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**FREE DETERMINATION IN THE REPRESENTATION OF INDIGENOUS PEOPLES AND
COMMUNITIES**
**(LIBRE DETERMINACIÓN EN LA REPRESENTACIÓN DE PUEBLOS Y COMUNIDADES
INDÍGENAS)**

CASE: *Amparo Directo en Revisión 7735/2018*

REPORTING JUDGE: Javier Laynez Potisek

DECISION ISSUED BY: Second Chamber of Mexico's Supreme Court of Justice

DATE OF THE DECISION: August 7, 2019

KEY WORDS: right to the free determination of indigenous peoples and communities, right to respect for customs and traditions, retroactivity of constitutional norms, agrarian law, agrarian communities, entities authorized to represent a community.

CITATION OF THE DECISION: Supreme Court of Justice of the Nation, *Amparo Directo en Revisión 7735/2018*, First Chamber, Javier Laynez Potisek, J., decision of August 7, 2019, Mexico.

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

<https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/sentencia/2021-07/ADR%207735-2018.pdf>

CITATION SUGGESTED FOR THIS DOCUMENT: Human Rights Office of Mexico's Supreme Court of Justice, *Extract of the Amparo Directo en Revisión 7735/2018*, Mexico.

SUMMARY OF THE *AMPARO DIRECTO EN REVISIÓN* 7735/2018

BACKGROUND: On February 21, 1942, San Agustín Etla and Santiago Zoquiapam (now Nuevo Zoquiapam), communities in Oaxaca, agreed that a territory would become a common zone. On July 10, 1947, they agreed to segment it. In May 1960, boundary conflicts among Nuevo Zoquiapam, San Agustín Etla and San Pedro Nexicho became apparent. On November 21, 1964, the Presidential directive confirming ejidal lands in favor of the community of Nuevo Zoquiapam was published. A suit was filed against this through a boundary conflict proceeding, before the Agrarian Unitary Court [*Tribunal Unitario Agrario*] (TUA), which recognized in favor of San Agustín Etla the zone disputed with Nuevo Zoquiapam. The latter filed a *recurso de revisión*, in which the Agrarian Superior Court [*Tribunal Superior Agrario*] (TSA) confirmed the decision. Nuevo Zoquiapam then filed a *juicio de amparo directo*, which was denied by a collegiate court, and so it filed a *recurso de revisión*, which Mexico's Supreme Court of Justice (this court) heard.

ISSUE PRESENTED TO THE COURT: Whether it is legally valid that the applicable regulations establish a mechanism for agrarian communities to be legally represented, or is it feasible for them, being indigenous, to make use of their customs and traditions to be represented in their own way according to the principle of free determination.

HOLDING: The appealed decision is upheld and the *amparo* for Nuevo Zoquiapam is denied, for the following reasons. It was recognized that the principle of free determination of indigenous peoples and the respect for their customs and traditions governs toward the past and was applicable to the case; however, this principle is not absolute; rather it is dimensioned by the limits established in the Federal Constitution, and therefore the procedures for the election of the indigenous authorities or representatives must be understood as complementary and not exclusionary. From the applicable regulations it was concluded that the Commissioner of Communal Property was the one authorized to intervene in favor of Nuevo Zoquiapam in the documents signed; nevertheless, although none of the agrarian laws established the municipality as legal representative of the population center, in the case of documents related

to the form of agreeing to boundaries with respect to another community, it was a custom and tradition of the community of Nuevo Zoquiapam that a community representative and a municipal representative would act in its name, without the latter's involvement in those actions invalidating them. Finally, it was recognized that the municipal authority acted unilaterally regarding the boundaries, and therefore that document was declared invalid.

VOTE: The Second Chamber decided this matter unanimously by the five votes of judges Yasmín Esquivel Mossa, Alberto Pérez Dayán, Eduardo Medina Mora Icaza (issued his vote against considerations), José Fernando Franco González Salas (issued his vote with reservations) and Javier Laynez Potisek.

The votes may be consulted at the following link:

<https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=247082>

EXTRACT OF THE *AMPARO DIRECTO EN REVISIÓN* 7735/2018

- p. 1 Mexico City. The Second Chamber of Mexico's Supreme Court of Justice (this Court), in session of August 7, 2019, issues the following decision.

