standing**

- p. 36 Subsequently, the Supreme Court resolved the grievance regarding the failure to show standing on the part of the affected organization, concluding that said organization does have the standing necessary to file the injunction (*amparo*).
- p. 40 In this regard, the First Chamber's decision in the *Amparo en Revision* 323/201420 on the standing of civil associations in defense of a class action was applied, where it was stated that the following must be considered: i) the nature of the right; ii) the corporate purpose of the association, and iii) the alleged impact. This is to be able to estimate whether or not the claim has significance in the legal sphere of the affected entity.
- p. 51 In this context, it is noted that the affected organization has standing; i.e., the necessary conditions to defend the right to housing due to the lack of statistical information related to informal human settlements. This follows from considering that the situation of the organization in the legal system may be particular, special and qualified, since it may not be able to fulfill its corporate purpose, which is directly related to the right to housing.
- p. 53 Therefore, an eventual granting of the injunction (*amparo*) would generate a specific benefit for Techo that would allow it to optimally exercise its

corporate purpose, which consists of carrying out actions that it considers indispensable to comply with the protection of the right to housing. This is because the case claims INEGI's failure to comply with its powers to issue statistical information that could have an impact on public policies that should be implemented regarding the right to housing of vulnerable groups living in informal settlements.

### **Obligations of INEGI regarding the generation of statistical information on informal human settlements**

- p. 54-55    Techo alleges that INEGI's failure to issue the statistical information it requested, mainly related to informal human settlements, violates the human rights not to be discriminated against and to decent housing, by impeding, due to the lack of such information, the ability of state public policies to address the multiple violations suffered by unprotected groups living in those areas. In this regard, the Supreme Court considered that the grounds of violation are well founded and that INEGI has the obligation to issue that information.
- p. 54-55    To this end, the Court takes into account that Article 3 of the legislation governing INEGI establishes that its main attribution is to provide society and the State with quality, relevant, accurate, and timely information, in order to contribute to national development. Therefore, the fact that other authorities also have certain powers related to the prevention, control and solution of irregular human settlements does not prevent INEGI from also intervening in this problem since it is responsible for issuing the aforementioned information.
- p. 71        The right to decent housing that Techo defends includes the necessary measures to prevent insufficient housing, prohibit forced evictions, fight discrimination, focus on the most vulnerable and marginalized groups, ensure security in occupancy and ensure housing is adequate.
- p. 73        In this regard, the United Nation's definition of informal human settlements is relevant, which states they exist where: a) the inhabitants do not have the

right of occupancy over the lands or homes in which they live, under the modalities that range from the illegal occupation of a house to informal rent; b) the neighborhoods usually lack basic services and urban infrastructure, and c) the houses would not comply with building and planning regulations and are usually located in geographically and environmentally hazardous areas.

- p. 73-74 Given the above, the Supreme Court considers that the informal settlements are the neediest and most excluded communities and are characterized by poverty and large agglomerations of houses in poor condition, located, in general, in the most hazardous areas.
- p. 74 In addition to the instability of the right to occupancy, informal settlement inhabitants do not have basic infrastructure and services, public space or green areas, and are constantly exposed to eviction, disease, and violence. This shows aspects of the right to decent housing that imply a minimum duty of the State to adopt public policies to reduce the problems experienced by people who reside in these places.
- p. 75 Based on the legal framework specified above, INEGI has the exclusive attribution of providing society and the State with quality, relevant, accurate and timely statistical and geographical information, so the authorities in turn can fulfill their obligation to promote, respect, protect and, above all, guarantee fundamental rights, including the right to housing. In order to guarantee respect for this right, the State must take immediate measures to allow access to housing without discrimination. Therefore, it is consistent with this purpose for INEGI, in the exercise of its exclusive powers, to generate effective statistical and geographical information that provides the State with the tools to implement the necessary public policies in those sectors of the population most unprotected, such as informal or irregular settlements.
- p. 76-77 It follows that statistical information relating to irregular or informal settlements must be issued in the disaggregated or segmented form requested by Techo;

since that information can provide the necessary elements to reduce poverty conditions by declaring priority areas for budgetary allocation and, therefore, plans and programs may be drawn up to improve the conditions of the irregular settlements inhabitants.

### Decision

- p. 114 Given that Techo's grounds for complaint are well-founded, the injunction (*amparo*) is granted and the appealed decision is reversed so that INEGI may generate, obtain, analyze, process and publish statistical information on housing related to informal human settlements.



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## UNCONSTITUTIONALITY OF HIV TESTING OF PHYSICIANS DURING A HIRING PROCESS

### *Amparo Directo 43/2018*<sup>43</sup>

**Keywords:** *right to equal treatment, right to health, right to social security, right to work, reasonable risk, discrimination, doctor, health institution, hiring, HIV/AIDS.*

#### Summary

A public health institute denied a doctor a job because of his HIV status. Based on that fact, the National Council for the Prevention of Discrimination initiated a proceeding and determined that the health institute was responsible for acts of discrimination against the doctor. The institute filed a suit for nullity of the decision, which was not granted for the purposes it requested. For this reason, the Institute filed a direct injunction (*amparo directo*), which was heard by the Supreme Court of Justice of the Nation.

#### Issue presented to the Supreme Court

Whether health institutions can carry out HIV/AIDS examinations as a requirement for the hiring of doctors and whether the protection of the right to health of medical

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<sup>43</sup> Decision issued by the First Chamber of Mexico's Supreme Court of Justice (February 6, 2019). Reporting Justice: Alberto Pérez Dayán. Direct Injunction 43/2018

personnel and third parties is reconcilable with the possibility for people with HIV to practice medical and health professions.

### Holding and vote

The injunction (*amparo*) was denied to the health institute. It was discriminatory for the health institute to establish the application of HIV/AIDS examinations as a requirement for the hiring of medical personnel since it would allow the person to be denied employment simply because of his or her health condition. The requirement of such examinations for applicants is not necessary to protect the health of other people, because the applicants are not part of the medical staff and therefore do not pose a risk to workers or patients. On the other hand, it was considered that it is allowed for health institutions to carry out HIV/AIDS examinations on medical personnel, as long as the obligations established in NOM-010-SSA2-2010 are met, which are: (I) they are carried out after the hiring of the health professional; (II) without resulting in the dismissal of the worker; (III) they are carried out only in the specialties, medical areas or activities in which, in fact, there is a reasonable and objective risk of infection to personnel or patients, according to the nature of the respective medical work and in a general, non-individualized way; and (IV) the results of the examination must be governed by the criteria of informed consent and confidentiality, which implies that, as a general rule, the condition of HIV/AIDS can only be known to persons and workers who are strictly responsible or co-responsible for the implementation of the measures necessary for the protection of the health of medical personnel and patients.

The Second Chamber of the Supreme Court of Justice of the Nation decided this case with the unanimous vote of the four Justices Alberto Pérez Dayán, Eduardo Medina Mora I., José Fernando Franco González Salas and Javier Laynez Potisek.

Justice Margarita Beatriz Luna Ramos was absent.

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### EXTRACT FROM THE DECISION

- p. 1 Mexico City. The Second Chamber of the Supreme Court of Justice of the Nation (the Supreme Court), in session of February 6, 2019, issues the following decision.

## Background

p. 5 On February 29, 2012, the National Council to Prevent Discrimination (hereinafter, Council) initiated a discriminatory procedure. The Human Rights Commission of the State of Coahuila sent a letter of complaint filed by a doctor against the Mexican Social Security Institute (hereinafter, the Institute) for acts of discrimination.

On October 6, 2015, it was determined that the Institute referred to was responsible for acts of discrimination against the doctor by denying him employment because of his HIV status.

The Institute filed a motion to vacate judgement against the decision.

p. 7 The Federal Court of Administrative Justice issued a decision on May 30, 2017, in which it decided to declare the challenged decision null and void.

p. 1 By submission filed on July 11, 2017, the Institute sued for an injunction (*amparo*) and protection from the Federal Courts against the May 30, 2017 decision.

p. 2 The Institute requested that the Supreme Court exercise its power to assert jurisdiction to hear and resolve the direct injunction (*amparo directo*).

p. 3 On June 13, 2018, the Supreme Court endorsed the request for the purpose of hearing the direct injunction (*amparo directo*).

## Study of the merits

### Analysis of Articles 17, section II and 83 of the Federal Law to Prevent and Eliminate Discrimination

p. 13 The Institute argues that the cited provisions are contrary to the principle of legality. They give the Council the powers to impose administrative measures through which they may order an administrative authority to disregard its

own regulations and on this basis to grant rights to those not contemplated by the law.

p. 15-16 The Supreme Court finds that the Council did not invalidate any norm, nor did it obligate the Institute to cease observing its internal regulations. On the contrary, the Council simply considered that the document: “Procedure for prevention and health promotion services for IMSS workers and Medical-Labor Aptitude Examinations for Applicants to Enter the Mexican Social Security Institute”, should not be interpreted in isolation, but systemically and in favor of the person. It should be read in the light of the Official Mexican Standard NOM-010-SSA2-2010 (hereinafter, NOM), that prohibits both individuals and authorities from carrying out HIV/AIDS examinations as a hiring requirement.

p. 16 In other words, it considered that the internal norm of the Institute does allow applying medical examinations to detect HIV/AIDS, but only those that are strictly necessary to avoid possible contagion to the workers or to prevent a worker from later claiming as an occupational illness, a disease he contracted before being hired. However, it should never be conducted as a requirement for hiring as this would go against the NOM itself and the Federal Law to Prevent and Eliminate Discrimination (Anti-Discrimination Law).

Therefore, the Institute’s constitutionality argument is ineffective, since Articles 17, section II and 83 of the Anti-Discrimination Law were not applied against it in order to force it not to observe its internal regulations.

### **Constitutional regularity of Articles 6.3.2, 6.3.3 and 6.3.4 of the NOM**

p. 17 The Institute argues that the provisions cited above establish the prohibition on requesting HIV/AIDS detection tests as a requirement for obtaining employment are in violation of the human rights to health and social security.

p. 24 This is considering that they do not allow the Institute to carry out HIV examinations on medical personnel and, therefore, are not able to use the

necessary measures to protect both employees and patients from a plausible risk of contagion of that condition.

- p. 24 The Supreme Court considers that the NOM can be interpreted most favorably for the person to allow the prevention, on the one hand, of discrimination against people with HIV in the medical profession and, on the other hand, of this condition of seropositivity of medical personnel generating undue effects on the human right to health and social security.
- p. 25 It is possible for the Institute or other health institutions to perform HIV/AIDS examinations on medical personnel as long as certain standards provided for in the NOM and interpreted in each case are upheld most favorably for the person.

The first standard in the application of medical examinations for the detection of HIV is that they can never be performed prior to the hiring of medical personnel.

- p. 25-26 This allows health institutions to fully comply with the NOM while avoiding direct or indirect discrimination by such health centers. This is because their ignorance of the HIV status of the person would mean it would not influence the hiring process and decision, and the applicant will be designated in the job based on their merits or other objective reasons, regardless of their status of seropositivity.
- p. 26 In addition, compliance with the NOM in no way prevents or hinders health institutions from taking the necessary measures to avoid the generation of risks of HIV/AIDS infection in order to protect both patients and other medical personnel.

This is because health institutions may carry out HIV/AIDS examinations, as long as they are subsequent to hiring – with the periodicity that the institutions themselves deem appropriate – and under the condition that they are applied in a general and non-individualized way to health workers, in order to avoid discrimination or stigmatization of the person.

In this regard, once the examinations have been carried out on health workers, and where the HIV status of any of them has been detected, they must comply with the prevention measures referred to in the NOM. This implies, among other considerations, that such institutions must carry out specific actions aimed at the health personnel to ensure that the seropositivity status of any of the workers does not present a real risk to the staff or other workers.

- p. 27 The second standard that health institutions must observe is that any HIV/AIDS examination that may be performed on medical personnel must be strictly so the institutions can carry out specific or individualized safety measures or protocols that are intended to prevent the HIV condition of the worker from posing a risk to the health of patients and medical personnel.
- p. 28 The third standard for the application of HIV/AIDS examinations, taking into account the systematic interpretation of the NOM and applying it in favor of the rights of the person, is that the detection of this condition of seropositivity cannot result in the termination of employment.
- p. 29 HIV/AIDS screening cannot result in termination of employment. As such, if a health worker is dismissed once his or her HIV/AIDS status has been detected, then an enhanced suspicion or presumption will arise that the cause of termination of employment was his or her HIV status. This not only implies that the judge must apply strict scrutiny, but also that the health institution must demonstrate that the cause of dismissal was entirely unrelated to the worker's HIV status.

The fourth of the standards to be observed by health institutions is that the application of HIV/AIDS examinations to health personnel cannot be indiscriminate. Thus, they should only be applied for those specialties, medical areas or activities in which there is actually a reasonable and objective risk of infection to staff or patients, considering the inherent characteristics of medical work.

- p. 30 General examinations may only be applied to the work, areas or specialties of the health sector in which there is a reasonable risk of objective contagion taking into account the causes of transmission of HIV/AIDS specified in the NOM and their relationship or link with the nature of the medical practice in question.
- p. 30-31 Finally, the fifth standard health institutions must observe is that the results of the examinations should never be published; the HIV/AIDS condition may only be known to the people and workers who are strictly responsible or co-responsible for the implementation of the necessary measures for the protection of the health of medical personnel and patients.
- p. 33 Having clarified the correct interpretation of the NOM, the Supreme Court considers that provisions 6.3.2, 6.3.3 and 6.3.4 of the NOM are not unconstitutional.

These provisions pursue a constitutionally legitimate aim, namely, to prevent health institutions from engaging in discriminatory acts with respect to persons and workers with HIV/AIDS status.

Similarly, such measures are conducive, necessary and suitable to achieve the constitutionally valid purpose pursued, precisely by prohibiting health institutions from: (I) applying HIV/AIDS examinations as a hiring requirement; (II) using the detection of this health condition to affect the human rights of a person, such as the right to work; and (III) using the detection of that disease for purposes other than health protection.

Thus, they are measures to ensure that persons and health personnel with HIV/AIDS are not discriminated against by the institutions to which they provide or intend to provide their services, taking into account their HIV-positive status.

- p. 34 Finally, the measures are proportionate, since, in pursuing the constitutionally legitimate aim, they do not excessively and unjustifiably affect other

constitutional principles or interests, such as the human rights to health and social security.

Hence, the contested articles do not violate the right to health or social security, since they allow HIV/AIDS examinations to be carried out, as long as they are carried out under the standards established in the NOM itself and, based on their results, they obligate health institutions to implement specific actions to ensure that this condition of seropositivity does not result in a risk of HIV/AIDS infection for patients and medical personnel.

Thus, in principle, requiring the HIV examination for access to medical employment would be in total violation of the principle of equal treatment, since it would allow a person to be denied employment simply because of his or her health condition, which would result in an arbitrary distinction.

p. 35      Second, because requiring the HIV/AIDS examination for job applicants is not necessary to protect the health of third parties since they are not yet part of those health institutions, the invasion of the applicants' privacy would not be justified, because at that time they do not represent any risk to workers or patients.

Third, because the protection of the right to health is fulfilled in any case with the possibility of applying the HIV/AIDS examination to people who are already working in specialties, medical areas or activities in which, in fact, there is a reasonable and objective risk of infection to staff or patients – on the understanding that the examination must be applied generally to all personnel of the respective area or specialty and not individualized to a single worker – since this allows the necessary measures to be taken so that the worker's HIV does not affect patients or the staff themselves.

And fourth, if it were permitted for job applicants in the medical sector to undergo the HIV/AIDS examinations – even if it were prohibited to refuse hiring based on HIV/AIDS status – there would be a risk that health institutions, knowing the HIV status of the job applicants, could deny them

the job, under the pretext that the denial was based on other reasons supposedly unrelated to the health condition. This is especially important because the recruiting agents have a certain flexibility and deference in deciding which candidate or candidates they consider should occupy a certain position within the institution.

- p. 36 The Supreme Court considers that proscribing or seeking to prohibit the exercise of the medical profession to a person merely because of their HIV status is a prototypical example of a disproportionate limitation on the human right to work under conditions of equality. Although the measure prohibiting the recruitment of health workers with HIV could be regarded as serving a constitutionally prevailing purpose, such as health protection, such a measure does not pass the proportionality test, since it disproportionately and unnecessarily affects the human right to work.
- p. 38 This measure precludes an assessment in each specific case to determine whether or not the medical practice of the person with HIV, in fact, brings an immanent risk to third parties, since it could not be examined whether the respective area, specialty or health activity poses a risk or danger of contagion. In this regard, the measure in question is not proportionate to the interest that must be protected, since it does not allow an assessment of whether the HIV status of the medical worker actually entails an objective and reasonable risk for patients and staff; on the contrary, it presumes that this health condition is a “danger” in all cases and with respect to any medical exercise, without taking into account whether there is a link between the respective medical work and the forms of transmission of such a disease.
- p. 39 In this regard, less harmful measures should and can be taken to allow the medical practice of people with HIV/AIDS, while protecting the health of others. It is reasonable for people with seropositivity to be able to practice the medical profession, under certain specific preventive measures that accompany this work that are already generic and individualized.

- p. 40 To accept categorically that people with HIV are prohibited from the practice of the medical profession would not only unduly and unnecessarily affect the life project of such people; it would also deprive the State and the community of the benefits and talents that such people could bring to the health sector, thereby affecting society as a whole.

**Discrimination by the Institute in requesting HIV/AIDS examinations**

- p. 42 The Institute's action, in establishing the practice of requesting HIV/AIDS examinations as a condition for obtaining employment, is discriminatory in and of itself and in violation of the NOM. There is no doubt that such conduct is in outright violation of the human right to equal treatment, in that it restricts and denies employment to the individual, simply because of his or her health condition, which constitutes an arbitrary distinction.

- p. 44 The fact that the Institute intends to establish, as a requirement for recruitment, that candidates be tested for HIV/AIDS, not only entails discriminatory treatment of persons, but may contribute to the formation or reinforcement of prejudices and stereotypes about persons with this health condition. In other words, it is likely to generate the perception that such persons are "different", "dangerous" and "unfit to work", which consequently has a stigmatizing effect - the creation of a division between "us" and "them" - which is contrary to the obligations that the Mexican State has undertaken with respect to the human right of equality and non-discrimination.

**Consistency of the appealed decision.**

- p. 45 The fact that the Institute is prohibited from conducting HIV/AIDS examinations for the recruitment of medical personnel does not contradict its obligation to protect the right to health of its staff and third parties.

- p. 46 The protection of the right to health is entirely reconcilable with the possibility for people with HIV to practice the medical and health profession, since this condition of seropositivity only means that health institutions

must adopt prevention measures and best practices that prevent the risk of infection of such a condition.

### **Analysis of the overall effects of the Council's determination**

- p. 47 In the opinion of the Supreme Court, it is untrue that the Council's determination gives "generality" to the prohibition on the Institute of applying HIV examinations as a hiring requirement; on the contrary, the only thing the Council did was to inform the Institute of the need to comply with a general rule that, precisely, prohibits it from performing such acts.
- p. 48-49 In this regard, the "generality" argued by the Institute does not result, in reality, from the decision of the Council, but from the obligation of the aforementioned Institute to observe the NOM that is general in nature and that is applicable nationally and for all personnel working in public sector, social and private health service units of the National Health System.

### **Decision**

- p. 49 The Institute is denied the injunction (*amparo*).



