

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

**INVIOLABILITY OF COMMUNICATIONS UNDER RISKY SITUATIONS  
(INVIOLABILIDAD DE LAS COMUNICACIONES ANTE SITUACIONES DE RIESGO)**

**CASE:** *Amparo Directo en Revisión 3886/2013*

**REPORTING JUSTICE:** Arturo Zaldivar Lelo de Larrea

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

**DATE OF THE DECISION:** May 18, 2016

**KEY WORDS:** Right to the inviolability of communications, consent of the victim of a crime, inviolability of communications in situations of risk or imminent danger, right to intimacy, article 16 of the Constitution, geolocation of mobile communication devices.

**CITATION OF THE DECISION:** Supreme Court of Justice of the Nation, *Amparo Directo en Revisión 3886/2013*, First Chamber, Arturo Zaldivar Lelo de Larrea, J., decision of May 18, 2016, 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/2022-01/ADR3886-2013.pdf>

**CITATION SUGGESTED FOR THIS DOCUMENT:** Center for Constitutional Studies of Mexico's Supreme Court of Justice, Excerpt of the *Amparo Directo en Revisión 3886/2013*, Mexico.

## SUMMARY OF THE *AMPARO DIRECTO EN REVISIÓN* 3886/2013

**BACKGROUND:** The case began with the disappearance of CJCC, who was last heard from on a day she went out with SIDC. The prosecutor that handled the reported disappearance, as part of the investigation, requested the Provisional Assistant Attorney General to issue the orders necessary for him to retrieve the information from SIDC's cell phone, in relation to incoming and outgoing calls, especially those made with the victim; as well as the physical location (antenna) information from the device. From that investigation, it was found that messages had been sent from SIDC's phone and a balance transfer was made to the number of the victim; it was also shown that both devices were in the same area of coverage. Because of the above, some judge released an arrest warrant against SIDC presuming him to be responsible for committing the crime of aggravated kidnapping of CJCC. Subsequently, a hearing was held in which the prosecutor formally accused SIDC and the judge ordered him to be held in custody. After several appeals and an *amparo* suit filed by SIDC, a court found the defendant guilty of aggravated kidnapping. SIDC filed an *amparo* suit against that decision which was resolved by a collegiate court granting him the constitutional protection requested. Nevertheless, still disagreeing, the petitioner filed a *recurso de revisión* which was remitted by the collegiate court to the Mexico's Supreme Court of Justice (this Court).

**ISSUE PRESENTED TO THE COURT:** Whether the interpretation of the collegiate court which considered that the interception of communications between SIDC and CJCC did not violate the right to private communications was correct.

**HOLDING:** The appealed decision is upheld and the *amparo* is granted primarily for the following reasons. The right to inviolability of communications implies that private communications will be protected at all times from any interception not consented to by those who participate in them or not authorized by a judicial authority who legally grounds such decision. However, this fundamental right is not violated when, as a result of a possible crime, the victim is in real and imminent danger, and cannot give his or her express consent to the interception of the

communication in which he or she participated, and therefore under these circumstances implicit consent can be presumed. While the conclusion of the collegiate court is correct, since the right of the complainant to privacy of communications was not violated, the basis of the decision was incorrect. The collegiate court relied on the false premise that there was a collision of two fundamental rights –the right to the inviolability of private communications of the complainant and the right of freedom of movement, health, physical and psychological integrity of the victim– in which the latter must be privileged. However, it is not a collision that would require a weighing of rights, since there is no violation of the right of inviolability of private communications when its holder is the victim. Therefore, the collegiate court’s conclusion that article 16 of the Constitution was not violated regarding the right to the inviolability of private communications is correct; but this Court does not share the grounds of its decision.

**VOTE:** The First Chamber decided this matter by a majority of three votes of the justices Norma Lucía Piña Hernández, Arturo Zaldívar Lelo de Larrea, and Jorge Mario Pardo Rebolledo. The justices José Ramón Cossío Díaz (reserved the right to issue a dissenting opinion) and Alfredo Gutiérrez Ortiz Mena (reserved the right to issue a dissenting opinion) voted against.