BACKGROUND

- p. 1,4 In a joint document of February 21, 1942, the communities San Agustín Etlá and Santiago Zoquiapam (now Nuevo Zoquiapam), both of the State of Oaxaca, agreed that a territory disputed between them would become a common zone for the work of both populations. In a boundary agreement document of July 10, 1947, they agreed to segment it.
- p. 5 On July 11, 1947, San Agustín Etlá, Santiago Zoquiapam and San Pedro de Teococuilco (now San Pedro Nexicho) issued another boundary agreement document in which they established the border zones between the communities.
- p. 7-8 On January 20, 1943, at the petition of the Municipal President of Santiago Zoquiapam, the case of confirmation of communal lands was filed in the Demarcation Office of the Lands and Waters Office of the Agrarian Department, under the argument that the community did not have boundary conflicts with other towns near it. In 1960 two communal representatives were elected who were delivered the plan and documents that covered the communal property.
- p. 8 In the aftermath of confirmation of ejidal lands the towns of San Agustín Etlá and San Pedro Nexicho came forward to demonstrate that they had boundary conflicts with Santiago Zoquiapam. However, on November 21, 1964, the presidential directive was published in the Official Gazette of the State of Oaxaca declaring those conflicts invalidated and, consequently, an area of 8,576 hectares, 60 ares, 0 centares, was recognized in favor of Santiago Zoquiapam as communal property.
- p. 8-9 San Pedro Nexicho filed a *juicio de inconformidad* against the presidential directive. This court decided that certain evidence was not taken into consideration and the representatives of San Pedro Nexicho were not duly called, and therefore the presidential

directive was revoked, and it was ordered to process the matter through the boundary conflict proceeding.

- p. 11 The Agrarian Unitary Court [*Tribunal Unitario Agrario*] (TUA) issued a decision in which it recognized in favor of Nuevo Zoquiapam the land in dispute with San Pedro Nexicho and in favor of San Agustín Etlá the zone disputed with Nuevo Zoquiapam.
- p. 13 The TUA determined that while it was true, as Nuevo Zoquiapam asserted, that the agreement document of July 11, 1947, should have been authorized by the representatives of communal property of that town, it was also true that it was a custom and tradition of that community that the municipal authorities would represent it in the more relevant agrarian matters.
- p. 16-17 Nuevo Zoquiapam filed a *recurso de revisión* and the Agrarian Superior Court [Tribunal Superior Agrario] (TSA) confirmed the above decision. Nuevo Zoquiapam filed a *juicio de amparo directo* and San Agustín Etlá presented an adhesion thereto.
- p. 17-23 A collegiate court of Oaxaca denied the principal *amparo* and left the adhesion moot, after reaching the same conclusion as the TUA and the TSA, that the territory in dispute between Nuevo Zoquiapam and San Agustín Etlá corresponded to the latter community. Nuevo Zoquiapam then filed a *recurso de revisión*, which was admitted for processing before this Court.

STUDY OF THE MERITS

- p. 26 To decide the case the following question must be answered: is it legally valid that the applicable regulations establish a mechanism for the agrarian communities to be legally represented, or is it feasible for them, being indigenous, to make use of their customs and traditions to be represented in their own way according to the principle of free determination?
- p. 26-27 First, it would seem that the principle of free determination of the indigenous peoples and the respect for their customs and traditions has a time problem, having been recognized by the Mexican State in regulatory instruments after the joint boundaries document and

the boundary agreement documents: Convention 169 of the International Labour Organization (ILO), ratified in 1990; the reform of article 4 of the Federal Constitution in 1992 and subsequently article 2 in 2001; as well as the U.N. Declaration on the Rights of Indigenous Peoples (UNDRIP).

I. Is the principle of free determination of indigenous peoples and respect for their customs and traditions applicable towards the past?

p. 27 When deciding the *Amparo Directo en Revisión* 1046/2012, the Plenary of this Court recorded that the general rules of the Federal Constitution can govern toward the past when they are related to human rights or the *pro persona* principle.

p. 28 Thus, in this case it is feasible to deem that the principle of free determination of peoples and the respect for the customs and traditions that concerns us, does govern toward the past, since it is now established in article 2 of the Constitution, and therefore it forms part of that constitutional unit like a coherent and homogeneous device whose modifications do not affect its identity and that allow for its application to acts that occurred in the past.