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## PROTECTION OF THE MIXQUIC CANALS, RESPONSIBILITY OF THE STATE AND CO- RESPONSIBILITY OF INDIVIDUALS IN THE PROTECTION OF ECOSYSTEMS

### *Amparo en Revisión 641/2017<sup>44</sup>*

**Keywords:** *right to a healthy environment, human right to drinking water and remediation, ecological restoration, wastewater, failure to act, right to a dignified existence, world heritage.*

#### **Summary**

A group of residents of San Andrés Mixquic, Mexico City, filed an injunction (amparo) against the failure of several Mexico City and federal authorities to adopt all the measures within their reach to ecologically restore and remediate the canals in the town of San Andrés Mixquic. The damage was generated mainly from dumping the wastewater from the Amecameca River. The District Judge who heard the case decided to grant the injunction (amparo) to the inhabitants of Mixquic. Several authorities filed appeals (*recursos de revisión*) against this decision. The Collegiate Circuit Court that heard the appeal determined that it should request Mexico's Supreme Court of Justice to assert jurisdiction.

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<sup>44</sup> Decision issued by the First Chamber of Mexico's Supreme Court of Justice (October 18, 2017). Reporting Justice: Alberto Pérez Dayán. Action For Constitutional Relief Through Injunction 641/2017

### Issue presented to the Supreme Court

Whether the responsible authorities have failed to adopt all the measures within their reach to restore and remediate the canals of the town of San Andrés Mixquic, specifically the canals of the San Miguel neighborhood and, based on this, whether there has been a violation of the human right to a healthy environment.

### Holding and vote

The decision under appeal was amended. The injunction (*amparo*) was denied against one of the authorities because the acts fall outside their sphere of power and it was denied against another authority because they demonstrated that they did not fail to exercise their environmental protection powers. However, the injunction (*amparo*) was granted because it was determined that certain Mexico City authorities violated the right of the inhabitants of San Andrés Mixquic to a healthy environment. This decision was based on the demonstration of the following: the canals of the area are highly contaminated and the responsible authorities have not adopted all possible measures, up to the maximum available resources, to avoid and control processes of water degradation, enforce compliance with wastewater discharge regulations in relation to quantity and quality, and carry out the necessary corrective actions to clean up the waters of the canals in the area; this violation is aggravated by the fact that the area was declared a World Cultural and Natural Heritage Site by UNESCO.

The First Chamber of Mexico's Supreme Court of Justice decided by a majority of four votes of Justices Margarita Beatriz Luna Ramos (reserved her right to issue a concurrent opinion), Alberto Pérez Dayán, Javier Laynez Potisek, and José Fernando Franco González Salas. Justice Eduardo Medina Mora voted against.

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### EXTRACT FROM THE DECISION

- p. 1 Mexico City. The Second Chamber of Mexico's Supreme Court of Justice (the Supreme Court), in session of October 18, 2017, issued the following decision.

### Background

p. 9 Several inhabitants of San Andrés Mixquic, Mexico City, filed a injunction (*amparo*) lawsuit in which they argued that the responsible authorities -both local and federal- “have failed to adopt all the measures within their reach to ecologically restore and remediate the canals of the town of San Andrés Mixquic. This refers specifically the canals of the San Miguel neighborhood, a product of the damage generated mainly by the dumping of wastewater from the Amecameca River” and that the risk of losing the canals is latent because of poorly designed actions for the rescue and restoration of the Chinampa area.

p. 12 The District Judge considered that although the responsible authorities have carried out actions to restore the ecological balance, they have been insufficient to deem that there is a healthy environment.

p. 13 He also considered that the contamination of the water of the San Andrés Mixquic canals was proven and therefore the water had not been remediated to a healthy level. There was also a violation of the Convention Concerning the Protection of the World Cultural and Natural Heritage, since San Andrés Mixquic is part of the zone declared a UNESCO world heritage site and therefore the affected parties’ right to a dignified existence was violated.

For these reasons, the District Judge granted the requested a injunction (*amparo*).

p. 4 The responsible authorities filed an appeal.

p. 5 The Collegiate Circuit Court determined that the Supreme Court should assert jurisdiction. The Supreme Court decided to hear the case.

### Study of the merits

p. 17 The issues before the Supreme Court are the following:

(1) Whether the challenged acts of both the Mexico City Mayor (hereinafter, the Mayor) and the Ministry of Environment and Natural Resources (hereinafter, SEMARNAT) are true, and whether the affected parties should have exhausted ordinary federal civil appeals prior to filing the injunction (*amparo*).

(2) Whether the responsible authorities have failed to take all measures within their reach to restore and remediate the canals of the town of San Andrés Mixquic and, based on this, determine whether there has been a violation of the human right to a healthy environment; and

p. 18 (3) If the appealed decision is upheld, determine whether the effects granted to the injunction (*amparo*) are in breach of the principles of division of powers and legality.

### **1. Validity of the injunction (*amparo*) lawsuit against the failure to act**

p. 19 For an authority to incur liability for failure to act, there must first be a corresponding obligation, established in the relevant legal framework; therefore, a failure to act attributed to the authority will be true or non-existent, depending on its constitutional powers and the obligations it is required to perform.

p. 20 In this case, although the responsible authorities denied that there was a failure to act, the District Judge considered that the Mayor failed to act since it is an “obligation, within the respective scope of his competence; to guarantee an adequate environment”.

The judge also held that SEMARNAT failed to act.

p. 21 Both the local and federal legal framework establish the obligation of the aforementioned authorities to take measures necessary for the protection, preservation and restoration of the ecological balance and the protection of the environment. Given their obligations and powers in this area, it is concluded that it is reasonable to consider they failed to take the necessary actions.

- p. 24 Finally, SEMARNAT’s argument that the lawsuit should have been dismissed “because the complainant should have first filed an ordinary federal class action lawsuit” is unfounded, because civil proceedings are not appropriate for challenging failures of authorities to act with respect to the human right to a healthy environment, nor for producing the intended remediation.

## 2. Violation of the human right to a healthy environment

In their grievances, SEMARNAT, the General Director of the Mexico City Water System (hereinafter, Water System) and the Mexico City Ministry of the Environment (hereinafter, SEDEMA) put forward various arguments aimed at evidencing that the contamination in the canals of the town of San Andrés Mixquic is attributable to other authorities that, unlike them, are responsible for protecting the human right to a healthy environment in the zone.

### 2.1. Liability of the responsible authorities

#### 2.1.1. Framework of powers in environmental matters

- p. 27 All three levels of government have concurrent responsibilities for environmental protection and the preservation and restoration of ecological balance.
- p. 28 In the Mexican legal system, having concurrent powers implies that Mexico City, the States, the Municipalities and the Federal Government can act with respect to the same matter, but it is for Congress to determine the form and terms of the participation of these entities through a general law.
- p. 33-34 Regarding the prevention, preservation, protection and remediation of water, the powers of the authorities are designed according to a “territorial” scope, in which the Federal Government, through SEMARNAT, in conjunction with the National Water Commission, must ensure compliance with the legal provisions on natural resources under federal jurisdiction, i.e., concerning the “national waters”, referred to in Article 27 of the Constitution.

- p. 34 The States and Mexico City are responsible for the “prevention and control of the contamination of waters under state jurisdiction.” Specifically, it is the local authorities that, in accordance with the distribution of duties, are responsible for “the control of wastewater discharges to drainage and sewerage systems”; and “the enforcement of the corresponding Mexican official standards [with respect to waters within their jurisdiction]”.
- p. 35 According to Article 6 of Mexico City’s Environmental Law for the Protection of Land (hereinafter, Environmental Law), the environmental authorities in Mexico City are: (I) the Mayor; (II) SEDEMA; (III) the Secretary of Science, Technology, and Innovation; (IV) the Heads of City Municipalities; and (V) the Environmental and Territorial Planning Agency (hereinafter, PAOT).
- p. 38 In addition, the Mexico City Water Law (hereinafter, local Water Law) establishes that the waters of Mexico City jurisdiction are those that are “an integral part of the heritage lands of the Government of Mexico City, through which they run or in which their deposits are located”.
- p. 38-39 Article 7 provides for the creation of the Water System, which is a decentralized body of the public administration, assigned to SEDEMA, whose main purpose is the operation of the hydraulic infrastructure and providing the public service of drinking water, drainage, and sewerage “as well as the treatment and reuse of wastewater”.

### 2.1.2. Liability of the responsible authorities with respect to the challenged act

- p. 40 It is not disputed in this injunction (*amparo*) lawsuit that the canals of the town of San Andrés Mixquic, specifically those of the San Miguel neighborhood, Tláhuac Municipality, belong to the jurisdiction of Mexico City.

Therefore, it is concluded that the grievances expressed by the Water System and SEDEMA are unfounded.

p. 42 The Water System has the legal duty to take the necessary measures to control the quality of water of that city; apply the water-related environmental regulations established in both the local Water Law and the official Mexican standards; enforce compliance with such regulatory provisions and, where appropriate, apply the respective sanctions. The obligations that have been imposed on it regarding the “control and prevention of contamination by the discharge of wastewater” –which is precisely the contaminating act challenged by the affected parties - are especially emphasized.

p. 44 SEDEMA has the obligation to guarantee the right of citizens to sufficient, safe, and hygienic access to water available for personal and domestic use within the scope of its jurisdiction; i.e., to ensure the sustainable use, prevention, and control of contamination of waters belonging to the Mexico City territory.

Although this authority argues that its powers were delegated by Decree of the Mayor to the “Authority of the Natural and Cultural World Heritage Zone in Xochimilco, Tláhuac, and Milpa Alta”, an analysis of the Decree shows that the mentioned authority has powers to aid the Mayor, but does not substitute him or her in environmental matters.

p. 46 Finally, SEMARNAT’s other grievance that the omissions are not attributable to it because those natural resources are not “national waters” and therefore are not under its jurisdiction is valid.

p. 48 Thus, the *injunction (amparo)* requested by the affected parties should be denied only regarding the challenged acts of that federal authority.

## 2.2. Violation of the human right to a healthy environment

### 2.2.1. General principles of the human right to a healthy environment

p. 51 The human right to a healthy environment presents its teleology in two dimensions: (I) as the obligation of the State to guarantee the full exercise of this right and its judicial protection; and (II) as the responsibility,

although differentiated, of the State and the citizenry for its preservation and restoration.

- p. 51-52 States “have an obligation to protect [individuals] against environmental damages that interfere with the enjoyment of human rights.” States are obligated to: (I) adopt “and implement legal frameworks to protect against environmental damages” that may violate human rights, and (II) “regulate private actors” to protect against such damages.
- p. 52 In addition, there is an essential correlation between water quality, the right to a healthy environment and public health.
- p. 53 It cannot be ignored that the safety of water is a central component of human rights and that one of the ecological problems that requires more attention from the State is precisely the proper regulation, monitoring and treatment of “wastewater”.
- p. 54 “Large volumes of untreated wastewater compromise the availability of safe drinking water.” Contamination of water also jeopardizes the enjoyment of other human rights. When not managed, wastewater “constitutes a danger to both the environment and human health.”
- p. 55 Due to the negative implications of water contamination for the public, it has been established that “it is essential to formulate specific objectives related to wastewater”. Current proposals show a tendency to set goals that include: (I) preventing contamination; (II) “reducing the effects of contamination through collection and treatment”; and (III) reuse of wastewater.
- p. 56 This requires measures that are “deliberate, concrete and oriented to full implementation”, in particular aimed at creating an enabling environment for people to exercise their remediation-related rights.

Various human rights bodies have considered that, in broad terms, water remediation “includes the treatment and disposal or reuse of excrement and associated wastewater.”

- p. 56-57 The State bears the primary human rights obligations related to water remediation, and it must guarantee that non-State actors, including individuals, do not jeopardize the enjoyment of human rights.
- p. 57 States have an obligation to “protect” the human right to a healthy environment. This implies they must pursue the following actions regarding the ecological protection of water: (I) protect the services of provision of water and remediation; (II) protect “necessary resources or infrastructure from contamination or interference,” and (III) protect the environment and water resources from misconduct by non-state actors.

### 2.2.2. Violation of the human right to a healthy environment

- p. 63 The authorities do not argue why, in their opinion, the actions they have taken are sufficient, from the constitutional point of view, to consider that they have complied with the human right to a healthy environment.

With regard specifically to the ecological care of the canals, one of the responsible authorities only indicates that several cubic meters of garbage were removed and silt was removed from the Tláhuac-Chalco Calzada and the Amecameca River; however, it is not seen that it has monitored the level of contamination and undertaken the treatment of the water, or any other remediation activity.

- p. 63-64 Hence, the Supreme Court considers that since the canal water in the San Miguel neighborhood is not only excessively contaminated and unsuitable for the survival of aquatic species, but in fact “contact with it should be avoided” according to an expert, then there is a frank violation of the duty to guarantee a healthy environment, as well as the right to sufficient, safe, and hygienic access to water.
- p. 64 In particular, the ecological degradation generated by the unregulated discharge of wastewater from adjacent properties is noticeable, despite the existence of various technical standards that should be used to monitor and

control these waters so that they do not cause unjustified damage to the ecological balance.

p. 65 The authorities should: (i) prevent wastewater contamination; (II) “reduce the effects of contamination through collection and treatment”; and (III) where appropriate, reuse wastewater by means of a treatment system.

p. 66-67 In this regard, it is concluded that the authorities designated as responsible have not adopted all possible measures, up to the maximum of available resources, to avoid and control water degradation processes; to ensure that the wastewater discharges comply with the current regulations in quantity and quality; and to take the necessary corrective actions to clean the waters of the canals of the San Miguel neighborhood.

p. 67 These failures are even more important considering that the Tláhuac zone, along with Xochimilco, was declared a World Cultural and Natural Heritage Site by UNESCO as of December 11, 1987, requiring its protection for the benefit of humanity, a conventional obligation that was not complied with by the responsible authorities either.

This obligation is not overcome by the argument of the Mayor and SEDEMA that the claimed effects cannot be attributed to the State since the contamination in the canals is due, to a large extent, to the acts of individuals.

p. 67-68 The human right to a healthy environment is not limited to ensuring that the State, through any of its agents, does not contaminate or directly endanger the sustainability of ecosystems, but also entails the obligation to take all positive measures aimed at protecting this right from acts of non-State agents that endanger it.

p. 68 The State cannot be passive when individuals are carrying out acts that negatively affect the environment and human rights due to the loss of sustainability and failure to safeguard ecosystems.

p. 71 Therefore, the grievances stated by the authorities are unfounded, since those responsible have a positive obligation to take all measures aimed at

protecting the human right to a healthy environment from the acts of non-State actors that endanger it. As such, they should have ensured that non-State actors act in accordance with the relevant provisions that have been issued to protect that right, exercising their inspection functions in order to safeguard the ecological balance - an obligation to “protect”- which did not happen.

The Mayor is incorrect in arguing that since there are wastewater discharges from the Amecameca River, belonging to the State of Mexico, the Mexico City authorities cannot be held responsible for the contamination they cause to the canals.

- p. 71-72 This argument is unfounded given that the poor quality of the surface water of the canals of the town of San Andrés Mixquic is not only the result of the flow of water from the Amecameca River, but also of other contaminating factors whose source of emission comes from Mexico City, namely: (I) the discharge of wastewater from dwellings adjacent to the canals; (II) the discharge of wastewater by spillage from the collector; (III) improper handling of hazardous waste by unidentified farmers in the area; and (IV) the inadequate handling of household waste by unidentified residents of San Andrés Mixquic.
- p. 73 In any case, the responsible authorities should have exercised their powers of coordination or cooperation with the different authorities and levels of government to protect the environment.
- p. 73-74 Hence, if the mentioned authorities of Mexico City did not demonstrate that they took the necessary actions to prevent or, where appropriate, to control the degradation of the waters of the San Andrés canals, it is clear that they transgressed the human right to a healthy environment.
- p. 74 Clarifying the above, the grievance expressed by the PAOT that it did not fail to exercise its powers in matters of environmental protection is considered to be well founded.

p. 75 This is because the evidence provided to the injunction (*amparo*) proceedings clearly shows that in the exercise of its powers, it filed various complaints to ensure compliance with the applicable legal provisions on environmental matters and territorial planning in the town of San Andrés Mixquic.

p. 76 Its resolutions specify that in the San Miguel neighborhood “the existence of irregular human settlements and illicit constructions, in contravention of the environmental law” has been verified, so the authorities were urged to take the necessary actions to “stop the irregular human settlements in San Andrés Mixquic and the illicit filling of its canals, *chinampas* and other water bodies”, and to “execute, without the express request of an individual or authority, the programs to clean the canals of the town of San Andrés Mixquic”.

Based on the above, it follows that PAOT did exercise its powers in environmental matters. Consequently, the injunction (*amparo*) requested by the affected parties against the failure to act claimed must be denied.

p. 78 Having confirmed the injunction (*amparo*) granted in the challenged judgment -except for the acts claimed against SEMARNAT and PAOT- the legality of the effects of the injunction (*amparo*) is examined.

### 3. Analysis of the legality of the effects of the *amparo* granted

p. 80-81 Contrary to the arguments of the Mayor and SEDEMA, the fact that the final injunction (*amparo*) decision obligates them to enter into agreements or administrative coordination and collaboration accords with the State of Mexico regarding the discharge of wastewater from the Amecameca River that affects San Andrés Mixquic, does not violate the sovereignty of the responsible entity, nor is it against the law.

p. 81 This is because various regulations provide the basis for local authorities, within the scope of their respective competencies, to undertake the mechanisms of coordination, inducement and dialog that are necessary

to address common environmental problems and exercise the powers established by their laws in ecological balance and environmental protection matters.

p. 81-82 And because it has been shown that there is a problem of severe water pollution in the canals of the town of San Andrés Mixquic, whose remediation requires, among other measures, the participation of the State of Mexico authorities to control the ecological degradation caused to those canals by the contaminated waters of the Amecameca River.

p. 83 With regard to SEDEMA's mandate to issue "a strategic environmental assessment for the integral solution of the environmental problems that arise in the Chinampa area of San Andrés Mixquic", that duty is based on Article 9, section I, of the Environmental Law, which empowers SEDEMA to "evaluate environmental policy in the Federal District, as well as the plans and programs that derive from it".

The obligation to establish "water quality monitoring systems in the area" follows from Article 9, section XXVII, of the mentioned law, which provides that the said administrative entity must exercise "all those actions aimed at the conservation and restoration of the ecological balance", as well as the regulation, prevention "and control of the contamination of the [...] water and soil that do not fall under federal jurisdiction."

p. 84 This obligation is also expressly contemplated in Article 15, section IV, of the local Water Law, which establishes that SEDEMA is responsible for "establishing and operating water quality monitoring systems in Mexico City."

The injunction (*amparo*) decision's guideline that SEDEMA must show that "it has promoted with the inhabitants of San Andrés Mixquic the best practices in the use of agrochemical products", can be based on Article 9, section XIX, of the Environmental Law, which establishes its obligation to

coordinate the participation of the government branches and entities of the Public Administration of Mexico City, and of the city municipalities “in the actions of environmental education, prevention and control of environmental deterioration, conservation, protection and restoration of the environment”.

The obligation to initiate or continue with the corresponding administrative procedures in order to stop irregular human settlements in San Andrés Mixquic is expressly derived from section XIX Bis 2 of Article 9, which establishes that SEDEMA has the power to remove persons and property that take part in human settlements established in contravention of urban development programs or of ecological land planning, “and to execute the necessary actions to avoid the establishment of such irregular human settlements in green areas, areas of environmental value, protected natural areas and land under conservation”.

- p. 85 Finally, with regard to the mandate to apply “the restoration programs of the natural elements affected in the land under conservation of the town of San Andrés Mixquic, with the purpose of recovering and restoring the conditions that favor the evolution and continuity of the natural processes that develop in them.”, it is noted that this obligation derives from Article 9, section XXVII, of the mentioned law, which provides that it must exercise “all those actions aimed at the conservation and restoration of the ecological balance”, as well as the regulation, prevention “and control of the contamination of the [...] land that does not fall under federal jurisdiction.”