The votes cast may be consulted at the following link:

<https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=158606>

## **EXTRACT OF THE *AMPARO DIRECTO EN REVISIÓN* 3886/2013**

p.1 Mexico City. The First Chamber of Mexico's Supreme Court of Justice (this Court), in session of May 18, 2016, issued the following decision.

### **BACKGROUND**

On February 21, 2007, SIDC went to the house of the victim, CJCC. That day CJCC went out with SIDC and she only told her twelve-year-old brother 'I'll be back, I don't have any keys'. She has not been heard from since that date.

p.1-2 On the following day, the SCC's sister, went to the Missing Persons Unit of the Attorney General's Office of the State of Chihuahua to report the event. From that day to March 24, when the arrest warrant was requested against the now complainant, the prosecutor collected evidence that later served to accuse SIDC of the crime of aggravated kidnapping, committed against CJCC.

As part of the investigations, the prosecutor's assistant agent requested the Provisional Assistant Attorney General to issue the orders necessary to retrieve SIDC's cell phone activity, in relation to the incoming and outgoing calls, as well as those made with the victim. He also requested the physical location information (antenna) from the device.

p.4-5 From that investigation it was determined that messages had been sent from SIDC's phone number and a balance transfer had been made to the number of the victim; it was also shown that both devices were in the same coverage area.

p.5 Based on the collected information, the agents of the Prosecutor's Office assigned to the Crimes Against Personal Liberty Unit filed a complaint against SIDC for the crime of aggravated kidnapping, committed against CJCC

The prosecutor requested a judge in the State of Chihuahua to release an arrest warrant to capture SIDC. The judge released that arrest warrant considering it more likely than not that he was responsible for the crime.

p.6 Subsequently, in the indictment hearing the prosecutor charged the accused and the judge ordered he be held in custody.

- p.7-8 After several appeals and an *amparo* lawsuit, a court ruled the defendant guilty of aggravated kidnapping, committed against CJCC.
- p.9 SIDC filed an *amparo* lawsuit against the above decision which was resolved by a collegiate court granting the *amparo* requested.
- p.10 Nevertheless, SIDC, filed a *recurso de revisión* which was remitted by the collegiate court to this Court.

## STUDY OF THE MERITS

- p.66 It is important to recall that the appealed collegiate court considered that the evaluation of the cell phone records of the defendant did not represent a transgression of the right to private communications established in article 16 of the Constitution, since the request for that information was made by the prosecuting authority based on the fact that one of the interlocutors (CJCC) was reported as a missing person.

The collegiate court weighed the rights involved: on the one hand, the inviolability of private communications that protects SIDC, and on the other hand, the right to freedom of movement, health, physical and psychological integrity of CJCC, and the latter prevailed. Therefore it was clear that the release of data by the telephone company was not considered a violation of article 16 of the Constitution.

- p.67 The case involved accessing two different types of data on the cell phones: (1) data on the incoming and outgoing calls of the cell phone numbers of the victim and the complainant; and (2) data related to the location of the telephone devices, which is called geolocation. Therefore, the study will be divided into those two types of data.

### I. Constitutional framework and interpretation of the right to private communications

- p.68 This right implies that any private communication will always be protected from interception not consented to by the interlocutors, unless its interception is authorized by a lawful judicial order.
- p.69 This Court has already set precedents regarding the scope and contents of the right to inviolability of private communication. In the *Amparo Directo en Revisión* 1621/2010 , the

First Chamber of this Court specified that the Constitution itself grants autonomy to such right, and therefore communications are protected regardless of their content or their circumstances.

It has also been established that the violation of this right occurs when someone else's communication is heard, recorded, stored, read or registered without the consent of the interlocutors, and therefore only third parties are not allowed to disclose them. There is no violation of the inviolability of private communications when one of the communicators authorizes its interception, although there may be a violation of the other interlocutor's right to privacy.

- p.72 The object of this protection is twofold, including both the process of communication and the data that identify the communication. This latter aspect includes the external data of the communication, which often reveal information on the circumstances in which it has been produced (e.g., *numbers called, identity of the communicators, duration of the call, internet protocol address*).
- p.73 Regarding the scope of time for the protection of communications, the Supreme Court has determined that the communication is covered after its issuance, as in the case of data stored on a device.
- p.74 According to those premises, it is possible to deduce that private communications require the following elements for their protection: a) That they are channeled through any means of communication; b) that the communication is produced when the communicators are physically separated; c) that it takes place in a non-public form, and the participants decide to keep the communication secret.