The above position is supported if it is taken into account that the bill that gave rise to the reform of article 2 of the Federal Constitution shows, among other things, that the constitutional amendment was pursued because the legal situation of indigenous peoples has been profoundly unsatisfactory since the founding of the Mexican State, and from that statement it is feasible to extract that the intention of the bill lay not only in protecting the rights of the indigenous peoples from the date on which the constitutional reform took place, but also in the past.

p. 29 As a consequence, this Court considers that the above-mentioned international instruments (Convention 169/1989 and U.N. Declaration on the Rights of Indigenous Peoples), also apply toward the past, since they establish prerogatives similar to those protected in article 2 of the Mexican Constitution, as well as the fact that they form part of the parameter of constitutional regularity.

Thus, this Court reaches a first conclusion, which is that the principle of free determination of indigenous peoples and the respect for their customs and traditions, protected both

constitutionally and conventionally, does govern toward the past and therefore it is feasible that it would permeate the documents in question.

II. What is the scope of the principle of free determination of indigenous peoples and respect for their customs and traditions?

p. 31 To best unpack article 2 of the Federal Constitution, it is useful to look again at its bill, from which it is seen that the free determination of indigenous peoples should not be a constitutive element for the creation of a State within the Mexican State, such that this principle should “be read” in consonance with articles 40 and 41 of the Constitution, which establish the republican, representative and federal nature of the Mexican State and which recognize the existence of the three Branches of the Union.

It was also indicated that free determination did not intend to create special indigenous forums, since the validation of indigenous decisions by the judicial authorities of the State is established.

p. 32 This Court reaches a second conclusion, which is that the principle of free determination of indigenous peoples and respect for their customs and traditions is not absolute; rather it is delineated by the limits established in the Federal Constitution, which include the following:

a) The indigenous peoples when applying their own normative systems in the regulation and resolution of their internal conflicts are conditioned by the observance of the general principles of the Federal Constitution, in respect to human rights.

b) The election by the indigenous peoples of their own representatives or authorities for the exercise of their own forms of internal government must be done within a sphere that respects the federal framework, the sovereignty of the States and the autonomy of Mexico City in consonance with articles 40 and 41 of the Federal Constitution.

p. 33 c) The procedures for the election of the indigenous authorities or their representatives must be understood as complementary and not exclusionary of those applicable, since

article 2 of the Constitution does not attempt to create independent indigenous forums from those that govern the rest of the country.

- d) The exercise of the principle that concerns us does not make article 27 of the Federal Constitution lose its application in establishing that Mexican lands originally correspond to the nation, and therefore that is what establishes the parameters for delegating those lands.

The conclusion is consistent with Convention 169/1989, because the arguments that supported its adoption and of article 8 show that even though the customs of the indigenous peoples should be considered, this cannot be done outside of the State in which they live.

III. Representation of a community in the signing of documents

- p. 35-36 It is necessary to look to the normative framework in force at the time of the events. In 1942 and 1947, section VIII, subsection c) of article 27 of the Federal Constitution referred to the surveying or demarcation of lands of population centers and, therefore, it was the constitutionally normative portion that governed the documents in question.
- p. 36-37 This section does not establish what entity is authorized to carry out processes of surveying or demarcation of lands of population centers; instead, it establishes which entities were prohibited from doing so, mentioning companies, judges or other authorities of the State or the Federal Government, with which lands of the ejidos, lands of common distribution, or any other kind, belonging to population centers, have been invaded or occupied illegally.
- p. 37-38 Having specified the content of the constitutional article, the following agrarian laws are also analyzed: the Agrarian Code of 1940, the Agrarian Code of 1943, and the Federal Agrarian Reform Law of 1971.
- p. 47-48 This Court reaches a third conclusion: the applicable article 27 of the Federal Constitution did not establish what entity was authorized to represent the agrarian centers; however, this question was addressed in the Agrarian Codes of 1940 and 1943, which establish that

the Commissioner of Communal Property is the legal representative of the population center. Therefore, it is feasible to establish that in this case, the Commissioner of Communal Property was authorized to intervene on behalf of Nuevo Zoquiapam in the 1942 joint boundaries document and in the 1947 boundary agreement documents, as their legal representative so recognized in the mentioned agrarian codes.