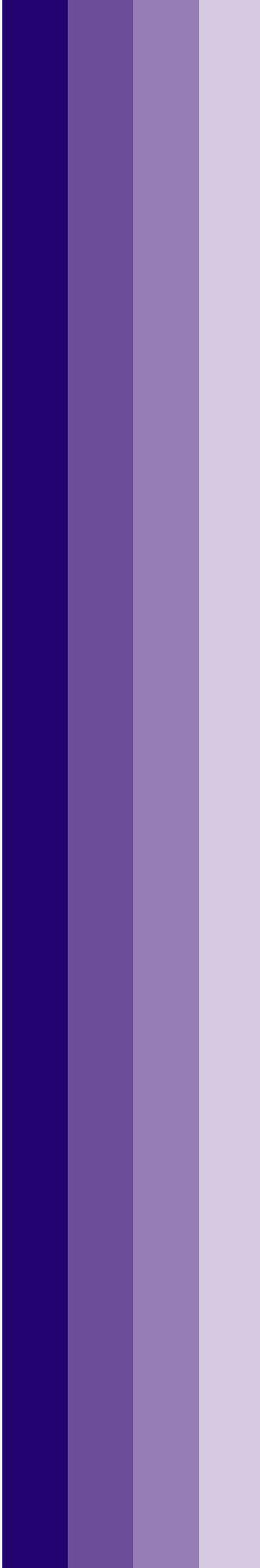
Based on the foregoing, the appeals filed by the Mayor, SEDEMA and the Water System must be declared unfounded.

### Decision

- p. 86 On the basis of the above arguments, the challenged decision must be amended to deny the requested *injunction (amparo)* against the challenged acts of PAOT and SEMARNAT.

On the other hand, the affected parties are covered and protected from the challenged acts of SEDEMA, the Mayor, Water System, Head of the Municipality in Tláhuac, and Secretary of Rural Development and Equity for the Communities, all of Mexico City, for the purposes specified in the appealed decision.





IX. GUARANTEES  
IN CRIMINAL  
PROCEEDINGS



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## PROHIBITION OF TORTURE (EVIDENCE EXCLUSIONARY RULE IN THE CASE OF TORTURE)

### *Amparo en Revisión 4530/2014*<sup>45</sup>

**Keywords:** *right to due process, rights of the defendant, torture, exclusion of evidence, weighing of evidence.*

#### **Summary**

In the state of Veracruz, a criminal judge sentenced JOV for the crime of kidnapping. Later, the criminal court chamber that heard the case confirmed JOV's guilt and increased the sentence imposed by the criminal judge. JOV filed an injunction (*amparo*) against the court's decision in which he stated that he had been tortured during the transfer from the place of detention to the prison in order to obtain the confessions from him and his co-defendant. JOV also argued that this situation was manifested in the preliminary statements and amendments and that specialists in psychiatry concluded that JOV was indeed subjected to torture. The collegiate court denied the injunction (*amparo*) considering that it was not credible that JOV

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<sup>45</sup> Decision issued by the First Chamber of Mexico's Supreme Court of Justice (September 30, 2015). Reporting Justice: Arturo Zaldívar. Action For Constitutional Relief Through Injunction (Amparo En Revisión) 4530/2014

and the co-defendant had been tortured when giving their preliminary statements. JOV filed an appeal against the collegiate court decision which was heard by the First Chamber of Mexico's Supreme Court of Justice (the Supreme Court).

### Issue presented to the Supreme Court

Whether constitutional and conventional standards for the investigation, prevention, punishment, and reparation of torture were applied in the case and what are the effects of the occurrence of torture on the weighing of evidence.

### Holding and vote

The injunction was granted for the following reasons. The Court warns that torture is a violation of human rights, that it affects the fundamental right to due process of law, and that, in the event of such a complaint, the judicial authority has the obligation to investigate it. This obligation is an essential formality of due process since it impacts the effective defense of the accused in the criminal process. In the event that torture is claimed judges must analyze whether this violation of human rights had an impact on the generation, introduction or presentation of evidence incorporated into the criminal case, because if it did, then they must apply exclusionary rules to the unlawful evidence.

If torture is not claimed, but there is a complaint or signs of torture, the judicial authority hearing the criminal proceedings must give notice to the Prosecutor's Office so that the act may be investigated as a crime. In addition, it must carry out an informal analysis of the material elements available so far in the proceeding in order to determine whether or not there are elements that lead to the conclusion that torture occurred.

Hence, when a failure to investigate is detected after the conclusion of the pre-trial criminal proceeding, the proceeding must be reinstated so the omission can be remedied and the legal situation of the defendant can be resolved taking this circumstance into account. The reinstatement of the proceeding must go back to the action immediately prior to the order to close the trial in the case of the traditional procedural system. In the event that it is determined that torture did occur in the process, either as a crime or as a violation of the human right to due process, any evidence that has been obtained

directly from or derived from it, including statements, confessions, and any incriminating information resulting from them, must be excluded.

The First Chamber resolved this case by a majority of four votes by Justices Olga María del Carmen Sánchez Cordero de García Villegas, Arturo Zaldívar Lelo de Larrea, José Ramón Cossío Díaz, and Alfredo Gutiérrez Ortiz Mena. Justice Jorge Mario Pardo Rebolledo voted against (he issued a dissenting opinion).

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### EXTRACT OF THE DECISION

p. 1 Mexico City. The First Chamber of Mexico's Supreme Court of Justice (the Supreme Court), in session of September 30, 2015, issues the following decision.

#### Background

p. 1-6 On March 19, 2014, JOV filed an injunction against the decision issued by the criminal court chamber that convicted him of the crime of kidnapping. JOV essentially argued that: (a) the decision issued against him was not properly grounded as there is insufficient evidence to prove that he had committed the offenses; and (b) the criminal court chamber failed to exercise control within *ex officio* conventionality in respect to human rights, specifically the protection of his right not to self-incriminate, since its decision was based on confessions by him and his co-defendant which were obtained under torture. JOV pointed out that this situation was manifested in the respective preliminary statements and amendments, in addition to the fact that the specialists in psychiatry, offered by the defense and the prosecution, concluded that he was indeed subjected to torture.

p. 9 The collegiate court denied the injunction. With regard to the torture referred to in the lawsuit, the collegiate court established that it was not credible that he had been tortured when giving his preliminary statement before the criminal judge since he had been assisted by defense counsel and had the freedom to express himself. Therefore, it considered that the

criminal court chamber was correct to deny evidentiary value to the opinions of specialists in psychiatry since, even though the specialists had concluded that the acts of torture narrated by JOV caused him post-traumatic stress, it was not a factor in his pre-trial confession in addition to the fact that there was no evidence to prove that he was beaten. The collegiate court also considered that it was correct to give probative value to the confession of the co-defendant made in his preliminary statement and statement at prosecution.

- p. 11 JOV filed an appeal and argued that the collegiate court had misinterpreted Articles 14 and 16 of the Constitution by failing to analyze all the evidence and by giving evidentiary value to confessions obtained under torture. Finally, the appeal was heard by the Supreme Court.

### Study of the merits

- p. 13 The Supreme Court considers that the allegations relating to the failure to properly ground and reason the challenged act, as well as the assessment of the evidentiary material on the basis of which the alleged offense and criminal liability were considered to have been demonstrated, are not issues that can be the subject of an appeal in a direct injunction (*amparo directo*), since they relate to questions of legality, so it is not appropriate to rule on their correction or not.
- p. 16 In spite of the above, we must correct the deficiency of the complaint to address the collegiate court's failure to rule on JOV's claim that his and his co-defendant's confessions should not have been given evidentiary value because they had been obtained under torture, which is demonstrated by psychiatric opinion and handwriting analysis.

### - Prohibition of torture through the constitutional doctrine of the Supreme Court

- p. 20-22 Torture is prohibited in Articles 20, section B, section II, 22, first paragraph, and 29, second paragraph of the Political Constitution of the United

Mexican States (the Federal Constitution). It is also prohibited in Articles 1, 3, 6, 7, 8, 9 and 11 of the Federal Law to Prevent and Punish Torture (LFPST).

- p. 23 International instruments require domestic legal systems to condemn torture in the context of a crime regardless of whether it was consummated or attempted or the degree of involvement of the individual who perpetrates it. Those instruments also establish the obligation to detain the torturer for internal prosecution or extradition after a preliminary investigation; punish this offense with appropriate penalties; render all possible assistance to criminal proceedings relating to crimes of torture including the provision of any evidence in their possession; and to invalidate any statement or confession obtained under torture for the purpose of forming evidence in any proceedings, except against the torturer.
- p. 25-26 The right not to be subjected to torture, cruel, inhuman, or degrading treatment or punishment is an absolute right that is *jus cogens*. Consequently, the authorities have an obligation to prevent, investigate, and punish torture. The right not to be subjected to torture is absolute; therefore, it does not allow any exceptions, even in emergency situations that threaten the life of the nation.
- p. 27-29 Torture triggers a special and more serious category that requires careful analysis under national and international standards and its impact as both a human rights violation and a crime. The Inter-American Court of Human Rights has emphasized that torture and cruel, inhuman, or degrading treatment or punishment are prohibited by International Law on Human Rights. The prohibition of torture and cruel, inhuman, or degrading treatment or punishment is absolute and non-derogable, even in the most difficult circumstances, such as war, threat of war, fight against terrorism and other crimes, state of siege or emergency, internal commotion or conflict, suspension of constitutional guarantees, internal political instability or other public emergencies or calamities.

p. 30 The Inter-American Court of Human Rights has also specified that the violation of a person's right to physical and mental integrity ranges from torture to other types of cruel treatment, the physical and mental consequences of which vary in intensity according to endogenous and exogenous factors of the persons involved (duration of treatment, age and health, among others). This implies a review of the personal characteristics of an alleged victim of torture or cruel, inhuman, or degrading treatment, as these must be taken into account when determining whether personal integrity was violated.

**- Timeliness of reporting acts of torture**

p. 32 The violation of the human right to personal integrity by the commission of acts of torture against persons who are in the custody of the State authorities generates serious consequences; this requires torture to be investigated as: (a) a crime in the strict sense and (b) a violation of the human rights of the person subjected to criminal proceedings.

p. 32-33 The investigation of the accusation of torture may not be conditioned on circumstances of temporality or opportunity to allege it, or even the existence of evidence consistent with acts of torture . As a violation of human rights it is not subject to conditions of preclusion. The violation of the human right to personal integrity must be investigated by the State as soon as the complaint is known or when there are well-founded grounds for believing that an act of torture has been committed . This is not subject to a discretionary decision of the State authorities but must be immediately observed based on legal norms of international and domestic sources. Torture should be investigated because it is classified as a crime.

p. 34 The use of torture to obtain elements to accuse a person of a crime not only affects the personal integrity of the alleged victim of the torture but also violates the human right to freedom, through illegal or arbitrary detentions and to an adequate and timely defense, among other types of harmful impacts that may be generated.

- p. 36 The core, objective and ultimate aim of the prohibition of torture and other cruel, inhuman, or degrading treatment is the protection of a broader fundamental right: personal integrity (physical, mental, and moral), derived from human dignity. It is therefore an absolutely fundamental right enjoyed by all people simply because they are human beings. Thus conditions of timeliness cannot be imposed for making an accusation of torture.
- p. 37 The complaint of human rights violations allegedly committed against a person subject to criminal proceedings has no conditions of preclusion, and therefore can be alleged at any stage of judicial proceedings. Otherwise, the court would be allowed to dismiss the complaint of torture submitted beyond a time limit or procedural stage, which would be contrary to the third paragraph of Article 1 of the Constitution, which requires all State authorities to prevent, investigate, punish, and remedy human rights violations, including acts of torture.
- p. 41 Since the allegation of torture of a person involved in a criminal proceeding cannot be subject to preclusion, it must be dealt with regardless of when it is asserted or whether a case has been prepared. This implies that the complaint or indication of torture, in the context of any type of criminal procedure, triggers the obligation of the authority who is hearing the case at that moment to investigate. This includes both administrative authorities — agents of public security forces and the Prosecutor's Office — as well as judicial authorities of first or second instance, who, during the proceedings, become aware of a complaint or have reason to believe that an act of torture has been committed against the accused. It also includes the constitutional control bodies that, when hearing a judicial review relieving and un-remediated breach of rights or a direct injunction, they have information on an act of torture.
- p. 41-42 The standard defined by the Inter-American Court of Human Rights requires the State to initiate an investigation *ex officio* and immediately when there are indications of acts of torture, even if they have not been reported to the

authorities, and especially in the case of a complaint. This implies that torture can be alleged at any time.

**- Torture as a violation of human rights of the defendant in criminal proceedings**

- p. 44-45 In the *Amparo en Revision* 703/2012, the First Chamber of the Supreme Court established guidelines for authorities before whom an allegation of torture is made taken from the parameters set by the Inter-American Court of Human Rights and based on the Inter-American Convention against Torture, which establishes the duty of the State to investigate when a complaint is filed or when there are indications that an act of torture has been committed within its jurisdiction.
- p. 46 In view of the foregoing, when any authority learns that a person claims to have suffered torture or when it has information to that effect, it must immediately and *ex officio* give notice to the Prosecutor's Office to initiate an investigation, the purpose of which is to determine the origin and nature of the impact on the personal integrity of the person who alleges torture and identify and prosecute the persons responsible.
- p. 47-54 For the reparation of a violation of the right not to be tortured, it must be specified whether the failure of the judicial authorities to investigate a complaint of torture during the procedure constitutes a procedural violation. In the Contradictory Decisions Case 315/2014, the First Chamber of the Supreme Court indicated that the right to due process requires the fulfillment of the essential procedural formalities, which altogether form the "right to a hearing". When the essential procedural formalities are violated, the defendant cannot fully exercise his fundamental right of defense and a direct injunction proceeding is appropriate. Therefore, if the prohibition of torture and other cruel, inhuman or degrading treatment protects the fundamental right to personal integrity (physical, mental and/or moral), and the violation of that right in relation to criminal proceedings is established, there is a violation of the procedural laws established in section VIII of Article 173 of the Amparo Law.

- p. 55-56 Furthermore, since torture is a violation of human rights from which information or elements can be obtained that can subsequently be used to support a criminal charge against the person identified as an alleged victim of torture, there is a clear link between the violation of human rights and due process.
- p. 57-58 Compliance with the mandatory parameters imposed by the international or national legal framework, in the case of complaints or indications of torture, requires the judicial authority hearing the criminal proceedings, after giving notice to the Prosecutor's Office so it may investigate the act as a crime, to carry out an informal analysis of the material elements available so far in the proceeding, to determine if there are elements suggesting that torture occurred.
- p. 58 When there is sufficient evidence to presume the existence of torture it is unnecessary to open an additional investigation in the criminal process itself and therefore when deciding the legal situation of the defendant it must be analyzed whether such human rights violation had an impact on the generation, introduction or presentation of evidence incorporated in the criminal case, because if it did, the rules for excluding illegal evidence must be applied.
- p. 58 Otherwise, when there is insufficient evidence to allow the judicial authority to determine that acts of torture were committed against the defendant, then the investigation must be carried out in the criminal proceedings themselves to answer that question. When such an investigation is omitted, that due process violation denies the defendant an adequate defense. Hence, when a failure to investigate is detected after the conclusion of the trial stage of the criminal proceedings, the procedure must be reinstated so that the omission is corrected and the legal situation of the accused can be resolved taking this circumstance into account.
- p. 59 The investigation will initially corroborate whether the torture actually took place; secondly, if a violation of the personal integrity of the defendant is

established, it will then be necessary to determine whether such conduct, which violates human rights, had any impact on the procedural stage at which it occurred; therefore, the legal situation of the defendant is determined based on the value that the authority has given to the evidence of torture, in respect to which the exclusionary evidence rules should apply.

- p. 60-61 Failure to investigate the existence of torture as a result of a complaint or the existence of indications that the violation of human rights occurred results in the reinstatement of the proceeding as a remedy. Such a reinstatement does not have the scope to nullify, *per se*, the investigation or the evidence already released at trial. The reinstatement of the proceeding must be carried out up to the action immediately prior to the order for the closure of the investigation, in the case of the traditional procedural system.
- p. 61 This is to protect the balance between the fundamental right to an expeditious delivery of justice, which is enshrined in Article 17 of the Constitution, and the fundamental right of the defendant not to be subjected to torture, as well as the corresponding fundamental rights of the victims of the crimes. The purpose of the reinstatement of the procedure is to take the necessary steps to determine the veracity of the complaint of acts of torture, through a diligent investigation and the expert examinations that determine the existence or not of the acts of torture. The justification for the reinstatement of the proceeding is to verify the existence of the alleged torture.
- p. 62 There is no reason for any other issue or question in the process to be affected because, if the allegation of torture is not proven, the proceeding will continue in its own terms. In the event that the existence of the alleged violation is proven, its substantiation will impact the evidentiary material, which will be subject to exclusion at the time of sentencing as appropriate. Not all the proceedings of the trial should be annulled, since that would invalidate all the actions carried out regardless of the outcome of the investigation into their relationship to the allegations of torture. This would affect the prompt delivery of justice, and could re-victimize the persons who suffered the crime.

### Application of the evidence exclusionary rules in case of torture

- p. 64 When considering torture as criminal, unlawful, and culpable conduct (a crime), the Prosecutor's Office must (a) prove that the victim was subject to the violation of their personal integrity and (b) verify, beyond a reasonable doubt, the criminal responsibility of the torturer. However, when torture is analyzed as a violation of personal integrity, with repercussions on the human right to due process, it will be sufficient to show the existence of the impact on personal integrity to consider it proven, even if it is not possible at the moment to identify the torturer(s).
- p. 66 Respect for the right to be tried by impartial courts and the right to an adequate defense are sought requires that evidence obtained irregularly (whether for contravening the constitutional or the legal order) must be considered invalid. Therefore, no evidence that violates the law should be admitted and if it has already been presented, all its evidentiary value must be eliminated.
- p. 67 Therefore, if the existence of torture has been established, either as a crime or as a violation of the human right to due process, any evidence that has been obtained directly from it or that derives from it, which includes statements, confessions, and all incriminating information resulting therefrom, must be excluded.
- p. 68-69 In accordance with the foregoing, the interpretation of the collegiate court regarding the obligations of state authorities to prevent, investigate, punish, and remedy human rights violations due to acts of torture is incorrect. First, the collegiate court did not notify the Prosecutor's Office to initiate an investigation into the allegations of torture, with an aim to determine the veracity of the complaint and conduct the respective medical examinations. Furthermore, despite the fact that JOV argued in his claim the existence of the expert psychiatric opinions, from which it appears that he suffered bodily and psychological harm which caused him post-traumatic stress disorder, the collegiate court rejected the argument without taking into

account that the complainant does not bear the burden of proof with respect to the facts classified as torture.

- p. 69 Finally, the interpretation of the collegiate court is also incorrect regarding the effects of its decision, because having considered that the elements in the case were not sufficient to establish torture as a violation of personal integrity, instead of rejecting the allegation of torture, it should have granted the injunction to have the chamber order the reinstatement of the proceeding so that the judge could carry out an investigation in the terms specified in this decision.

### **Decision**

- p. 102 The decision of the collegiate court is overturned and the case is returned to it, so that it may re-examine JOV's argument related to the existence of torture.