Furthermore, the elements required to consider the right to private communications violated are the following: a) the unrelated third party must consciously intercept the communicative process and thus the interception of the communication cannot result from a mere accident; b) there must be a means of transmission of the message different from the word or gesture perceived directly between two individuals, which may be through any existing or future technological form of communication.

If the above specified elements are fulfilled, the evidence obtained will not be admissible, which will affect both evidence obtained by the authorities and evidence collected by and at the risk of a private party.

p.75 However, the right to private communications will not be violated if one of the participants consents to the disclosure of the content of the communication.

The main goal of protecting private communications is to create a barrier of protection from the intrusion of third parties unrelated to the communication, and therefore it is enough that one of the interlocutors breaks the secret of the communication to consider there is no violation of that fundamental right, because the consent of both or all the communicators or participants in the communication is not necessary, since as participants they are autonomously holders of that fundamental right.

p.76 Therefore, we can conclude that this fundamental right protects a form of personal expression containing private information not meant for public exposure, which expression is an essential aspect of human nature that reinforces individuality and independence and protects an inalienable right to dignity. That is why the interference of a third party in the exercise of this right can only be permitted in very specific situations as an exception, through judicial authorization.

## **II. Interpretation of the constitutional right in this case**

Clear this Court doctrine has been developed that any interlocutor may manifest consent to disseminate the communication or release it from the privacy protection. However, that interpretation does not resolve the particular questions raised in this case by the real and imminent danger of the victim. Those questions are: *What information is released at the time of revealing the communication to a third party? and; What happens when one of the parties cannot give their consent due to the possibility of their imminent endangerment?*

p.77 The information released at the time one of the interlocutors reveals a communication to a third party is the process of communication as well as the "traffic data of the communications", which means the circumstances of time, mode and place in which the contents of the communication has been produced. If one of the interlocutors of the communication is in danger, and the other interlocutor reveals the communication process

to a third party because of learning of this situation, the traffic data in which it was produced is also released, due to the urgency of safeguarding the integrity of that person.

p.78 Even when the information is directly or indirectly revealed to an authority, the inviolability of private communications protected by the Constitution will not be an impediment to using that information in the investigation of the facts and as evidence in the trial resulting from that investigation, since this is justified by both the revelation by one of the interlocutors and the situation of danger of the other.

The answer to the second question is also based on the real and imminent danger of the interlocutor who is impeded from revealing *motu proprio* the content of the communication, and for whom an implicit consent can therefore be presumed. Thus, the investigating authority can assume that the victim would not object to the disclosure of the content and circumstances of the communication in which she was involved, since the purpose is to locate her and free her from that danger.

p.79 Consequently, given one of the requirements for the communication to be revealed is met, the prosecuting authority may intercept the communication to the extent necessary to locate the victim who may be in danger.

It should be noted that such implicit consent cannot be assumed in just any case, but only when the victim is the interlocutor of the communication and is not able to give her consent, because her fundamental right to personal freedom is at stake and other interests are potentially at risk.

p.79-80 In summary, the following conditions can be established for intercepting a private communication: a) *Type of crime*: There must be a possible crime that threatens the life or freedom of the victim, such as the crimes of homicide and false imprisonment; b) *The opportunity*: the interception must be exceptional, to prevent or interrupt the crime, and therefore there must be a specific emergency; c) *Agents authorized to intercept the communication*: the prosecutor in charge of the investigation, for purposes of a specific inquiry; d) *Real urgency of the case*, when given the danger of a greater impact on the victim, it is not possible to ask the judicial authority to order the interception of the communication; e) *The main goal* of the interception of the communication should be to



locate the whereabouts of the victim, with the intention of her release, in order to stop the crime and preserve her life and physical integrity.