IV. Verification of the customs and traditions of Nuevo Zoquiapam to carry out joint documents and boundary demarcation of agrarian lands

- p. 48 To verify the customs and traditions of the community of Nuevo Zoquiapam, the documents that are similar to the joint boundaries document of 1942 and the agreement documents of 1947 should be looked to, such that the question consists of verifying how that town tended to agree on boundaries with respect to another community.
- p. 49-52 To verify in this case the customs and traditions of Nuevo Zoquiapam, various documents signed with other communities should be assessed. This Court reaches a fourth conclusion, which is that in the case of documents related to the form of agreeing on boundaries with respect to another community, it was a custom and tradition of the community for two types of representatives to act in its name: one communal and the other municipal.
- p. 52-53 It is emphasized that none of the agrarian laws applicable to the documents establishes that the municipality is the legal representative of the population center, which corroborates that its intervention in these types of documents resulted from a custom and tradition of the community and not from the normative framework.
- p. 53 From all the above it is feasible to answer the question originally raised, in the sense that the agrarian communities must respect the rules that govern their legal representation, and their customs and traditions or the principle of free determination derived from their status as indigenous people cannot change this situation.

This is so because as we already saw, the customs and traditions of the indigenous peoples and the free determination that governs them protected in article 2 of the Constitution and in the international instruments previously mentioned, are constrained by

the limits established in the Federal Constitution, which include those concerning the fact that: the Mexican Nation is one and indivisible (no other nation can be formed within it); the Nation has the original ownership of the lands of the country and it decides how to distribute them; the election of the representatives or authorities of the indigenous communities must be done within a framework that respects the federal framework and the sovereignty of the States; and the procedures for the election of the indigenous authorities or their representatives must be understood as complementary and not exclusionary of those applicable; from which it is feasible to state that the Federal Constitution is clear in that the indigenous customs and traditions and the principle of free determination cannot ignore the applicable regulations.

- p. 53-54 Having stated the above, this Court considers that in this case the joint boundaries document of February 21, 1942 and the boundaries agreement document of July 10, 1947 are legally valid with regard to the legitimation of Nuevo Zoquiapam to enter into them, because if the TUA, the TSA and the collegiate court considered that its communal representatives appeared on its behalf, then the terms of the applicable regulatory framework which establishes that that body is the legal representative of the population center is complied with.
- p. 54 And the intervention of the municipality in those proceedings does not make them invalid or nonexistent, since the municipal entities that intervened did not do so as authority but as representatives of Nuevo Zoquiapam as was its custom and tradition.
- p. 54-55 However, the boundaries agreement document of July 11, 1947 is not in accordance with the law, because it violates the Agrarian Code of 1943, which established that the Commissioner of Communal Property is the legal representative of the population center, since that body did not appear on behalf of Nuevo Zoquiapam, but rather the municipal council member holding himself out as communal authority and various neighbors of the town, which shows that the document does not comply with the regulatory framework, and article 2 of the Federal Constitution and the international instruments already mentioned cannot overcome this circumstance, since again, the customs and traditions and the

principle of free determination of indigenous peoples only complement the legal system of the country, but they cannot fail to observe it, since the intention is not to create one state inside another, but only to permit indigenous peoples to elect their representatives without circumventing the Mexican legal system.

p. 55 In addition, this document does not abide by the customs and traditions of Nuevo Zoquiapam since, as seen, that community traditionally executed documents through the joint involvement of community and municipal figures, and in none of those documents did the municipality attempt to act unilaterally also as communal representative, as in this case, and therefore it lacked legitimacy for its execution.

This Court also considers that the actions of the municipality without the legal representation of the community shows that there was a unilateral decision to agree on boundaries with another agrarian community in detriment to Nuevo Zoquiapam.

DECISION

p. 58 Under the circumstances indicated, the appealed decision is upheld and the *amparo* against the decision issued on October 4, 2016 by the TSA is denied to Nuevo Zoquiapam, municipality of the same name, District of Ixtlán de Juárez, Oaxaca.