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## CONSTITUTIONALITY OF THE CRIME OF FEMICIDE

### *Amparo en Revisión 652/2015*<sup>46</sup>

**Keywords:** *right to equality and non-discrimination before the law, criminal law, legal equality of men and women, femicide, gender perspective, violence against women, discrimination, proportionality.*

#### **Summary**

On March 11, 2014, a criminal judge determined the criminal liability of a person (the affected party) for the crime of attempted femicide when condemning him to a prison term. The sentence was appealed and on May 13, 2014, it was confirmed by a criminal chamber of the Supreme Court of Guanajuato. Dissatisfied with that decision, the affected party filed a direct injunction (*amparo directo*) on June 23, 2014, arguing that the crime was unconstitutional because it violated the principles of equality and non-discrimination. The collegiate criminal court that heard the case decided to deny the injunction (*amparo*) on January 9, 2015. The sentenced

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<sup>46</sup> Decision issued by the First Chamber of Mexico's Supreme Court of Justice (November 11, 2015). Reporting Justice: a Sánchez Cordero de García Villegas. Action for Constitutional Relief Through Injunction 652/2015

party filed an appeal (*recurso de revisión*) against this determination on February 3, 2015, which was heard by the First Chamber of the Supreme Court (this Court), considering whether or not it is within its jurisdiction.

### Issue presented to the Supreme Court

Whether Article 153-a of the Criminal Code of the State of Guanajuato (CPEG), which establishes the crime of femicide, is unconstitutional for violating the principles of equality and non-discrimination contained in Articles 1 and 4 of the Federal Constitution, or if on the contrary, it is in accord with constitutional provisions.

### Holding and vote

The sentence was confirmed for the following reasons. The offense of femicide contained in the article that was challenged is not discriminatory, since the distinction created by the local legislator serves an objective and constitutional purpose, seeking to ensure that women have the right to a life free of violence. It was also considered that the definition of the offense was an objective and rational measure because it guaranteed equity; it is also proportional because it does not excessively affect other rights protected by the Federal Constitution. Consequently, the sentence that was the subject of the complaint was confirmed, through which he was denied the injunction (*amparo*) against Article 153-a of the CPEG.

The First Chamber resolved this case through a unanimous vote of the five votes from Justices Olga Sánchez Cordero de García Villegas, Arturo Zaldívar Lelo de Larrea (reserved the right to formulate a concurring vote), José Ramón Cossío Díaz (reserved the right to formulate a concurring vote), Jorge Mario Pardo Rebolledo and Alfredo Gutiérrez Ortiz Mena.

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### EXTRACT OF THE DECISION

p. 1 Mexico City. The First Chamber of Mexico's Supreme Court of Justice (this Court), in session on November 11, 2015, issues the following decision.

## Background

- p. 1-2 A criminal judge of Celaya, Guanajuato, in a sentence of March 11, 2014, considered a person (the affected party) liable for the crime of attempted femicide against a woman condemning him to a prison term of 13 years and to the reparation of damages in favor of the woman.
- p. 2 The affected party and his public defender filed an appeal in which the criminal chamber of the Supreme Court of Justice of the State of Guanajuato issued a decision on May 13, 2014, confirming the conviction.
- p. 2-3 0.00%

On 3 February 2015, the affected party filed an appeal (*recurso de revisión*) before the filing office of the collegiate court. Subsequently, on February 4, 2015, the presiding Magistrate of the collegiate court referred the matter to this Court.

## Study of the merits

- p. 14 The appellant's grievances that he is harmed by the determination that Article 153-a of the Criminal Code of the State of Guanajuato (CPEG) is not unconstitutional are groundless; the affected party points out that this provision creates the crime of femicide based on the grounds of gender and in violation of the principles of equality and non-discrimination, contained in Articles 1 and 4 of the Federal Constitution.

### I. Equality before the law and non-discrimination

- p. 15-16 Article 1 of the Federal Constitution contains a general affirmation of the principle of equality in the enjoyment of the human rights recognized in the Federal Constitution itself and in international treaties. By virtue of which, this provision safeguards individuals in comparable situations from any discrimination in the enjoyment of the rights and freedoms enshrined in the Federal Constitution itself. This implies that the legislator must be

careful when subjecting individuals to differentiated legal regimes when this affects the exercise of the rights and freedoms recognized by the Federal Constitution; this implies that this provision recognizes in all persons the human right to equality and non-discrimination.

- p. 16 The Inter-American Court of Human Rights has pointed out that the right to equality and non-discrimination encompasses two concepts: a negative one related to the prohibition of arbitrary differences, and a positive one related to the obligation of States to create conditions of equality for historically excluded groups.

This, in conjunction with Article 4 of the Constitution and various international instruments, indicates that equality, rather than a concept of identity, seeks to order the legislator not to introduce distinctions between the two genders and, if it does, these must be reasonable and justifiable.

- p. 17-18 Equality between men and women before the law implies the right of women to participate actively and fully, as men do, without discrimination on the basis of their sex, in the essential areas of society.

- p. 18 The intention to elevate women to the same level of equality was preceded by the discriminatory treatment given to women in secondary, federal, and local legislations, which prevented them from active participation and from assuming, like men, tasks of public social responsibility. Thus, the reform of Article 4 of the Constitution had the effect of giving guidance for modifying all those secondary laws that included subtle modes of discrimination.

For this reason, it was left to secondary federal and local regulations to meet the constitutional imperative of legal equality between men and women. It follows that the unconstitutionality that was claimed would have to demonstrate that the secondary legislation discriminates against women on the basis of their sex.

- p. 19 Equality before the law is related to the general principle of equality for those governed, provided for in Article 1 of the Constitution, which

establishes that every individual shall enjoy the guarantees granted by the Federal Constitution. It is understood that these guarantees may not be restricted or suspended, except in the cases and with the conditions that it establishes, which shows the desire of our current culture to overcome the discrimination that was often granted to one or another individual on the basis of their gender.

Thus, the principle of equality is configured as one of the superior values of the legal order, which means that it must serve as a basic criterion for the production of regulations and their subsequent interpretation and application.

- p. 20 Both national and international legal frameworks refer to two concepts: equality before the law and non-discrimination, concepts that are not identical but complementary. The idea that the law should not draw or permit distinctions between the rights of individuals on the basis of the categories envisaged is a consequence of the idea that all persons are equal.
- p. 22-23 Based on the foregoing, it is stated that with the equality provided for in Article 4 of the Constitution and in various international human rights instruments, rather than a concept of identity, it is a question of ordering the legislator not to introduce distinctions between the two genders and, if it does so, these must be reasonable and justifiable.
- p. 23-24 In Injunction Under Review (*Amparo in revision*) 796/2011, this Court considered that the principle of equality as a limit to materially legislative activity constitutes a subjective right that protects its holder against the behaviors of public authorities and, in particular, materially legislative activity contains a prohibition on acting with excessive power or arbitrarily. As a limit to materially legislative activity, it does not postulate parity between all individuals, nor does it necessarily imply material or real equality, but requires reasonableness in the difference in treatment, as a basic criterion for the normative production. The essence of equality is not to outlaw differentiations or singularities, but to prevent them from lacking objectively reasonable justification.

- p. 29 In order for regulatory differentiations to be considered non-discriminatory, it is essential that there be an objective and reasonable justification, in accordance with generally accepted standards and value judgments, the relevance of which must be assessed in relation to the purpose and effects of the measure in question, and a relationship of proportionality must therefore be present between the means used and the aim pursued.
- p. 29-30 Thus, the exercise of analysis of constitutionality determines whether differential treatment is discriminatory and consists of three steps to follow: a) Determine whether the purpose is objectively and constitutionally valid. This is because the means chosen by the legislator must not only be related to the purposes sought by the law but also share its character of legitimacy. b) Examine the rationality of the measure, to ensure there is an instrumental relationship between the means used and the intended purpose. c) Assess whether there is a relationship of proportionality, which properly weighs the relationship of similar means, with the aim of determining whether, for the sake of a constitutionally valid purpose, other assets or rights protected by the Federal Constitution are not unnecessarily or excessively affected, verifying, where appropriate, whether there could be any less burdensome way for the right.
- p. 31 In this specific case, it is noted that as correctly considered by the collegiate court, Article 153-a of the CPEG does respect the human right to equality and non-discrimination, on the basis of gender, in accordance with the following:
- a) Constitutional purpose**
- p. 32 The first paragraph of the contested article provides for the crime of femicide when the victim of homicide is a woman and the deprivation of life is committed for reasons of gender, based on various hypotheses in aggravation thereof.
- p. 32-33 Thus, it is considered that the crime of femicide, contained in the contested provision, is not discriminatory in that it privileges the life of women over

that of men, since this distinction created by the legislator serves an objective, constitutional and conventionally valid purpose, seeking to ensure that women have the right to a life free of violence.

p. 33 The legislator, in order to create legal mechanisms so that women's lives are not violated, added to the CPEG the typical description of femicide, thereby recognizing that these behaviors affect not only life, physical and mental integrity, and sexual freedom, but are also committed based on discrimination and implicit subordination on the basis of gender.

p. 39 It follows from the explanatory statement that the different legal treatment established by the crime of femicide is justified mainly in the recognition by international instruments, such as the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, "Convention Belem Do Pará", that violence against women is an offense to their human dignity, as well as a manifestation of the historically unequal power relations between women and men.

It was appropriate to point out that for the occurrence of the crime of femicide, the main cause was related to gender, in order to have normative provisions that had greater precision and protection of women's rights.

p. 39-40 The legislature also noted that, in accordance with the provisions of both national and international legal instruments, there was a need to improve the normative conditions for the eradication of issues adverse to women's access to and development and enjoyment of rights, power and participation in all aspects of social life; in such a way that it sought to achieve a greater scope and protection of women's rights, in particular their right to live free from any type of violence.

p. 40 In these terms, this Court recognizes that the human rights of women need the protection of the State and, therefore, the Federal Government and the States must issue regulations and implement public policies that regulate and protect those fundamental rights.

p. 40-41 A necessary reference in the issue of violence against women is the González y Otras case (“cotton field”), in which the Inter-American Court of Human Rights stated that the duty of prevention covers all those measures of a legal, political, administrative, and cultural nature that promote the safeguarding of human rights and that ensure that possible violations thereof are effectively considered and treated as an illegal act, for which sanctions can be imposed and compensation for the victims required.

p. 41 It is also considered that the aforementioned gender distinction in the crime of femicide does not violate the purpose of the constitutional reform of Article 4 of the Federal Constitution, which consisted of seeking gender equality, since there is an end that is reasonably justified.

p. 42 Consequently, the crime of femicide serves a constitutional purpose, since it seeks to achieve greater protection of women’s rights, especially their right to live free from any type of violence, in such a way that the criminal conduct that threatens the lives of women, must be based on reasons of gender.

Therefore, this Court considers that the aforementioned contested provision does have an objective and valid purpose from a constitutional point of view.

#### **b) Reasonableness**

p. 42-43 It must be determined whether the method adopted is aimed at achieving the intended purpose. Since it is a relationship between means and ends, it must be determined whether the specific mechanism chosen by the legislator leads to the desired result. This would demonstrate its rational nature; in other words, it is necessary to analyze whether the option adopted by the legislator is suitable for achieving the desired end.

p. 43 The measure being studied responds to the purpose established in the previous section, since it finds its justification in the constitutional order by

seeking equality and non-discrimination of women and by attacking the obvious violence against women, providing mechanisms and measures to protect their personal integrity when there are aggressions against them and aggressors, which makes it possible to consider that the rule is reasonable in terms of its purpose.

The definition of the crime of femicide is an objective and rational measure, since it is agreed that equity is guaranteed by establishing mechanisms to protect the integrity of women who have suffered violence.

- p. 43-44 Consequently, it is concluded that the article analyzed constitutes an adequate and rational measure to achieve the desired goal.

### c) Proportionality

- p. 44 In this section, it is necessary to determine whether, for the sake of the purpose described, other property or rights protected by the Federal Constitution, particularly the human right of equality and non-discrimination before the law, are not excessively affected.

The core of the principle of equality is established in terms of sufficient reason to justify unequal treatment of equals; the problem is therefore concentrated on the justification for this.

This Court, in a case in which the law distinguishes between two or more facts, events, persons or groups, must analyze whether that distinction rests on an objective and reasonable basis or whether, on the contrary, it constitutes discrimination.

- p. 45-46 In this specific case, although the definition of the crime of femicide is only aimed at the gender “woman”, the distinction is not offensive, since it tends to balance the exercise of civil, political, economic, social, and cultural rights between men and women in the State of Guanajuato, given the great imbalance in which the latter find themselves.

p. 46            Consequently, the regulations under study comply with the requirement of proportionality, since it generates the same legal situation for all women who are found under this hypothesis.

Furthermore, it should be noted that this classification is not directed at a right as a perpetrator of the crime, but at a vulnerable situation specific to the victim, in this case, a socially vulnerable group in the specific community where the law applies; in addition, equality does not refer to an absolute identity between man and woman, which would imply denying the obvious differences, primarily physical and biological, but to an equivalence in rights and obligations that, in this case, are not in any way violated.

p. 47            Thus, this Court reiterates that the legislative measure to define the crime of femicide when the victim is a woman does not unnecessarily or excessively affect other assets or rights protected by the Federal Constitution, such as the human right to equality before the law.

This is especially poignant since in the explanatory statement that gave rise to the contested article, it was established that the need to redirect the crime of femicide derives not only from the seriousness of the conduct displayed by the perpetrator, which has a direct impact on social sensitivity and evidences the repudiation of the norms of collective coexistence, but also it seeks to protect, under any circumstances, the superior legal good of women and every human being, life, with the purpose of preventing and eradicating any impairment in their dignity and rights.

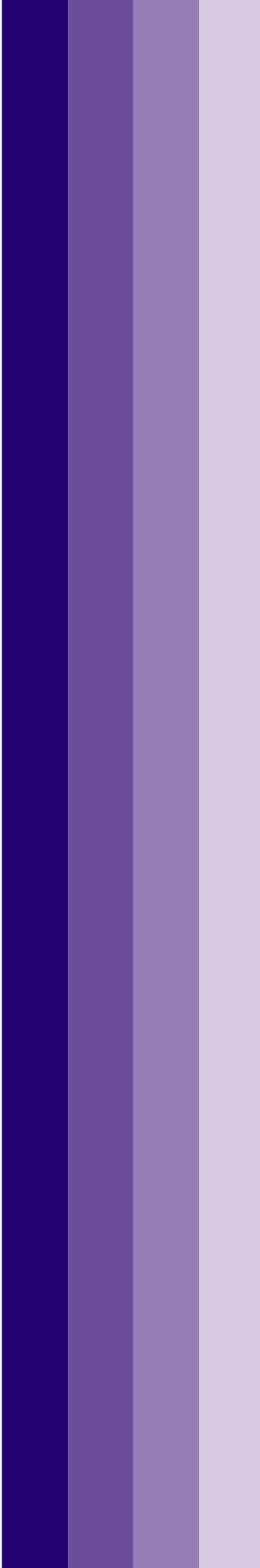
p. 47-48        There is also an appropriate balance between the description given in the contested provision and the purpose it pursues. The local legislator took into consideration that gender-based violence against women is an extreme manifestation of it, in which the common denominator is inequality and discrimination. This generates a situation of greater vulnerability for women in the enjoyment of their human rights and above all their right to a life free of violence, to their security in the public space, to personal freedom, among other rights, which aspects are considered so serious at the international level.

- p. 48 Also, since the local legislator has harmonized the creation of the crime of femicide with international standards on women's human rights, this is in accordance with the constitutional reform of June 10, 2011, to Article 1 of the Federal Constitution, which essentially included the concept of person and subjected it to the enjoyment of the human rights recognized not only by the Federal Constitution, but also by all international treaties signed by the Mexican State.
- p. 48-49 The determination of the case by the collegiate court was correct, in the sense that Article 153-a of the CPEG, which defines the crime of femicide, is constitutional, as it does not violate the principles of equality and non-discrimination.

### Decision

- p. 49 Considering the foregoing, the sentence under appeal, which denied the sought injunction (*amparo*), must be upheld.





X. RIGHTS TO  
ACCESS TO JUSTICE  
AND DUE PROCESS



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## RIGHT OF VICTIMS TO KNOW THE TRUTH

### *Amparo en Revisión 382/2015*<sup>47</sup>

**Keywords:** *right to truth; due process; rights of victims in the criminal process; migrants; missing persons.*

#### **Summary**

In 2011 of at least 120 bodies were discovered in various clandestine graves in the Municipality of San Fernando, Tamaulipas. Two women (BPO and AYRA) who filed an injunction were relatives of two persons who were found in those clandestine graves, CAOP and MARA. Their relatives departed in March 2011 from different cities in El Salvador headed towards the United States in search of work and a better life. After months without hearing from their relatives, BPO and AYRA received the notification that CAOP's and MARA's bodies may have been found in Mexico. BPO and AYRA initiated a series of procedures before the Attorney General's Office (AGO) to be recognized as victims and to take part in

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<sup>47</sup> Decision issued by the First Chamber of Mexico's Supreme Court of Justice (March 2, 2016). Reporting Justice: Jorge Mario Pardo Rebolledo. *Action For Constitutional Relief Through Injunction 382/2015*

the preliminary investigations related to the disappearances. When the AGO denied their requests, in May 2013, BPO and AYRA, together with the civil association FJEDD, filed a request for a judicial review regarding un-remediated breach of rights (*amparo indirecto*) against various authorities in Mexico for the violation of their right to truth, access to justice and due process. A district judge in Mexico City issued a decision in which he dismissed the suit with respect to certain acts challenged by the affected parties and granted the injunction so that the AGO would analyze whether they should be considered victims in the preliminary investigation. The parties of this lawsuit appealed this decision twice until a collegiate court of Mexico City requested the Supreme Court of Mexico (this Court) to exercise its authority to assert jurisdiction.

### Issue presented to the Supreme Court

Whether the relatives of migrants who presumably disappeared in Mexican territory can also be considered victims or injured parties in the prosecutorial investigation of the facts, and whether a civil association whose purpose is the protection of human rights has standing in the injunction to demand the right to truth.

### Holding and vote

This Court upheld the appealed decision regarding the dismissal of the an injunction against an order to cremate the bodies of the persons presumably missing since the responsible authorities concurred in denying the existence of such order so that AYRA and BPO could be recognized as victims in the preliminary investigation. The fraction of Section II, part C of Article 20 of the Constitution establishes the right of the victim or the injured party to be a codefendant to the public prosecutor from the investigation stage onwards. Therefore, the petition of a relative of the direct victim of a crime to be a codefendant to the public prosecutor implies a request to be recognized as a victim or injured party of the crime without the need to request a genetic correspondence test. The relatives of a migrant presumably missing in Mexican territory can have access to the preliminary investigation as victims because treatment otherwise would imply a contradiction of the Inter-American doctrine on the right to truth for victims of violations of human rights and the provisions of the General Victims' Law (GVL). Also, as part of the development of the Inter-American precedent, the concept of victim has been

expanded to cover persons who initially would not have been considered as such. It has also recognized that the direct relatives of victims of violations of human rights as having the right to truth. Therefore, the affected persons must have ample possibilities to be heard and to act in the respective processes. This Court addresses the provisions in the GVL that distinguish between direct and indirect victims and notes the difficulty of demonstrating the existence of harm in cases of disappearances, above all, when the persons missing are migrants that entered the country irregularly. In these cases it is highly likely that the indirect victims do not have any evidence that corroborates the disappearance of their family members, except their own word. In this respect, based on the principle of good faith recognized by the GVL, in the cases of disappearance, credibility must be given to the statement of the victims provided there is no compelling evidence that casts doubt on their version of the facts. In this way, the principle of good faith requires giving credibility to their statement in all cases where there is no strong reason to doubt their statement. Based on the right to truth of victims of disappearance, if a person appears before the prosecutor requesting to be recognized as a victim in a preliminary investigation, the authority must give that person access to the investigation as long as the investigated acts have some connection with the statement of the victim on the disappearance of their relative.

