



Suprema Corte
de Justicia de la Nación



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**INDIGENOUS COMMUNITIES AND DIRECT ACCESS TO LEGAL PROTECTION
(COMUNIDADES INDÍGENAS Y ACCESO DIRECTO A LA TUTELA JUDICIAL)**

CASE: *Amparo en Revisión* 990/2016

REPORTING JUDGE: José Fernando Franco González Salas

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

DATE OF THE DECISION: May 24, 2017

KEY WORDS: 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.

CITATION OF THE DECISION: Supreme Court of Justice of the Nation, *Amparo en Revisión* 990/2016, Second Chamber, José Fernando Franco González, J., decision of May 24, 2017, 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/2021-10/AR%20990-2016.pdf>

CITATION SUGGESTED FOR THIS DOCUMENT: Human Rights Office of Mexico's Supreme Court of Justice, *Extract of the Amparo en Revisión* 990/2016, Mexico.

SUMMARY OF THE *AMPARO EN REVISIÓN* 990/2016

BACKGROUND: On May 14, 2014, representatives of the Commissariat of Common Property of San Juan Jaltepec de Candayoc (Community of San Juan), filed an *amparo* lawsuit against the Ejidal Promotion Fund of the Ministry of Agrarian, Territorial and Urban Development (FIFONAFE), for the refusal to put before the competent unitary court the reversion of communal lands because they were not used for the purpose for which they were expropriated and demand the corresponding indemnity; various provisions of the Agrarian Law and its Regulation were also challenged. A district judge granted the *amparo* against the norms and the refusal. The President of the Republic and the FIFONAFE filed a *recurso de revisión* against that decision, which was heard by a collegiate court in administrative matters, which 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 *recursos de revisión*.

ISSUE PRESENTED TO THE 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 determine what entity should work with and give advice to the indigenous communities and ejidos.

HOLDING: The *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 reversion of expropriated assets, protects a procedural prerequisite that impedes the communities considered affected by the expropriations from being able to directly exercise the reversion 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 reversion 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 powers to guide, advise and collaborate with the community in the preparation of the reversion claims, not the FIFONAFE as

the district judge asserted. Therefore, the effects of the *amparo* granted were modified to permit the community itself to go before the agrarian unitary court, with no need for the intermediation of the FIFONAFE.

VOTE: The Second Chamber decided this matter by the unanimous vote of the four judges Alberto Pérez Dayán, Javier Laynez Potisek, José Fernando Franco González Salas and Eduardo Medina Mora I. Judge Margarita Beatriz Luna Ramos was absent.

The votes may be consulted at the following link:

<https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=205127>

EXTRACT OF THE *AMPARO EN REVISIÓN* 990/2016

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 *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 reversion of 2,050 hectares of communal lands owned by the community, because they were not used for the purpose for which they were expropriated, and 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 *amparo* was granted against the norms and the challenged act of application.

- p. 5-6 The President of the Republic and the FIFONAFE filed a *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 *recursos de revisión*, ordered its placement in the Second Chamber of this Court, and sent the case record for its study to Judge José Fernando Franco González Salas.

STUDY OF THE MERITS

I. 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 reversion 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, so that through a process 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, 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 people to have full access to legal protection, for which 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 directly file a reversion action judicially.
- 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 reversion 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-, since only that would prevent lands returned as the result of a reversion 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 reversion from being awarded without legal basis to unrelated persons or persons who did not have rights in relation to the expropriated lands, it could have been chosen to recognize the legitimation of the indigenous and agrarian communities for purposes of claiming the reversion 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 reversion 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.

II. Grievances in which the FIFONAFE challenges the effects of the *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 reversion 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 *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 In article 136 its powers are established, 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 reversion proceedings and to exercise the reversion 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 reversion claims.

Thus the grievances are well-founded and, therefore, the effects of the *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 *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 reversion of lands and the payment of the indemnity it alluded to in its request, without needing the intermediation of the FIFONAFE.