### III. Doctrine on the geolocation of mobile communication devices

p.80-81 The Plenary of this Court in the *Acción de Inconstitucionalidad 32/2012* recognized the validity of articles 133 Quater of the Federal Criminal Procedures Code, 16, section I, part D and 40 Bis of the Federal Telecommunications Law, which allow the Attorney General's Office, the state prosecutors, or public officials to which the power is delegated, to ask the telecommunications companies for the geographic location in real time of the mobile devices associated with a phone line during the investigation of serious crimes.

p.82 In that *acción de inconstitucionalidad* it was held that the challenged measure does not constitute an intrusion in the right to privacy and, therefore, it does not need authorization by the judicial authority, since its purpose is the geographic location of a mobile device associated with a telephone number.

p.82-83 This Court also determined in the aforementioned *acción de inconstitucionalidad* that, although such power implies an intrusion in private life, the measure pursues a *legitimate end* since it facilitates the investigation and prosecution of crimes that threaten legal interests of great importance in order to maintain the public order and social peace; it is *appropriate*, since it permits the use of adequate technology for the prosecution of such crimes and for the authority to act in a timely manner; it is *necessary*, since it is an effective measure that aids in the prosecution of crimes ; and it is *proportional*, given that the restriction it presumes is compensated by the importance of the legally protected interests of public order and social peace which prevail over the private interest .

p.83 This Court holds that, as a rule, having a judicial order to invade the privacy of a person can only be foregone when the life or physical integrity of the victim of a crime is at stake or when there is a risk that the object of the crime will be hidden or disappear. In this context, the measures are constitutional only if they operate in such exceptional situations, which does not relieve the authority from the obligation to legally ground its acts.

### IV. Analysis of the interpretation by the Collegiate Court

p.84 We must begin with the fundamental premise established in the Constitution that the right to private communications is not violated if one of the interlocutors reveals the content of the communication or gives consent for a third party to have access to it.

From the evidence presented in the trial stage and subsequently considered by the court of cassation, it is possible to establish that the prosecutor obtained information corresponding to the cell phone number of the complainant SIDC and of the victim CJCC, without judicial authorization, from which –and after distilling the evidence before the control judge- certain evidence was generated and presented in the trial hearing.

Based on the above, the collegiate court validated the obtaining and admission of these elements under the following considerations: a) The right to private communications does not protect the data that surround the movements in time and place in which they were carried out, since they were not related to the content of the conversation or messages sent. b) There is a collision of two fundamental rights –*the right to private communications of the complainant and the right of freedom of movement, health, physical and psychological integrity of the victim*– and that the latter should be privileged.

p.85 The first assertion is not compatible with the doctrine of this Court, since not only the communication itself but the data logs related to the communication are within the scope of protection of this fundamental right.

Regarding the second assertion, this Court does not find a collision of rights that must be weighed because the right to private communication is not violated when the victim, who is the one constitutionally authorized to consent to the interception, is unable to do so because she is missing. In this case, her consent was appropriately assumed by the prosecuting authority in his effort to locate her and achieve her release.

The urgency of finding the victim was enhanced by the fact that one of the communications between her and the complainant was a message informing him that the child she was expecting was not his, which was revealed to her mother the day of her disappearance (February 21, 2007), who in turn informed the prosecuting authority.

p.86 The following characteristics of this case make it exceptional: a) At the time of the investigation it was possible that CJCC was a victim of aggravated kidnapping, who at that

moment was missing and her and her baby's physical and psychological integrity potentially compromised; b) The cell phone activity was investigated to learn the location of the victim and achieve her release; c) The complainant was identified as the last person to communicate with the victim . d) An agent of the Prosecutor's Office requested the information referring to the communications from the telephones of the victim and the complainant; e) The false imprisonment of the victim and the possible impact on her personal integrity reflected the latent danger that her disappearance would transcend to other legal interests.

p.87 In conclusion, as the collegiate circuit court determined, the probatory elements are admissible.

p.88 The *geographic location of the mobile communication devices* of CJCC and SIDC was also considered not to violate article 16 of the Federal Constitution because, as concluded in the *Acción de Inconstitucionalidad 32/2012*, the main goal of the geolocation is the location of mobile devices and not of persons, and therefore it does not violate the inviolability of private communications.

p.89 Based on the above, the conclusion of the Collegiate Court that the interception of the private communications between the complainant and the victim did not violate article 16 of the Federal Constitution is correct.

## DECISION

p.89-90 Since the grievances are partly invalid and partly valid but inoperative, it is ordered, regarding the review, to uphold the appealed decision and grant the *amparo* requested to the complainant in the terms specified in the appealed decision.