The First Chamber decided this case with the unanimous vote of the five Justices Norma Lucía Piña Hernández, Arturo Zaldívar Lelo de Larrea, José Ramón Cossío Díaz, Jorge Mario Pardo Rebolledo (reserved the right to issue a concurring opinion) y Alfredo Gutiérrez Ortiz Mena.

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### EXTRACT OF THE DECISION

p. 1 Mexico City. The First Chamber of Mexico's Supreme Court of Justice (the Supreme Court), in session of March 2, 2016, issues the following decision.

#### Background

p. 9 The facts resolved in this decision originate from the discovery in 2011 of at least 120 bodies in various clandestine graves in the Municipality of San Fernando, Tamaulipas. The persons who filed the injunction are relatives of

migrants who, after leaving El Salvador to travel to the United States (US), disappeared within Mexican territory and presumably were found dead in the clandestine graves of Tamaulipas.

In March 2011, CAOP and MARA departed their homes from different cities in El Salvador to go to the US in search of work and a better life.

- p. 58-59 In February 2012, after several months without having contact with CAOP and MARA, their relatives received telephone calls from the staff of the Foreign Affairs Ministry of El Salvador and the Attorney General's Office of that country, in which they were notified that their relatives' bodies had possibly been identified in the clandestine graves of San Fernando, Tamaulipas. In both cases the relatives of the presumably missing migrants requested to participate in different actions with the Mexican authorities to attempt to identify the bodies of CAOP and MARA.
- p. 11 In February 2013, BPO and AYRA, relatives of the migrants presumably missing requested the Mexican Attorney General's Office (PGR) to recognize them as victims in the preliminary investigation related to the clandestine graves in San Fernando, Tamaulipas. They also requested the cremation of the bodies of their presumed relatives be stopped and to receive a copy of all the information and expert witness testimonies in possession of the prosecuting Mexican authorities.
- p. 11-12, 27 The Assistant Prosecutor Specialized in Investigation of Organized Crime of the PGR clarified that there was no cremation order. He also denied them access to the information requested from the preliminary investigation.
- p. 1-3 In May of 2013, BPO and AYRA filed an injunction for judicial review relieving an un-remediated breach of rights (*amparo indirecto*) against various authorities in Mexico challenging the possible cremation order of the remains found in the clandestine San Fernando graves that may belong to their relatives. The injunction was also filed against the PGR due to their refusal to recognize them as victims in the preliminary investigation and

the remains found in the clandestine San Fernando graves that may belong to their relatives. The injunction was also filed against the PGR due to their refusal to recognize them as victims in the preliminary investigation and provide access to information in the case file. The civil association FJEDD also participated in the injunction claiming the right to truth. In their claim, the affected parties indicated that the actions of the PGR violated their rights to truth and access to justice, as well as the right to know and due process, contained in Articles 1, 14, 16 and 20 (subsection C) of the Constitution, as well as the related articles contained in the American Convention on Human Rights (ACHR), the International Convention for the Protection of All Persons from Forced Disappearance and the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families and the International Covenant on Civil and Political Rights.

- p. 13-14 In September 2013, a district judge in Mexico City issued a decision dismissing part of the proceeding and denying the injunction. The decision also issued a third aspect granting the protection of Federal Justice to one of the affected parties. After an appeal and the reinstatement of the original injunction, a new decision was issued dismissing the possible cremation order and granting the injunction to BPO and AYRA so that, among other things, their possible status as victims within the preliminary investigation could be adequately considered. The decision also upheld the denial to recognize the standing of the civil association FJEDD to participate in the injunction.
- p. 6-7 Disagreeing with the decision, the parties filed an appeal. The collegiate court of Mexico City that processed the appeals asked this Supreme Court to exercise its authority to assert jurisdiction. This Court asserted its jurisdiction considering that this matter was important for identifying when a person has the status of victim and from what moment that status should be recognized. This is particularly important for purposes of having the right to access the case file of a preliminary investigation as well as for determining if the relatives of the victims may also be considered victims and injured parties with respect to the investigation of the facts.

### Study of the merits

- p. 25 Having resolved the preliminary questions in the study of this case, the grievances stated by the parties will now be analyzed.

### The existence of the cremation order

- p. 27 This Court upholds the decision of the district judge dismissing the suit with respect to the possible cremation of the bodies of the relatives of BPO and AYRA because both the Specialized Assistant Prosecutor and the prosecutor denied that the cremation order existed and there was no other evidence that disproved this denial.

### The standing of the Civil Association FJEDD

- p. 28 In its grievances with respect to the decision of the district judge not to recognize its standing, the civil association FJEDD stated that society in general can demand the right to truth both individually and collectively. This Court considered these arguments unfounded based on the following considerations.
- p. 28 First, it is specified that this matter was presented on May 8, 2013, and therefore it is governed under the Amparo Law in force and based on the parameters established in the reform of Article 107, section I, of the Federal Constitution, published June 6, 2011.
- p. 30 The Plenary of this Court, when resolving the Contradiction of Thesis 111/2013, concluded that to resort to the injunction trial, there must be a specific impact on the rights of persons or a community, appreciated under a parameter of reasonability, and not just a simple possibility, given which, a possible decision of constitutional protection would imply obtaining a determined benefit, which would be the immediate result of the decision that is ultimately issued.

- p. 38-39 This Court considered that the civil association FJEDD cannot argue the existence and violation of a subjective right related to the responses given by the defendant authorities to BPO and AYRA with respect to their petitions to be recognized as victims in the preliminary investigation since they do not generate any immediate and direct impact on the association's legal sphere. Regarding the grievances related to the right to truth of the civil association FJEDD, a differentiated situation is not identified that empowers it to participate in the injunction trial, nor is a specific link identified between its right to truth and its purpose as an organization; on the contrary, there is only a possible generic impact.
- p. 39-40 This Court did not observe that the activities that are contemplated in the bylaws of the civil association FJEDD place it in a special situation in relation to the public order, as is required to prove its interest in participating in this case in the injunction.

Furthermore, preventing FJEDD from having access to the injunction does not prevent it from fulfilling its purpose as an organization, since in any case it could act in representation of the victims, but not in its own name.

### **The right of relatives of the victims to have access to the preliminary investigation**

- p. 41 This Court considered that the district judge did not overreach his functions when ordering the PGR to analyze if the relatives of MARA had the status of victim in the preliminary investigation.

This is because while the relatives of MARA did not request at any time to be considered victims in the proceeding, for the Supreme Court it is clear that the request of a member of the family to be codefendant in the preliminary investigation and to contribute evidence for the identification of their missing relative. This implies being recognized as a victim or injured party since the status of codefendant is recognized constitutionally as a prerogative of the victims of the crime.

To support this decision this Court holds that section II of part C of Article 20 of the Constitution establishes as rights of the victim or the injured party to “be a codefendant to the Prosecutor; to receive all the information or evidence there is, in both the investigation and the process; that the corresponding procedures be conducted; and to intervene in the proceeding and file the appeals in the terms the law establishes”. With very similar drafting, this right is accommodated in section II part B of Article 20 in its drafting prior to the constitutional reform of 2008 in criminal matters. This provision was applicable to this case, since they were acts that occurred before the entrance into force of the adversarial criminal justice system.

- p. 43 According to the above, this Court understands that the petition of a relative of the direct victim of a crime to be permitted to be codefendant to the public prosecutor; it also implies the request to be recognized as a victim or injured party of the crime.

Secondly, the Court analyzed the grievance of the affected parties that the district judge, instead of ordering the analysis by the prosecutor of their petition for recognition as victim, should have recognized that right within the decision of the injunction (*amparo*) itself. This Court considers this argument well-founded.

- p. 44 This Court recognized that this was a complex case, to which not only the constitutional framework on the rights of victims in criminal processes was applicable, but also the Inter-American doctrine on the right to truth that victims of violations of human rights have and various provisions of the General Victims’ Law related to the victims of disappearances in Mexican territory.

- p. 44-46 Those affected in this case expressly requested that their entitlement to the rights “of the victim or the injured party” that was contemplated in the Constitution before the constitutional reform of 2008 in part B of Article 20 of the Constitution and that is currently found with very similar drafting in part C of the same article, be recognized. It is important to remember that

the PGR denied them access to the information in the preliminary investigation of the clandestine graves in Tamaulipas because it was considered that BPO and AYRA did not have their status recognized in the investigation.

- p. 46 Specifically, with respect to BPO, the Assistant Prosecutor Specialized in Investigation of Organized Crime indicated that among the 120 bodies found in the clandestine graves of San Fernando, Tamaulipas, there was no positive identification of CAOP, and that their remains were not located in the facilities of the PGR.
- p. 47 For this Court, the reasoning of the district judge, that in order to recognize the status of victim for BPO and permit access to the preliminary investigation it was necessary to show that there was a genetic correspondence with one of the bodies found in the graves in Tamaulipas, is incorrect.

It is not possible to demand proof of genetic correspondence as an essential requirement for the relatives of a migrant reported as disappeared in Mexican territory to have access to the preliminary investigation as victims. This determination would be incorrect considering the Inter-American doctrine on the right to truth of the victims of violations of human rights and Articles 5, 7, 19 and 20 of the GVL on the rights of the victims of disappearances.

- p. 47,51 This Court emphasized the importance of analyzing this decision from the point of view of international human rights law and, specifically, the Inter-American precedent, because to deny the affected parties access to the investigation in cases such as this could be a violation of the human rights of the victims.
- p. 47-49 This is because in the development of the Inter-American precedent, the concept of victim has been expanded to cover persons who initially would not have been considered as such and the relatives of direct victims of human rights violations have also been recognized as entitled to the right to truth. This implies that those affected should have ample possibilities to be

heard and act in the respective processes; this applies to fact finding, the punishment of those responsible and in search of due redress.

- p. 50 In this same regard, the Inter-American Court of Human Rights (IACHR) has also indicated that the states have the obligation to adopt “institutional designs that permit this right to be realized in the most appropriate, participative and complete form possible” so the victims and their relatives do not face legal or practical obstacles that make their right to truth illusory. In addition, the same court clarified that the participation of the victims in the investigation of the facts must be guaranteed in all the stages of the respective process and they must be permitted “to formulate their claims and present probatory elements and have them analyzed completely and seriously by the authorities before whom the facts, liabilities, penalties and indemnities are decided”.

In the case *Radilla Pacheco v. México*, the IACHR restated that “the States have the obligation to guarantee that during all stages of the corresponding proceedings, the victims can present arguments, receive information, provide evidence, make allegations, and, in synthesis, defend their interests”, in the understanding that such participation “shall seek a fair trial, the knowledge of the truth of what happened, and the granting of fair reparations”. Similarly, in *Fernández Ortega et al. v. México*, it indicated that the participation of the victim in criminal processes is not limited to the mere redress of the damage but, primarily, to enforcing their rights to know the truth and to justice before competent courts.

- p. 51-52 In this same regard, in the GVL the term “victim” is used to refer to both the persons who feel an impact because of a crime and the persons that suffer a violation of their human rights.

While in this specific case the relatives of the missing persons claimed the right to be recognized as victims in a preliminary investigation, denying them access to the investigation in cases such as this can be presumed to be a violation of the human rights of the victims.

Like the Inter-American precedent in this matter, the GVL also distinguishes between direct victims and indirect victims. Article 4 identifies as direct victims the “individuals that have suffered some economic, physical, mental, or emotional damage or harm, or in general any endangerment or injury to their legal interest or rights as a consequence of the commission of a crime or violations of their human rights.” In contrast, according to the second paragraph of that article, *indirect* victims would be “those relatives or those individuals who are directly responsible for the victim that have an immediate relationship with him or her”. However, the same Article 4 indicates that “the status of victim is acquired with the evidence of the damage or harm to rights”, *damage* being understood as established by Article 6 of the same law: the “[d]eath or bodily injuries, damages or losses, moral and material, except the property of the person responsible for the damages [...]”, among other impacts. Therefore, the Supreme Court noted the difficulty of providing evidence of the existence of damages in cases such as this, especially given the fact that the missing persons are migrants that entered into Mexican territory irregularly.

p. 52-53 Thus, the Court concluded that in these cases and given the circumstances in which the acts occurred it is highly likely that the indirect victims do not have any means of evidence that corroborates this circumstance, except their own word.

In this case, the victims reported the disappearance of persons of Salvadoran nationality who did not reside in Mexico and who were likely to have entered Mexican territory with an irregular migratory status. Therefore, it is clear that in these situations, to require the victims to prove with a high degree of corroboration that a relative has suffered a violation of their human rights or suffered an injury to their legal interests as a consequence of a crime becomes a practically impossible task. The relatives of migrants that attempt to report their disappearance in foreign territory usually can only state that they have not received any communication with the person for some time, and therefore, they presume he or she is missing.

- p. 53 In this respect, it is necessary to consider that Article 5 of the GVL establishes that the mechanisms, measures and procedures established in the law itself will be designed, implemented and evaluated applying, among other things, the principle of good faith. That provision indicates that “the authorities will presume the good faith of the victims”. Thus, based on this principle, this Court understood that, in the cases of disappearance, in which it is very complicated to prove the harm suffered by the direct victim, credibility should be granted to the statement of the victim, provided there is no strong evidence that casts doubt on their version of the facts.
- p. 54 The Court also emphasized that the GVL contains specific provisions on the right to truth of the victims in cases of disappearance, such as Article 19, which clearly shows the mandate of the legislator to recognize the relatives of the disappeared as victims, without prejudging the reason for that disappearance.
- p. 54-55 Based on the above, this Court considered that, in cases like this one, to demand the proof of genetic correspondence as a requirement to have access to the preliminary investigation as victim is incorrect in light of the Inter-American doctrine on the right to truth of the victims of violations of human rights and the provisions in the GVL with respect to the rights of the victims of disappearances.

Thus, in situations where the victim reported the disappearance in Mexican territory of a relative that is a migrant, the principle of good faith requires giving credibility to their word in all cases in which there is no strong evidence to cast doubt on their statement. In this way, based on the right to truth of the victims of disappearances, if a person appears before the prosecutor requesting to be recognized as victim in a particular preliminary investigation, the authority is obligated to give them access to the investigation. This continues as long as the investigated facts have some connection with the story of the victim around the disappearance of their relative, such that the information in the preliminary investigation can serve to inform the victim of what happened to the person.

- p. 55 This Court considered therefore that the recognition of a person as victim in a preliminary investigation not only grants them the possibility of physically accessing the case file, but also includes the right to obtain simple copies of the records in the investigation.
- p. 57-58 Based on the above, this Court concluded that the Assistant Prosecutor Specialized in Investigation of Organized Crime of the PGR should have on the one hand applied the principle of good faith when he analyzed the petition of the affected parties, specifically for the type of damage and harm they alleged, which is to say the disappearance of a relative that was a migrant in an irregular situation inside Mexican territory; and, on the other hand, he should have recognized them as victims in the preliminary investigation so that they could have access to the existing information and know what occurred with their relatives. This is in accordance with the right to truth that victims have, contained in Articles 8 and 25 of the ACHR and in various provisions of the GVL.
- p. 58-59, 64 Additionally, this Court stated that from the records that were remitted by the Assistant Prosecutor of the PGR when rendering his answer to the complaint in the injunction trial, there were elements to consider that a relationship of kinship existed between the affected parties and the two persons whose bodies were found in the graves of San Fernando, Tamaulipas.

### Decision

- p. 64-65 The appealed decision is upheld regarding the dismissal of the injunction against the cremation order and in relation to the dismissal of the injunction for lack of standing of the civil association, FJEDD. The appealed decision was amended, the injunction and the protection of federal justice is granted to AYRA and BPO that the Assistant Prosecutor may recognize them as victims in the preliminary investigation. This permits them to have access to the cited investigation and issue the copies requested by the affected parties.



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## CONSULATE PROTECTION AND PROVISION OF SERVICES. Florence Cassez Case

### Action for Constitutional Relief Through Direct Injunction (*Amparo Directo en Revisión*) 517/2011<sup>48</sup>

**Keywords:** *right to consular notification, contact, and assistance, right to be brought immediately before the public prosecutor's office, right of the presumption of innocence, right of adequate defense, right to due process, Vienna Convention on Consular Relations, foreign persons subject to criminal proceedings, poisonous effect, corruptive effect.*

#### Summary

Florence Marie Louise Cassez Crepin (Florence) and her boyfriend were arrested and taken to a ranch where the police staged their detention and the rescue of the kidnapped victims. That operation was livestreamed on national television as if it were happening at that moment. Both Cassez and her boyfriend were asked questions for the T.V. and they were singled out as members of a criminal gang. The images circulated widely throughout the country. Later, under diverse scrutiny,

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<sup>48</sup> Decision issued by the First Chamber of Mexico's Supreme Court of Justice (January 23, 2013). Reporting Justice: Olga Sánchez Cordero De García Villegas

the investigative authority admitted that it had staged the event to satisfy the media's interest in their job. Florence was sentenced to 60 years of prison. She filed a direct injunction (*amparo directo*) against this decision. She considered that her rights violated specifically regarding access to consular assistance, to be brought immediately before the *Ministerio Público* (*public prosecutor's office*) and of the presumption of innocence. Nevertheless, the Collegiate Court denied the injunction (*amparo*). Florence challenged this decision by filing an appeal (*recurso de revisión*), which was granted and heard by Mexico's Supreme Court of Justice (this Court).

### Issue presented to the Supreme Court

Whether there was a violation of the fundamental rights to consular notification, contact, assistance, the right to be brought immediately before the Public Prosecutor (*Ministerio Público*), and a right to the presumption of innocence. If so, this Court determines the consequences in the criminal process and the scope of its effects.

### Holding and vote

The injunction (*amparo*) was granted essentially for the following reasons. This Court determined that there was a violation of the right to be brought immediately before the Public Prosecutor (*Ministerio Público*). After Cassez was detained, she was held and taken to a ranch under the argument that they were going to liberate kidnapped victims. In reality, the detaining authorities staged the detention and thus, violated that right. Also, the content of the right to consular assistance was analyzed and the Court concluded that it was violated. This right entails an immediate communication to establish contact between the foreign national and the consular authorities. In the present case that did not happen until after thirty-five hours. This infringement transcended to Cassez's right to defense because she did not receive technical assistance or any other aid that stems from this right of instrumental character in order for the person to learn about the accusation and make decisions regarding her defense. Furthermore, these two breaches of Florence's rights contributed to the staging of the events, followed by a narrative in the media against her and public treatment as a guilty person, violating her right to the presumption of innocence, which in turn caused a poisonous effect in all the procedure. The testimonies against her cannot be considered due to the infringement of the right to the presumption of innocence, as a procedural

rule, because the detaining authorities influenced the victims and used them in staging the events; hence the victims' statements provided to the authorities were not reliable. Therefore, the totality of the process was seriously affected, and with it, the compliance of the right to due process. Consequently, this Court ordered Florence's release from prison.

The First Chamber decided this matter by the majority of three votes of Justices Olga Sánchez Cordero de García Villegas, Arturo Zaldívar Lelo de Larrea (reserved the right to draft a concurring opinion), and Alfredo Gutiérrez Ortiz Mena. Justices José Ramón Cossío Díaz (reserved the right to draft a particular opinion) and Jorge Mario Pardo Rebolledo voted against.

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### EXTRACT OF THE DECISION

p. 1 Mexico City. The First Chamber of Mexico's Supreme Court of Justice (this Court), in the session of January 23, 2013, issues the following decision.

#### Background

p. 1,20 On August 30, 2010, Florence Marie Louise Cassez Crepin (Florence) filed an injunction (*amparo*) against the sentence imposed by a unitary court. A collegiate court confirmed the sentence and denied the injunction (*amparo*).

p. 20-21 Cassez was sentenced to 60 years of imprisonment for the crimes of kidnapping, carrying and possessing a firearm of the exclusive use of the Army and infringement of the Federal Law against Organized Crime [Ley Federal contra la Delincuencia Organizada].

p. 21 Cassez challenged the collegiate court's decision denying the injunction (*amparo*) by filing an appeal (*recurso de revisión*). On March 10<sup>th</sup>, 2011 this Court addressed the matter.

p. 33, 36 The main facts considered in the case are the following. As part of an investigation, the federal police found evidence that some people had been

kidnapped and illegally held at a ranch. At 4:00 a.m., on December 9, 2005, federal police officers launched an operation in the ranch's surroundings. At 4:30 a.m. the federal police arrested Florence Cassez and her boyfriend on a federal highway close to the ranch.

p. 38-39

At 6:47 a.m., a daily news program broadcasted on a national TV channel, was abruptly interrupted to transmit a live report. A reporter from said channel was outside the ranch, from where he informs that the Investigative Federal Agency (*Agencia Federal de Investigación*, AFI) was about to “hit hard over the kidnapping industry.” The reporter announces that they are broadcasting “practically live” while a banner on the screen displays “live.” The reporter tells the news anchor the police are trying to rescue three people: a woman, her 8-year-old child and a man. Furthermore, the reporter informs that “the gang’s chief is a man married to a foreign woman.”

p. 40-41,  
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Inside a cabin in the ranch, the camera streams the boyfriend, submitted and handcuffed by the federal agents. The camera zooms on his face while the reporter informs that he is showing the kidnapers. Next, the camera shows a couch with high-caliber rifles labeled by the reporter as the weapons they used to kidnap. Then, a woman covering her face –Florence Cassez– is shown. The reporter states that “...she is a foreign woman. She is the wife who helped in planning the kidnapping.” Then Cassez says to the reporter that she has nothing to do with it, that she is not his wife, that he is her ex-boyfriend, that she did not know anything and that she was staying at the ranch while she could find an apartment. Around 6:50 a.m., the reporter interviews the rescued people in the police operation.

p. 47-48

A reporter from another TV national channel introduces Florence Cassez to the audience as “another woman who was part of this kidnapping” and proceeded to interview her. Florence affirms she has nothing to do with it, that she was not in the ranch and was arrested in the street. The reporter closes by saying that, despite Florence’s statements, “it is evident that she was in this property and was part of the kidnapping gang.” A different news anchor repeats information about Florence and affirms that “the people who were kidnapped there recognized Florence as the person who fed them.”

- p. 59-61 At 7:40 a.m., the reporter accuses them of being involved in nine other kidnappings. At 7:50 a.m., the news anchor says that pictures of both alleged kidnappers will be displayed and asks the audience to report them to the authorities in case someone recognizes them.
- p. 65 At 10:16 a.m. –five hours and forty-five minutes after the arrest, according to the time indicated in the police report– Florence and her ex-boyfriend were brought to the Office of the Assistant Attorney General for Special Investigations in Organized Crime (*Subprocuraduría de Investigación Especializada en Delincuencia Organizada, SIEDO*).
- p. 65-66 The news of the operation, the victims' rescue and the detention of the alleged kidnappers were replayed by the most-watched news channels in the country. The media recreated kidnappings, showed images of the reunions between the victims and their family members as well as interviews with neighbors of the ranch.
- p. 69-71 On February 5th, 2006, the Director-General of the AFI and the head of Special Investigations and Kidnappings of the Federal Attorney General's Office (*Unidad Especializada en Investigación y Secuestro de la Procuraduría General de la República, PGR*) were interviewed in a national TV channel. The host journalist started by pointing out that there were contradictions regarding the detention date. The journalist was informed that Florence was listening and wanted to "go live." While "on air," Florence stated that she was detained on December 8, 2005, on the highway and "was kidnapped" in a van, stressing that, it was false that her detention had occurred on December 9. She assured that her detention occurred at 11:00 a.m. and that she was held in custody that day and part of the next. Finally, at 5:00 a.m., on December 9<sup>th</sup>, 2005, she was forced to enter into the ranch's cabins by the police using force and hitting her. The Director-General of the AFI added that, "the media arrived after the events took place and at the reporters' request, "the authorities showed them how they came in the ranch and how were the victims rescued."

- p. 71-73 During a press conference convened by the PGR, on February 10<sup>th</sup>, 2006, the Federal Attorney General, the Assistant Attorney General for Special Investigations in Organized Crime, and the head of the AFI clarified that the media was not present during the detention of the accused nor at the moment of the victims' liberation. The Assistant Attorney General for Special Investigations in Organized Crime declared that the success of the victims' release cases provided by the AFI brought up the media's interest. In this logic, he accepted that the videos streamed on TV did not reflect the actual moment of the detention nor the victims' rescue because it would have been irresponsible that the media had joined the agents at that moment. He clarified that this kind of TV streaming did not affect the process legally because it was not relevant. The Director-General of the AFI affirmed that there were no media at the time of the rescue and that the staging was made at the media's request in order to show them how the entrance to the security house happened.
- p. 73 The facts above represented the public acknowledgment that the broadcasted videos were staged and did not constitute actual live streaming. This public recognition caused a significant media impact.

### Study of the merits

#### Right to consular notification, contact and assistance

- p. 79,81 The right of foreign nationals to consular notification, contact, and assistance is a fundamental right enforced in our country. Our legal system recognizes the rights embodied in Article 36 (1) of the Vienna Convention on Consular Relations (the Convention) which is the result of an international consensus: foreigners face particular disadvantages when detained by an authority and subjected to a criminal process under the norms of a foreign legal system.
- p. 81-82 Article 36 not only grants the right for the consuls to communicate and assist their nationals in detention but also comprises the fundamental right

of the foreigners to be immediately informed that they have the right to communicate with their respective consulate and to receive assistance if so requested.

- p. 82 The consular assistance provides at least three basic actions: of humanitarian nature because consuls offer contact to the external world and take care of their essential needs; of protection because the presence of consuls helps mitigate acts against human dignity or that jeopardize the criminal process; and the technical legal assistance.
- p. 83 Also, consular assistance reduces the gap that separates foreign nationals from nationals regarding the protection of a minimum standard of rights. Consular assistance is vital to secure an adequate defense where violations of foreign nationals' fundamental rights are common due to a lack of knowledge of the legal system in which they find themselves immersed. A detained foreigner faces a multitude of linguistic, cultural, and conceptual barriers that make difficult her ability to understand, fully and comprehensively, the rights she is entitled to as well as the situation she is going through.
- p. 86-87 It is necessary to establish the specific rights that derived from Article 36 of the Convention. First, there is an obligation to inform the foreign national of her right to communicate with the consular office or a consular representation of her country. The information must be immediate and cannot be delayed under any circumstance. Second, she has the right to choose, if desired, to contact or not their respective consulate. Third, if the detained selects to contact the consular office, then the authority shall inform closest consular office about the situation. This communication must be immediate and made through every means possible. Lastly, the authorities must guarantee the communication, visitation and contact with the foreign national and the consular office of her country so that the consulate may provide immediate and effective assistance; this represents the consular assistance *strictu sensu*.
- p. 87 The aim of the right to consular assistance is to assure the effective application of the principles of equality of the parties and confrontation that underlie the

criminal process in order to avoid imbalances or limitations in the defense of the foreign national. In this logic, consular assistance guarantees the correct development of the process and a structural requirement of it. Thus, foreigners' fundamental right to consular assistance cannot be conceived as a mere formal requisite. To impede a foreign national the possibility of bridging a gap in the process through the means provided by Article 36 not only limits but make impossible the satisfaction of the right to an adequate defense.

- p. 88 Consular officers shall make sure that the foreign national not only be informed about the accusation and her rights but also that the person fully understands them. In order to consider that a foreign national was informed in a free and conscious manner about these issues, it is indispensable that the element of cultural idiosyncrasy be covered.
- p. 89 In some legal systems, statements made to the police and cooperation with the investigative authorities may be considered, throughout the process, as a sign of good faith from the detainee. On the contrary, it is recommendable that the accused not utter a word in other systems until he is before a judge. Likewise, in some legal systems, cooperation with the police and stipulation to some facts may lead, in the future, to a reduced sentence. In others, the spontaneous confession of the accused is irrelevant. These decisions may only be considered once the consular officers have provided effective technical assistance.
- p. 90 Hence, it is not a rule that can be conceived as a mere formal requisite of process, but rather, it is a Human Right with diverse objectives and scopes. It is a norm specially applied to criminal proceedings against foreigners. Its function is to introduce to legal operators the notion that proceedings against a noncitizen are necessarily a situation of potential legal insecurity if acting without considering this right.
- p. 91,93 Therefore, the consular officer's presence guarantees protection against the legal insecurity that can logically be produced by being subjected to an unfamiliar and possibly unknown legal system. It is intended that consulates

guarantee legal security and take part in the perspective between the legislators that articulated the process and the person's diverse cultural perspective facing a criminal procedure in the foreign country. Therefore, its non-compliance significantly affects the validity of the criminal actions that ignore it.

- p. 93-94 The fundamental core of the right of a foreign national to an adequate defense may be precisely observed, not only in the designation of a legal expert, but also in the effectiveness of the defense; meaning, that defense provided immediately after the detention. In case the assistance occurs at a point in the process where it is no longer relevant, then it will result in a mere declaration of good intentions.
- p. 94-95 The importance of this right stems from the fact that it is a right that is instrumental in defending the foreigner's other rights and interests. The foreigner's opportunity to be heard publicly, with complete equality and justice, before an independent and impartial court, absolutely depends on the prior presumption that the defendant received real and effective assistance from the members of the diplomatic office of her country.

### **Right to be immediately brought before the Public Prosecutor**

- p. 95,97 This right is recognized in the Federal Constitution. An undue delay happens when, without having reasonable cause that makes it impossible for the authorities to immediately bring the detained person to the Public Prosecutor (*Ministerio Público*), the detainee remains with the apprehending authority and is not surrendered to the competent authority to determine her legal status. Said reasonable causes may only be based on factual, real, verifiable, and, particularly, lawful impediments.
- p. 97-99 This entails that police agents cannot hold a person for a period longer than the strictly necessary to transport her to the public prosecutor's office where all pertinent and immediate investigations may be conducted to determine the legal status of the detainee. The police cannot simply hold a person to obtain a confession or information related to the investigation, to incriminate

her or others. This right is the most significant guarantee against illegal police actions destined to exert pressure or to influence the detainee in an environment that is totally against her. Under this logic, the courts must make a strict exam of the case's circumstances. In Cassez's case, the period between the detention and the moment she was brought to the Public Prosecutor resulted in an unconstitutional deprivation of liberty.

**Violation of the right to be brought immediately before the Public Prosecutor and of the right to consular assistance**

- p. 107-108 It was argued that the reason for Florence not being immediately brought before the public prosecutor was justified by the need to protect the life and integrity of the victims and, in any case, despite the fact that the staging was reprehensible; it was not taken into account for the sentencing. The court considers that, even conceding – which the court does not – that the justification to go to the ranch with Florence to release and protect the victims was real; the fact is that there is no constitutional justification that accounts for the time in which Florence was retained at the property and exposed to a planned staging conducted by AFI with the purpose of exposing her as the person responsible of three kidnappings.
- p. 108-109 Indeed, the reasons or justification as to why an authority keeps a detained person for a longer period have to be considered. However, in this case, the police actions were not laudable, but rather contributed to the manipulation of facts and circumstances of the investigation. It is impossible to conclude that the police's actions are not relevant because it is evident that the illegal staging brought a series of significant infringements to her rights, which then had a complex impact on the process. Hence, this Court determines that the detainee suffered a violation of the right to be immediately brought before the public prosecutor.
- p. 109-112 Regarding the fundamental right to consular notification, contact, and assistance, this Court considers that in the present case there was a violation of the fundamental right contained in Article 36 of the Convention. The record

shows that she was not informed of her right to communicate with the consular office when she was detained, nor that the authorities had contacted the consulate directly.

- p. 113-115 The authority must favor consular communication through all the means at its disposal. It is not relevant that the detention was carried out during non-working hours, since the consulate has emergency telephones. Indeed, the authority provided an excuse stating that, hours after her detention, at the public prosecutor's office, a call to the consulate was placed at 3:05 p.m. and a recording indicated that office hours had already ended. The authority that practiced the detention should have had an institutional, direct, and immediate coordination with the Ministry of Foreign Affairs, custodian of the diplomatic delegations' records, as well as of the contact details of embassies and consulates. In any case, the violation lasted until 12:20 p.m., on December 10, 2005, the moment where at least the public prosecutor's agent managed to communicate with the consulate. Between 4:30 a.m., on December 9, and 3:45 p.m., on December 10, 2005, where the first consular contact between Florence and the consular agent was made, she did not receive consular assistance.
- p. 115-116 This makes 35 hours that shaped the criminal process and that the events that took place could have been avoided if consular assistance was provided. During this period, Florence was taken to the ranch; the staging of the events was planned and executed by the authorities to involve her in the crimes. Later, she was taken to the public prosecutor's office, where she made her first statement and the authorities disseminated to the media the recorded scenes.
- p. 116-117 Effective consular assistance may only be that that is provided when immediately after detention and not in another moment of the process where it is empty of content. It is in the moment of arrest that understanding the accusation, the rights that assist her, the criminal system, the effects of the first declaration before the authorities, as well as the decisions to be taken related to the contact or hiring a local attorney to establish her defense,

become conclusively relevant to avoid the state of defenselessness. Thus, it is incompatible with this interpretation the argument that consular assistance is not necessary before her first statement to the authorities. Rather, it is a constitutional requirement to preserve her rights of defense. Because of these reasons, this Court determines that in this case, there was an infringement of the right to consular notification, contact, and assistance.

- p. 118 There are cases where the material violation of a fundamental right brings together practical consequences that consist of the total deprivation of the defense as well as a real and effective prejudice to the affected person's interest. This case is one of them. This Court faces a very particular case in which the violation of fundamental rights to the consular assistance and to be immediately brought before the public prosecutor produces, by themselves, a total defenselessness of the defendant here. Moreover, in this particular case, this defenselessness was not only the product of said violations, but those violations produced a devastating effect on other fundamental rights, namely the presumption of innocence and adequate defense.
- p. 120-121 Said violations to the fundamental right to the consular assistance and the fundamental right to be immediately brought before the public prosecutor were the causes that led, favored, and prepared the field for the police to organize and carry out the staging contrary to the actual events. The police clearly and appallingly violated Florence's fundamental rights and decided to continue with their conduct contrary to the Constitution by setting-up a scenario through which they could incriminate Cassez of three kidnappings. That staging has direct and immediate repercussions to the violation to the fundamental right to the presumption of innocence.

### **Fundamental right to the presumption of innocence**

- p. 121-122 The recognition of the right to the presumption of innocence by the Federal Constitution links all of the public powers and it is of immediate application. Besides being a principle or criterion in the criminal statutes, it is, above all else, a fundamental right.

- p. 124-125 Its scope transcends the orbit of due process. It also applies in extra-procedural situations and constitutes the right to receive the consideration and the treatment of “not being author or participant” in the crime until proven guilty. Therefore, it grants the right not to apply the consequences to such events until after a determination as to the culpability of a person is made. It has a triple meaning: as a rule of treatment, as a probatory rule and as a trial rule or probatory standard in the process.
- p. 126 As a probatory rule, it establishes requirements that the probatory activity must comply with and the characteristics of the means of proof must have in order to be able to consider that a valid prosecutorial proof exist in order to destroy the innocence status. Consequently, not just any evidence may undermine the presumption of innocence, but it must be practiced in accordance with certain guarantees and in a certain way to comply with that purpose. In this regard, there must exist prosecutorial evidence, that is, evidence about the existence of the crime and the accused’s responsibility. This evidence had to have been provided by the prosecutor’s office and within constitutional principles and that rules its practice.
- p. 126-127 As a trial rule or probatory standard, it can be understood as a norm that orders the judges to acquit the accused when sufficient prosecutorial evidence has not been provided to prove the existence of the crime and the person’s criminal responsibility. This rule so understood applies at the time of assessing the evidence.
- p. 128 As a rule of treatment in this extra-procedural aspect, it constitutes a right to receive the consideration and treatment of a non-author or non-participant in criminal acts and determines, therefore, the right not to apply the consequences or legal effects to the acts in question. Simply put, the Constitution does not allow early sentencing. The violation of this aspect can stem from any State agent, especially from the police.
- p. 128-129 The Federal Constitution grants a series of rights that aim to guarantee a fair trial. Nevertheless, they are worthless when the authorities carry out actions with the aim to publicly expose someone as responsible. These actions pose

a great risk of convicting the accused ahead of time since the gravity that corresponds to the process itself has been subject to public accusation. Furthermore, it may introduce factual elements that do not correspond with reality, subsequently influencing the tribunal and especially the victims and possible witnesses that may act as evidence against the most elementary rights of the defense.

p. 129-130 The violation of the rule of treatment of the presumption of innocence may influence a process when the manipulation of reality by the police tends to refer to: (i) conduct, credibility, reputation, or criminal record; (ii) the possibility of a confession, admission of facts, a prior statement by the accused or refusal to testify; (iii) the result of examinations or analyses of someone involved; (iv) any opinion regarding the guilt of the detainee; and (v) the fact that someone had identified the detainee, among many others. Thus, in these types of scenarios, the “true trial” was held long before the judge’s appearance. In these situations, the police do not intend to provide information on the case that is being processed before the courts but rather to anticipate or reproduce its development without complying with the guarantees of due process.

p. 135-136 The presumption of innocence is not limited to the actions of the judges. Neither is “public opinion” nor the media who should be accused of recreating the actual events and the anticipated treatment of guilt. It was not the media who detained Florence and did not bring her immediately the public prosecutor’s office, nor who denied her consular assistance and took her to the ranch. AFI Agents and their leadership were responsible to organize and prepare a staging in order to publicize it being that the head of the AFI acknowledged it.

p. 136-137 Cassez was exposed repeatedly and deeply to a spectacle inadmissible in a democratic system of rights and freedoms. For the thousands of citizens who saw and heard it, such a spectacle was the actual judgment of Florence. Any judicial process carried out afterward, in which victims and witnesses

were exposed so thoroughly to this setup, could not be more than a mere formality. Thus, there is a violation to the right of the presumption of innocence as a rule of treatment.

- p. 138 This Court considers that the violation of the presumption of innocence –derived from the violations to the right to consular assistance and to be immediately brought before the public prosecutor– generated in this case a corrupt effect in all the criminal process that poisoned all the incriminatory evidence against the defendant. This Court understands this effect as the consequences of that conduct or set of conducts, intentional or unintentional, on the part of the authorities, which produce suggestive conditions in the incriminating evidence. For the authority's behavior to produce a corrupting effect on the evidence, its action must be improper, that is, carried out outside of all constitutional and legal channels.
- p. 139 The evidentiary material affected by the corrupting effect causes its lack of reliability, a situation that impacts the rights of the accused, since the Constitution protects the right that her conviction is not based on questionable evidence, especially when it is attributable to the illegal actions of the authority.
- p. 139-140 This Court considers that a corrupting effect is clearly observed in the case as a consequence of the undue and arbitrary conduct of the AFI members when exposing Florence to the media as guilty without a trial that clarified her legal situation, in addition to an alleged re-creation of events that never occurred but which, without a doubt, were intended to have an impact on public opinion and all those linked to the process.
- p. 140 The fact that the authorities orchestrated a media performance generated a poisonous effect on the entire process because, in addition to the fact that the entire society was influenced, so were the people involved in the process, obviating the reliability of their statements. This situation is inadmissible and dangerous since the probability of causing an erroneous and irreparable identification against Florence became latent from that moment.

p. 149-150 The corrupting effect that the staging had on the child victim's statement is clear. Despite having been present at the staging that same day –before the public prosecutor– the child declared that he did not recognize Florence neither for her physique nor by her voice. However, after it was established that the streamed recordings constituted a staging, he stated that he identified the voice as that of a woman who had a strange and foreign accent and had put an injection to him during his captivity.

p. 150-151 The victim and mother of the mentioned witness, despite having been present at the staging, that same day before the public prosecutor declared that she did not recognize Florence as one of her kidnappers, indicating that it was the first time she had seen her and that her voice did not match that of the kidnappers.

Finally, she added that AFI officials informed her that Cassez had participated in her kidnapping. Despite this, three days after the staging was exposed, she declared that her son told her that a woman with a strange accent was the one who drew his blood. Seven days later, she stated again before the public prosecutor and, on that occasion, described that she and her son heard a foreign person whose voice, as they recognized in the news, is that of Florence, and identified her as the woman who she heard in the two safety houses.

p. 151-152 The same happened with the testimony of a third party. The same day that the authorities admitted that the images transmitted on television constituted a staging and five days after that information came out to the public light, the witness voluntarily appeared before the public prosecutor to declare that he identified Florence as one of the kidnappers by what he had seen on television.

p. 152 This Court does not rule on the credibility of the witnesses. What is relevant is that the staging is an element that undoubtedly reduces the reliability of their testimonies since exposure to the performance predisposes to judge the reality through the filter created by the authorities. This caused a process of altered recall of the events by having fabricated an alternative reality.

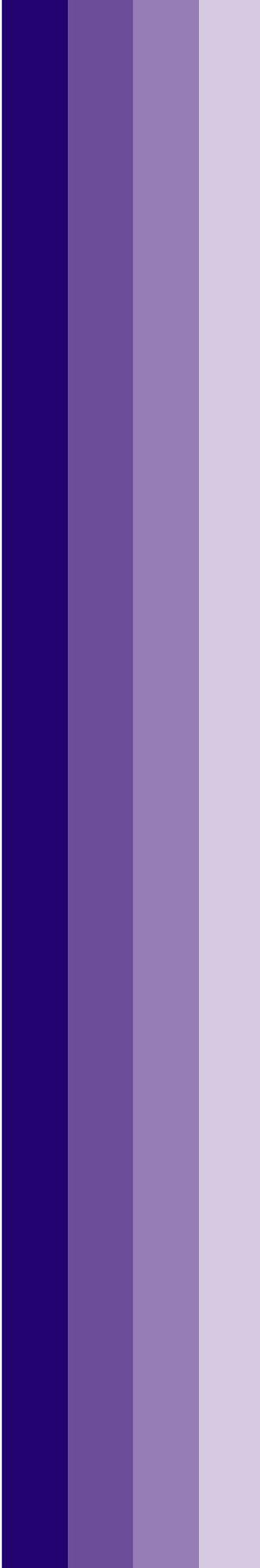
- p. 152-154 A third victim was interviewed at the ranch at least four different times by the media present at the premises. This person recognized the individual who accompanied Florence as one of his captors, but not her. Once at the public prosecutor's office, the victim stated that he recognized her as one of the kidnappers because of her foreign accent and the color of her hair. That same day, at night, the victim gave an exclusive interview for a television newscast where he not only recognized Florence but also gave her one of the main roles within her kidnappers. This person played a leading role in the staging as his "liberation" was accompanied by the constant labeling of Florence as guilty. With regard to his kidnapping, he pointed out three male individuals. Later, however, he corrected himself and pointed out Florence, to whom he attributes active participation. The foregoing produces a lack of reliability in his testimony, vitiated by the influence produced by AFI's undue actions.
- p. 154-155 Therefore, the violations of fundamental rights described above made the content of the statements unreliable since the authority influenced them through the staging. This contravened the obligations arising from the right to the presumption of innocence as a rule of treatment. Before a sentence was pronounced, the AFI carried out acts that, instead of treating Florence as a "non-author" of the commission of the criminal acts, singled her out as the "author" of the crimes before the victims. Thus, the statements were influenced by the authority based on acts contrary to the Constitution.
- p. 155 Regarding the testimonies of federal agents contained in the police report, they are also affected by the aforementioned corrupting effect and, therefore, lack reliability. The document represents the official version of the events that constitute the staging that was streamed on TV.
- p. 156-157 Ultimately, it is clear the probatory material against Florence cannot be considered valid prosecution evidence since it derived from the violation of the fundamental rights to consular assistance and to be brought without delay to the public prosecutor's office, which undoubtedly had a strong

impact on her rights to the presumption of innocence and adequate defense. In this case, the violation of the constitutional principle of presumption of innocence occurred in two tracks: as a rule of extra-procedural treatment and as a probatory rule.

- p. 157 For this reason, this Court considers that the corrupting effect pervaded the entire process, especially in the incriminatory probative material. That material is the basis of every criminal process and which, in this case, was essentially translated into statements of persons that were part of a performance contrary to the reality, who could have been influenced by it. In this case, because the poisonous effect subverted the probatory material, it makes it impossible to determine Florence's guilt.

### Decision

- p. 158-160 This Court considers that the specific circumstances of this case, the violation of the fundamental rights to consular notification, contact, and assistance, to be brought immediately before the public prosecutor and to the presumption of innocence, which permeated the entire process by producing a serious corrupting effect on it, undoubtedly affected the compliance with the fundamental right to the due legal process by the investigating authorities. Therefore, this Court reverses the challenged decision and grants the injunction (*amparo*) and protection of Federal Justice. Consequently, the absolute and immediate liberty of Florence is ordered.



XI. CIVIL AND  
PATRIMONIAL LIABILITY  
OF THE STATE



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“MAYAN PALACE CASE”, PUNITIVE DAMAGES,  
MORAL DAMAGES AND COMPENSATION  
FOR THE NEGLIGENCE OF A LODGING  
SERVICE PROVIDER

*Amparo Directo 30/2013*<sup>49</sup>

**Keywords:** *right to damages, right to a fair indemnification, reparation of damages, rights to equality and non-discrimination, moral damages, fault-based liability, wrongful act, causal link, quantification of indemnification, punitive damages.*

**Summary**

A young man died from electrocution when his kayak tipped over and he fell into the water of a hotel's artificial lake that was negligently electrified. His parents sued the company that owned the hotel and Admivac (the hotel manager). The family seeks indemnification for moral damages, damages and losses arising from civil liability and the court expenses generated by the lawsuit. A trial judge determined the parents did not have standing to sue for damages and losses derived from the civil liability causing the death of their son and ordered Admivac to pay the parents an indemnification of 8 million pesos for moral damages and acquitted the other

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<sup>49</sup> Decision issued by the First Chamber of Mexico's Supreme Court of Justice (February 26, 2014). Reporting Justice: Arturo Zaldívar Lelo de Larrea

company because its liability was not proven. Admivac and the victim's parents filed appeals. The appellate chamber decided to modify the decision, ordering Admivac to pay the parents an indemnification in the amount of one million pesos. The parents and Admivac filed for direct injunctions (*amparos directos*) against said ruling, over which the Supreme Court asserted jurisdiction.

### Issue presented to the Supreme Court

To determine whether Article 1916 of Mexico City's Civil Code is discriminatory, since the last paragraph provides that when determining the amount of the indemnification or compensation for moral damages, the economic situation of the victims must be considered; and whether the amount of the indemnification established in the appeal was lawful.

### Holding and vote

It was concluded that Article 1916 of the Mexico City Civil Code is unconstitutional if it is construed to mean that the amount of the compensation for non-pecuniary (*extrapatrimonial*) consequences arising from the moral damages depends on the economic condition of the victim. It was determined that it is justified to assess this circumstance when determining the reparation of the pecuniary consequences. It was also determined that, given the serious impact on the rights of victims, the high degree of liability of Admivac and its significant financial capacity, the quantity of the indemnification must be equally severe. For the aforementioned, the sought an injunction (*amparo*) was granted to the affected parties so that the appellate chamber may overturn the challenged decision and issue a new one. The new ruling established, in accordance with the guidelines of this ruling, that Admivac pay the parents of the young man an indemnification for moral damages in the amount of \$30,259,200.00 pesos.

The First Chamber of the Supreme Court decided unanimously by five votes of Justices Olga Sánchez Cordero de García Villegas, Arturo Zaldívar Lelo de Larrea, José Ramón Cossío Díaz (reserved the right to issue a concurring opinion), Alfredo Gutiérrez Ortiz Mena, and Jorge Mario Pardo Rebolledo (reserved the right to issue a concurring opinion.)

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### EXTRACT FROM THE DECISION

p. 1 Mexico City. The First Chamber of Mexico's the Supreme Court of Justice (the Supreme Court), in session of February 26, 2014, issues the following decision.

#### Background

p. 7 On September 15, 2010, during the celebrations of the bicentennial of Mexico's independence, a young man invited a group of friends (among them, ASGM and his girlfriend) to join the celebrations at the Mayan Palace hotel in Acapulco.

On September 16, 2010, ASGM and his girlfriend boarded a kayak. While in the boat, they decided to rest in front of some artificial rocks, when turning, the kayak tipped over and both fell into the water, which was electrified. While trying to help them, a friend also fell into the water. With the help of a friend only ASGM's girlfriend managed to get back on the kayak.

p. 7-8 Several guests alerted the hotel staff and asked them to turn off the electricity supplied to the artificial lake. Twenty to twenty-five minutes passed and a hotel employee finally disconnected the lake's electrical power. The late reaction of the employee indicates inexcusable negligence as the electricity was controlled from the lakeshore.

p. 8 With the electricity turned off they managed to get ASGM out of the lake. First aid (resuscitation) was provided by hotel guests who claimed to be cardiologists. During the transfer to the hospital, paramedics established that he had died.

p. 2 By writ filed on February 21, 2011, ASGM's parents brought an ordinary civil suit against Company 1 and Admivac, a stock corporation with variable capital (hereinafter Admivac) for the following claims: **(i)** indemnification for moral damages, for the death of their son; **(ii)** derived from the stric

liability of the defendant, the damages and losses generated as a result of the transfer of their deceased son to the State of Mexico, as well as the funeral and exhumation expenses, which come to the sum of \$77,798 pesos; and **(iii)** court expenses.

On August 9, 2012, a final decision was issued which determined: (i) in relation to civil liability, the lack of standing of the plaintiffs to file a claim for losses and damages resulting from the civil liability causing the death of their son, preserving their rights so they may assert them properly; (ii) in relation to the moral damages, Admivac was ordered to pay the plaintiffs an indemnification for moral damages in the amount of 8 million pesos; and (iii) Company 1 was exonerated of the payment of the indemnification for moral damages, since its responsibility for injuring the plaintiff's rights was not proven, and no special order was made on court expenses.

- p. 3 Admivac and ASGM's parents both filed appeals. On November 28, 2012, the appellate chamber decided to modify the challenged decision to order Admivac to pay the plaintiffs an indemnification for moral damages in the amount of one million pesos.

ASGM's parents and Admivac both filed a direct injunction (*amparo directo*). The injunctions (*amparo*) were sent to a Collegiate Circuit Court.

- p. 3-4 On March 1, 2013, ASGM's parents requested that the cases be referred to the Justices of the First Chamber of the Supreme Court.

By decision of May 29, 2013, this Court determined to exercise its authority to assert jurisdiction over the direct injunctions (*amparos directos*).

### Study of the merits

- p. 38 The concept of moral damages and the type of liability that occurs in this case directly affect the quantification of the indemnification for moral damages and consequently the constitutionality of Article 1916 of Mexico City's Civil Code (hereinafter, the Code).

Under these conditions, in order to determine the constitutionality of Article 1916 of the Code and whether the amount of compensation established by the appellate chamber was lawful, the following will be explained: **(I)** the general framework of the right to reparation of the damages; **(II)** what is moral damage; **(III)** that in this case Admivac was found liable, which gives rise to the reparation of moral damages to ASGM's parents; and **(IV)** the amount of the indemnification.

### **I. General framework of the right to reparation of damages.**

- p. 38-39 According to the theory of civil liability, in accordance with the provisions of Article 1910 of the Code, a person who causes harm to another is obligated to repair it. Harm may be caused by a breach of contract or by the violation of the generic duty of every person not to harm another. The first case is known as contractual liability and the second as non-contractual liability. In turn, non-contractual liability can be fault-based or strict.
- p. 39 Reparation of property or material damage is usually pursued through a civil suit for wrongful acts. However, there are other types of non-pecuniary impacts that have also been granted the right to reparation. This type of injury has been called moral damages.

### **II. Moral damages.**

- p. 42 Moral damages are determined by the non-pecuniary [extrapatrimonial] nature of the impact, which may be the injury of a right or a simple non-pecuniary asset or interest. Thus, it is appropriate to define moral damages as the injury to a non-pecuniary (or spiritual) right or interest that is the premise of a personal right.
- p. 43 The conceptualization of moral damages centers its object and content on the non-pecuniary or spiritual interests that may be affected. In this regard, anguish, affliction, humiliation, suffering, or pain constitute damages to morale in so far as they are impacts to non-pecuniary interests.

- p. 44 As for the types of moral damages according to the interest affected, it can be argued that moral damage is a genus which in turn is divided into three species, namely: (i) damage to honor; (ii) aesthetic damage; and (iii) damage to feelings.
- p. 45 Damages to feelings, or to the affective part of moral property, as referred to in legal theory, hurt an individual's affectations. This kind of moral damage is regulated in Article 1916 of the Code. As will be seen, in this case ASGM's parents sued for the reparation of that type of moral damages.

### Consequences of moral damages

The conceptualization of moral damage outlined above makes it possible to distinguish between harm in the broad sense (injury to a right or a non-pecuniary [extrapatrimonial] interest) and harm in the strict sense (its consequences). Thus, the affected interest would be one thing and the consequences that the impact produces another.

- p. 46 It is correct to qualify moral damage as the impact on a right or interest of a non-pecuniary nature, which can produce both non-pecuniary [extrapatrimonial] and pecuniary consequences.
- pp.46–47 Moral damages have two types of projections: present and future. In all of them, the judge must assess not only the current damages, but also the future ones. Therefore, in addition to the economic or extra-economic nature of the consequences derived from moral damage in the broad sense, these can also be distinguished according to the moment at which they materialize.
- p. 49 However, while in this case it was determined as settled that the victims did not have the standing to sue for pecuniary liability, it must be specified that the action for reparation of moral damages can be filed autonomously from the actions claiming pecuniary damages. This follows from a teleological interpretation of Article 1916 of the Code.

### III. In this case, Admivac was found liable, which gives rise to the reparation of the moral damages suffered by ASGM's parents

p. 50 Although it was established that moral damages can be claimed autonomously from injuries to patrimonial rights or interests, in order for them to be claimed, the existence of civil liability must be proven. Thus, in this case, it must be determined what type of liability is proven, taking into account the elements that compose it.

In this case, it is argued that the type of relationship that was generated between the victims and the company was contractual in nature, and therefore ASGM used the hotel facilities at his own risk, since this is clear from the lodging contract and the hotel regulations where the company is exonerated from any liability for the use of its facilities. However, the type of liability that is proven in this case goes beyond the contractual scope.

p. 53-54 Speaking of consent generically, it can be argued that through this it is possible to authorize or consent to situations in which the legal system leaves the injured assets or rights freely waivable by the holder. However, consent cannot be given for the interference in or harm to rights that cannot be waived by the holder; in this respect Article 6 of the Code provides that the will of individuals is not a release from the observance of the law, nor does it alter or modify it. Only private rights that do not directly affect the public interest may be waived when the waiver does not affect the rights of third parties.

p. 54 Thus, even if the guest accepts the risks inherent in the use of the hotel facilities, it is determined that the harmful event occurred due to the negligence or carelessness of the hotel, a non-contractual liability exists, since such damages cannot be accepted through a services contract between the hotel and the guest, as they are legal assets not waivable by the holder, such as health, physical integrity and in this case life itself.

p. 56 Now, the difference between fault-based and strict liability is that the latter does not have to show the subjective element of the conduct, that is, the fault or negligence of the defendant.

In this case we have fault-based liability, as it is relevant whether the company has fulfilled its duties of care derived from both public order norms and from the provision of the services it offers. It was the series of negligent acts that led to ASGM's death.

p. 56-57 Indeed, it was not the artificial lake, or that there was a water pump in it, or the use of the kayak that, operating under normal conditions, led to ASGM's death. If the company had fulfilled its duties, such as if it had given maintenance to the water pump, the artificial lake would never have been electrified, thus avoiding ASGM's death. As will be seen below, the harmful act and the negligent conduct of the company are duly proven, and there is a causal link between such conduct and the harmful event.

p. 57 To prove the fault-based liability of Admivac, the general elements that accompany the evidenced of that liability must be analyzed, namely: 1) Unlawful act or omission, 2) Damage caused, and 3) Causal link between the act and the damage.

### 1. Wrongful act

p. 57-58 As a necessary assumption for a non-contractual liability for moral damages to exist, Article 1916 of the Code establishes that there must be an act or omission. Thus, the negligent conduct of the person and the production of damages as a result of this behavior appear as requirements of fault-based non-contractual civil liability subject to indemnification.

p. 58 Acts or omissions are only a source of liability when they are unlawful. Therefore, not just any act or omission that causes damage will give rise to liability rather, the other elements of liability must also be present.

- p. 59 Unlawfulness may arise from two different sources: (i) that the person responsible has failed to comply with a generic duty of care that the provision of the service requires; or (ii) that the responsible person was obligated to act in accordance with some norm and failed to do so.

In this case, the service provided by Admivac is regulated by the General Tourism Law and the Federal Consumer Protection Law.

- p. 72-75 From the facts, it follows that Admivac engaged in a series of unlawful acts, which gave rise to the damage, such as: 1) poor maintenance of the facilities and omission of security measures in their use; 2) failure to have trained personnel; and 3) the conduct of the company during the contingency.
- p. 75-76 In conclusion, it can be deduced from the established facts that Admivac failed to comply with the regulations that were applicable to it due to the nature of the service provided and that it was also negligent.

## 2. Damages

- p. 76 In order for liability to exist, damages must occur in addition to unlawful conduct.

Damages must be certain. That is to say, their existence can be ascertained qualitatively, even if their amount cannot be exactly determined. Purely possible or hypothetical damages are not suitable to generate compensatory consequences.

- p. 79 In the matter analyzed here, the physical integrity of ASGM was illegitimately harmed, therefore, we have a case in which the moral damage suffered by the parents can be presumed from the harmful act. Once the relationship of kinship has been proven, it can be presumed that there are moral damages, in respect of the closest relatives of the deceased, such as parents, spouses, common law partners, co-workers, children, siblings and grandparents.

p. 80 In addition to the aforementioned presumption, the moral damages were directly proven, since the content of the expert opinions rendered demonstrated that ASGM's parents show psychological impacts derived from the death of their son. Therefore, the damage to their affections and feelings has been fully proven.

### 3. Causal Link

p. 80-81 Finally, it is necessary to demonstrate the causal link between the defendant's conduct and the harm caused to the plaintiff. This means that the damage experienced must be a consequence of the conduct of the agent. Otherwise, a person who has nothing to do with the damage caused could be held liable.

In this case, the damage consisted of the impact on the feelings of the plaintiffs derived from the death of their son, which occurred because the lake he fell into was electrified due to the negligence of the company, consisting of not giving maintenance to the pump that caused the lake to be electrified.

### IV. The amount of compensation derived from moral damages

p. 87 This case must start from the right to receive a "fair indemnification" in order to determine the due compensation in the case of damages caused to the feelings of individuals. This means that the reparation must meet the standards established by that right.

Through compensation, fundamental objectives in terms of social retribution are achieved. Firstly, by imposing on the person responsible the obligation to pay an indemnification, the victim obtains the satisfaction of seeing his or her desire for justice fulfilled. Thus, through the compensation, the victim can verify that the damages caused to him or her also have adverse consequences for the person responsible.

Furthermore, compensation has a deterrent effect on harmful behavior, which will prevent future wrongful conduct. This measure fulfils a twofold

function: people will avoid causing harm in order to avoid having to pay an indemnification and it will be economically convenient to cover all the costs necessary to avoid causing harm to other people.

- p. 87-88 This facet of the right to damages is known in the legal theory as “punitive damages” and it is part of the right to a “fair indemnification”. Indeed, by means of compensation, the law punishes persons who act unlawfully and rewards those who comply with the law. This reinforces the victims’ conviction that the legal system is fair and that their decision to act legally was useful.
- p. 91 Therefore, the amount of the indemnification to be fixed as compensation for the damages suffered by the victim must be sufficient to compensate for such damages and to reproach the misconduct of the person responsible.
- p. 94 In the quantification of moral damages, the following factors must be weighed, which in turn can be classified according to their level of intensity, among minor, medium or high. These modalities will make it possible to establish the *quantity* of compensation.
- p. 94-97 With regard to the victim, the following must be considered:
- A) The qualitative aspect of the damage or moral damage strictly speaking:  
i) the type of right or interest injured, ii) the existence of the damage and its level of severity.
- B) The patrimonial or quantitative aspect derived from the moral damage:  
i) the accrued expenses derived from the moral damage; and (ii) the expenses to accrue.
- p. 97-99 With regard to the persons responsible, consideration must be given to:  
(i) the degree of responsibility; and (ii) their economic situation.
- p. 100 It should be noted that the above-mentioned quantification elements, as well as their intensity qualifiers, are merely indicative. The judge, when weighing each of them, can note particularities relevant to the circumstances.

Their enunciation is simply intended to guide the actions of judges, starting from the function and purpose of the right to reparation for moral damages, but this does not mean that these parameters constitute an objective or exhaustive basis in the determination of the compensatory *quantum*.

### 7. Constitutionality of Article 1916 of the Mexico City's Civil Code

- p. 100-101 The affected party considers that Article 1916 is unconstitutional because by establishing the economic capacity of the victims as one of the parameters for determining the amount of the indemnification derived from moral damages, people are discriminated against based on their social situation.
- p. 105 Because Article I of the Constitution protects social status, there is a suspicion that any distinction based on this classification is discriminatory, so its rationale must be particularly rigorous and carry great weight.

First, it should be clarified that Article 1916 refers to the fact that the economic situation of the victim should only be taken to calculate the amount of the indemnification, so this factor has no influence when determining the existence of moral damages, which is to say, the existence of injuries to the affections or feelings of the victims.

#### **h) Test of equality with respect to the weighing of the economic situation to determine the compensation of the non-pecuniary (extrapatrimonial) consequences derived from the moral damage**

- p. 108 Although the weighing of the economic situation of the victims could be considered to pursue a constitutionally compelling purpose, which is to satisfy the right to a fair indemnification, the measure is not suitable for achieving that end.

The distinction set out above is not linked to the constitutionally compelling purpose. The social condition of the victim does not affect, increase or decrease the pain suffered.

- p. 109 In this regard, this interpretation of the normative portion “economic condition” must be rejected as violating the principle of equality and non-discrimination. The economic status of victims should not be weighed in determining the amount of compensation for non-pecuniary (extrapatrimonial) consequences arising from moral damage.

### **XVIII. Weighing of the victim’s economic situation in order to determine compensation for pecuniary consequences**

Article 1916 of the Code can be interpreted as constitutional, if and only if it is interpreted that the economic situation of the victim may be weighed in order to determine the indemnification corresponding to the pecuniary consequences derived from the moral damages.

- p. 109-110 The normative provision thus interpreted does not even distinguish between groups of people. In fact, the weighing of social status, as computable data when assessing the pecuniary loss caused by the moral damage does not distribute rights according to classes of people. On the contrary, it aims to discover the real dimension of the damages. It is not a question of subverting the guarantee of equality but of gauging, with an equitable criterion, the real impact that the damage has on the subjective profile of the victim. It is through this process of weighing of these aspects that cannot be dispensed with.
- p. 110 Therefore, it is not necessary to perform the equality test to determine the constitutionality of Article 1916 of the Code since, under this understanding, the article does not even differentiate between classes of people.

### **- Study of this case**

- p. 112 In this case, the appellate chamber assessed the victim’s financial situation to quantify the pain suffered by ASGM’s parents, i.e., to determine the non-pecuniary (extrapatrimonial) consequences of the moral damage. This is contrary to Article I of the Constitution, since it is not linked to the purpose of the fair indemnification pursued by the institution of moral damage.

Therefore, the chamber's interpretation and application of Article 1916 of the Code violated the right to equality and non-discrimination of those affected. Under these conditions, the concept of infringement is justified, and the injunction (*amparo*) must therefore be granted so that the determination of compensation for non-pecuniary (extrapatrimonial) consequences does not take into account their economic situation. In this way, the amount of the indemnification must be adjusted to the real impact that ASGM's parents suffered in their feelings.

#### **XV. Determination of the amount of compensation derived from the moral damages of ASGM's parents.**

- p. 123 A serious impact on the qualitative aspects of the moral damage was determined with respect to the victim, which is to say that high ranking rights were injured. On the other hand, the present and future disbursement for the payment of the recommended psychological therapies in the amount of \$259,200.00 pesos, was estimated as pecuniary consequences derived from the damages suffered.
- p. 123-124 It was established that the responsible party's degree of liability was serious, since it put at risk the life and physical integrity not only of ASGM, but potentially of all its guests; a high degree of negligence was proven; and the high social relevance of the activities carried out by the company was justified. Furthermore, it is considered that Admivac benefits financially from the activities which, having been negligently carried out, led to the death of the young man, and that this company has a high economic capacity.
- p. 124 In this regard, given the serious impact on the rights of the victims, the high degree of liability of Admivac and its high economic capacity, the quantity of the indemnification must be equally severe.

#### **Decision**

Given the basis of the concepts of infringement studied, the federal protection requested by the affected parties is granted, so that the appellate

chamber overturns the challenged decision, and issues another one in which, in accordance with the guidelines set forth herein, it orders Admivac to pay the parents of ASGM an indemnification for moral damage in the amount of \$30,259,200.00 pesos.



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## DAMAGES FROM THE NEGLIGENT APPLICATION OF ANESTHESIA (STRICT LIABILITY FOR NEGLIGENT USE OF ANESTHESIA)

### *Contradicción de Tesis 93/2011*<sup>50</sup>

**Keywords:** *civil liability, strict and fault liability, anesthesia, contractual liability, informed consent, medical-health professionals, burden of proof.*

#### **Summary**

A Tabasco Collegiate Circuit Court reported the possible conflicting lines of precedent (*contradicción de tesis*) between its decision and the decision of a Collegiate Circuit Court in Mexico City. The Tabasco Collegiate Circuit Court held that, regardless of whether anesthesia represents a risk, the application of the assumption of risk doctrine is not justified, since the use of anesthesia is the result of a patient-doctor agreement where the patient knows and accepts the risks of its use so the harm generated by its use gives rise to contractual liability. The Collegiate

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<sup>50</sup> Decision issued by the First Chamber of Mexico's Supreme Court of Justice (October 26, 2011). Reporting Justice: Arturo Zaldívar. *Conflicting Lines Of Precedent 93/2011*

Circuit Court in Mexico City considered that anesthesia, due to the effects it produces (intense depressant of the central nervous system), is inherently dangerous, so the harm resulting from its application generates strict liability.

### Issue presented to the Supreme Court

Determine what type of civil liability is generated by the harm caused by the negligent use of anesthesia.

### Holding and vote

The conflicting decisions were resolved as follows: Even when the patient has given their informed consent for the administration of anesthesia, the harm generated by the negligent administration of such substance falls under non-contractual liability, since values are not waivable by the patient such as the right to health and the right to life that are at stake. That said, such non-contractual liability is fault-based. In order to claim a remedy for the damages generated by the use of anesthesia negligence of conduct must be proved.

The First Chamber of the Supreme Court decided the core of this case by the unanimous vote of its five Justices Arturo Zaldívar Lelo de Larrea, Jorge Mario Pardo Rebolledo, Guillermo I. Ortiz Mayagoitia, José Ramón Cossío Díaz and Olga Sánchez Cordero de García Villegas.

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### EXTRACT OF THE DECISION

p. 1 Mexico City. The First Chamber of Mexico's Supreme Court of Justice (the Supreme Court), in session of October 26, 2011, issues the following decision.

### Background

p. 1 and 12 On March 3, 2011, the possible conflicting lines of precedent (*contradiccion de tesis*) between the decision issued by a Collegiate Circuit Court of Tabasco and the holding of a Collegiate Circuit Court in Mexico City was reported.

Both courts analyzed the type of civil liability generated by the harms caused by the negligent use of anesthesia.

- p. 13 The Tabasco Collegiate Circuit Court, in deciding a direct injunction (*amparo directo*), considered that, regardless of whether anesthesia represents a risk, the application of the assumption of risk doctrine is not justified, since the use of anesthesia is the result of a patient-doctor agreement where the patient knows and accepts the risks of its use. Therefore, the harm generated by its use gives rise to contractual liability.

For its part, the Mexico City Collegiate Circuit Court, in deciding a direct injunction (*amparo directo*), considered that anesthesia, due to the effects it produces (intense depressant of the central nervous system), is inherently dangerous, and therefore the harm resulting from its application generates strict liability.

### Study of the merits

- p. 14 To resolve this contradiction, some general concepts of civil liability are explained, based on which it is argued that the harm caused by the negligent use of anesthesia generates non-contractual liability. It is then determined that such liability is fault-based. Finally, it is specified that it is the anesthesiologist who must prove that he acted with due diligence.

### - Civil liability

- p. 14-15 According to the theory of civil liability, one who causes harm to another must remedy it. This harm may be caused by a breach of contract or by a violation of the generic duty of every person not to harm others. In contractual liability, the parties are connected prior to the act that causes the liability and, in non-contractual liability, the connection arises from the occurrence of the harmful acts. Therefore, contractual liability arises from an agreement that has been transgressed by either of the parties, while fault liability results from the breach of the generic duty not to harm others.

p. 15 For contractual liability to exist, failure to comply with the agreed obligation is enough, while non-contractual liability may be either strict or fault-based. Fault liability is based on a psychological element, either because there is an intention to harm or because there is carelessness or negligence. On the other hand, the subjective element (fault or negligence) is absent from strict liability.

**- Medical-health civil liability**

p. 16-17 Medical-health liability may have an explicit or tacit contractual origin: (a) the providing of the doctor's services or, (b) the providing by the State of a social right, such as public health services. In the first case, the activities included in contractual medical liability are those that were specifically acquiesced to by the doctor and the patient; those duties that by virtue of the services contract had to be fulfilled by the doctor and the patient (payment for the services, date of the procedure, place of the medical intervention, among others). In contrast, in the providing of social security services there is no contract between individuals, but an administrative liability arises, since the State is liable for damages caused by the "irregular actions" of its agents (doctors and public institutions).

p. 18 Regardless of the origin of the relationship between the doctor and the patient, such liability should not be governed solely by the rules of a contractual breach since contractual liabilities and non-contractual liabilities may coexist. The liability of medical-health professionals goes beyond the duties contained in or derived from the contractual relationship, since they are bound to the standards of their profession. Thus, to determine the type of liability arising from harm generated by medical-health professionals, their compliance or non-compliance with the specifications of medical science when performing their activities must be analyzed.

p. 19 Harm caused to the patient by the negligence of doctors cannot be included in contractual liability because undue impact on physical integrity, or life, which are unwaivable values, cannot be subject to a contract.

**- Non-contractual liability in the case of negligent application of anesthesia**

- p. 20-21 Point 16.1.1 of NOM-170-SSA1-1998, for the Practice of Anesthesiology (NOM), requires the patient's signature attesting to know the risk of the administration of anesthesia. The duty imposed by the NOM fulfills the function of authorizing the physician to participate in the rights to health and physical integrity of the patient. Thus, patients have the right to decide freely on the application of the diagnostic and therapeutic procedures offered, since otherwise their fundamental rights of personal freedom and bodily autonomy would be violated.
- p. 22 The General Health Law also requires that consent, stating that patients have a right to grant or not grant their informed consent for medical treatments or procedures. In emergency situations there may be exceptions to the informed consent requirement, such as when the patient is in a state of temporary or permanent incapacity.
- p. 23 Through consent, generically, it is possible to authorize or consent to situations in which the legal system makes the harmed interests or rights freely waivable by the holder. However, consent cannot be used for intrusion into rights that are not waivable by the holder. Through informed consent the patient assumes the risks and consequences inherent in or associated with the authorized intervention; but it does not exclude medical liability when the doctors or health institutions involved act negligently.
- p. 23-24 In medical science there are accepted risks that can arise even when the interventions in the patient are performed under the highest standards required by the profession. In some cases, the type of harm that can be generated and the probability of its occurrence can be estimated. However, there are other types of harms that are generated by the negligence of medical professionals, which are not accepted by patients when they decide to undergo surgery, since they are beyond the scope of the contract. Thus, even if the patient accepts the use of anesthesia, if it is determined that there was

a negligent application or inadequate post-surgery care, then non-contractual liability exists. That type of harm cannot be accepted through a contract for services between the doctor and the patient, since they are unwaivable legal interests, such as health, physical integrity, or life itself.

### Medical-health fault liability

- p. 26-27 Fault and strict liabilities are regulated in Articles 1910 and 1913 of Mexico City's Civil Code, and in Articles 2024 and 2070 of the Civil Code for the State of Tabasco. Both regulations characterize fault liability as the duty to remedy the damages caused to a third party when they have been caused by the fault or negligence of the defendant, while strict liability is derived from the damages generated by the use of dangerous mechanisms, instruments, devices, or substances even if it is not an illegal use, unless it is proven that such damages were caused by the fault or inexcusable negligence of the victim.
- p. 27-28 Doctrine and foreign courts have determined that medical-health liability is fault liability, so it is necessary to prove the element of guilt or the negligence of the professional for there to be a duty of compensation, since the exercise of medical science entails certain risks that cannot always be avoided. In this regard, the elements of fault liability are the harm, the fault, and the causal link between the harm and the fault.
- p. 28-29 The social benefit generated by the use of anesthesia is clear. It is no exaggeration to say that it directly protects values such as health and physical integrity and its use represents a great contribution to medical science. The administration of anesthesia is essential in the treatment of various medical conditions, so it is undeniable that its use has a social purpose. Consequently, in order to hold medical professionals or institutions involved in the anesthetic process liable, it must be established that the anesthesia was administered incorrectly or without adherence to the medical or scientific techniques required— *lex artis ad hoc*. Thus, to determine the doctor's duty of compensation it must be analyzed whether the anesthesia was applied according to the care required by the NOM and the duty of diligence required by the profession.

- p. 29-30 According to the NOM, the responsibility of the physician specializing in anesthesiology includes the study and assessment of the patient prior to the application of anesthesia to select the lowest-risk procedure most appropriate to each situation; the correct and timely application of anesthesia, constantly monitoring the conditions of the patient during surgery; and the post-anesthetic recovery up to the complete stability of the patient's functions. Thus, anesthetic care is a process that encompasses three stages: pre-, during and post-anesthesia. Although anesthesia must be used under the highest standards of the medical profession since its use involves various risks, this cannot mean that any damage caused by its administration must be compensated by the anesthesiologist who administers it, since the actions of the medical personnel must also be weighed.
- p. 30 **- Presumption of negligence in the application of anesthesia resulting in harm**
- p. 30-31 In the case of application of anesthesia, the subjective element of the conduct must be proven – the negligence of the doctors – and the burden of proof of diligence falls on the doctors and/or medical institutions in view of the victim's right to compensation. Due to the difficulty for the victim to prove the fault of the anesthesiologist, the burden of proof may be shifted so the doctor is the one who must prove that the anesthesia was applied in accordance with the care established in the applicable regulations and the duty of diligence required by the profession. Thus, the medical staff must demonstrate that they took due care at each stage of the anesthetic procedure.
- p. 31-32 According to the principles of probatory ease and proximity, the burden of proof must be met by the party who has the means of proof or can produce it or render it to the process at a lower cost so that it can be assessed by the judge. Medical professionals and/or health institutions can more easily access testing to demonstrate their diligent action. They have the necessary knowledge to determine what information may be relevant in the process and they can access such evidence more freely than the person concerned.

- p. 32 Even in the case of the application of anesthesia, the NOM requires hospital institutions to document the anesthetic procedure. These institutions must also have the patient's medical record. Therefore, the relevant evidence is often in the possession of the doctors themselves or of the hospitals, or these professionals can access it more easily.
- p. 32 This reversal of the burden of proof does not imply that the doctor has to prove that his or her action (i.e., the application of anesthesia) was not the cause of the harm produced. The reversal of the burden of proof does not cover other elements of liability such as the existence of a causal link between conduct and harm; it is exclusively limited to the subjective element of liability.
- p. 34 The elements of fault liability are the harm, the fault, and the causal link between such harm and fault. Consequently, reversing the burden of proof of fault means that it will be the medical professional who must prove that he or she did not act negligently, which does not mean that the medical professional has to prove the absence of the other elements of liability. Thus, the medical staff or the hospital institution must only prove that the anesthesia was applied under the legal and professional standards of due diligence that are required of them.

If it were accepted that strict liability applied to medical-health matters, the doctor would be liable when it is proven that an injury was caused, regardless of whether his or her conduct was in accordance with the standards of action required by the regulations and *lex artis* of the profession. In this regard, strict liability must be distinguished from fault liability where it is the defendant who must prove that he or she acted diligently.

- p. 34-35 In Summary, in the case of liability arising from harm caused by the application of anesthesia, the defendant doctor will bear the burden of proof of due diligence. Therefore, if it cannot be proven that the care established in the applicable regulations or in the *lex artis* of the profession was complied with, the defendant doctor will be liable for the harm caused by the application of that substance.

**Decision**

- p. 64-65 In accordance with the foregoing, the criteria established by the Supreme Court in the following terms must prevail as case law:

“Harm caused by the negligent application of anesthesia generates civil fault liability (civil legislation of Mexico City and the state of Tabasco).”



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This book is an example of the transformative power of the judicial system and the importance of the constitutional control of the norms and acts of any public authority in order to protect the human rights of everyone. This work systematizes 50 of the most emblematic decisions that Mexico's Supreme Court has issued in recent years and that have positioned this court as a main actor in the construction of a more fair and equitable society. The decisions that have been selected stand out for their resolution of complex problems, their argumentative solidity and their contributions to democratic constitutionalism. It was sought that the chosen decisions have a high legal value and have been crucial to trace the path followed in the interpretation of certain human rights cases or related situations.

The decisions are grouped into 10 sections on the following topics: the parameter of control in constitutional regularity; the right to the free development of personality; the right to the freedom of expression and information; the right to equality and non-discrimination; gender; rights of children and adolescents; the rights of indigenous people and communities; economic, social, cultural and environmental rights; criminal guarantees; the right of access to justice and due process; civil liability and patrimonial liability of the State.

It is necessary to promote projects like this work to disseminate the content of the resolutions of this court. In this way, the dialogue of the Supreme Court with the courts of other latitudes will be strengthened and the holders of human rights will be given tools to make them effective in judicial instances. This effort contributes to the collective construction of judicial reasoning that provides increasingly adequate responses to human rights violations and that it contributes to making the protection of the rights of all people effective.

