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RIGHT OF VICTIMS TO KNOW THE TRUTH
(DERECHO DE LAS VÍCTIMAS A CONOCER LA VERDAD)

CASE: *Amparo en Revisión 382/2015*

REPORTING JUSTICE: Jorge Mario Pardo Rebolledo

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

DATE OF THE DECISION: March 2, 2016

KEY WORDS: right to truth; due process; rights of victims in the criminal process; migrants; missing persons.

CITATION OF THE DECISION: Supreme Court of Justice of the Nation, *Amparo en Revisión 382/2015*, First Chamber, Jorge Mario Pardo Rebolledo, J., decision of March 2, 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-emplematicas/sentencia/2022-01/AR382-2015.pdf>

CITATION SUGGESTED FOR THIS DOCUMENT: Center for Constitutional Studies of Mexico's Supreme Court of Justice, Excerpt of the *Amparo en Revisión 382/2015*, Mexico.

SUMMARY OF THE *AMPARO EN REVISIÓN* 382/2015

BACKGROUND: 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 *amparo* lawsuit 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 toward 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 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 an *amparo indirecto* lawsuit 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 *amparo* 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 Mexico's Supreme Court (this Court) to exercise its authority to assert jurisdiction

ISSUE PRESENTED TO THE 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 *amparo* lawsuit to demand the right to truth.

HOLDING: This Court upheld the appealed decision regarding the dismissal of the *amparo* against an order to cremate the bodies of the persons presumably missing, since the responsible authorities concurred in denying the existence of such order; in order that AYRA and BPO could be recognized as victims in the preliminary investigation, since the fraction Section II of part C of article 20 of the Constitution establishes the right of the victim or the injured party to be coadjutant to the public prosecutor from the investigation stage. Therefore, the petition of a

relative of the direct victim of a crime to be coadjutant to the public prosecutor implies the request to be recognized as victim or injured party of the crime, without the need to request a genetic correspondence test so the relatives of a migrant presumably missing in Mexican territory can have access to the preliminary investigation as victims, because that would be against the Inter-American doctrine on the right to truth of victims of violations of human rights and the provisions of the General Victims' Law (GVL). Also, 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 it has also recognized relatives of direct 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 addressing the provisions in the GVL that distinguish between direct and indirect victims, notes the difficulty of evidencing 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. In this way, based on the right to truth of the 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 acts investigated have some connection with the statement of the victim on the disappearance of their relative.

VOTE: 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.

The votes cast may be consulted at the following link:

<https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=178853>

EXTRACT OF THE *AMPARO EN REVISIÓN* 382/2015

p.1 Mexico City. The First Chamber of Mexico's Supreme Court of Justice (this Court), in session of March 2, 2016, issues the following decision.

BACKGROUND

p.9 The facts that are 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 *amparo* lawsuit that took this case to this Court are relatives of migrants who, leaving El Salvador to attempt to reach the United States (US), disappeared in Mexican territory and presumably were found dead in the clandestine graves of Tamaulipas.

In March 2011, CAOP and MARA departed their homes in 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 Mexican prosecuting 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 *amparo indirecto* lawsuit against various authorities in Mexico challenging the possible cremation order of the remains found in the clandestine graves of San Fernando that may belong to their relatives, and against the refusal of the PGR to recognize them as victims in the preliminary investigation and give them access to the information in the case file. The civil association FJEDD also participated in the *amparo* lawsuit claiming its 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, 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 Enforced 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 *amparo* for the other part, and in a third aspect granting the protection of the Federal Justice to one of the affected parties. After a *recurso de revisión* and the reinstatement of the original *amparo* lawsuit, a new decision was issued dismissing the aspect of the possible cremation order and granting the *amparo* 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 *amparo* lawsuit in this case.
- p.6-7 Disagreeing with the decision, the parties filed a *recurso de revisión*. The collegiate court of Mexico City that processed the appeals asked this Supreme Court to exercise its authority to assert jurisdiction. This Court exercised its authority to assert 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, particularly 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.

I. 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 the cremation order existed, and there was no other evidence that disproved this denial.

II. 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 *Contradicción de Tesis* 111/2013, concluded that to resort to the *amparo* 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 *amparo* 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 *amparo* trial.

Furthermore, preventing FJEDD from having access to the *amparo* 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.

III. 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 coadjutant in the preliminary investigation, and to contribute evidence for the identification of their missing relative, implies being recognized as a victim or injured party, since the status of coadjutant 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 coadjutant 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, which 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 coadjutant to the public prosecutor, implies the request to be recognized as a victim or injured party of the crime.

Secondly, it is 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 in the *amparo* decision 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 the Constitution contemplated 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 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 so 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, both in the finding of the facts and 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 that this right 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 the 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 responsible for the direct 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 evidencing 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 evidencing 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, this 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, since 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 This 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 as long as the facts investigated have some connection with the story of the victim on 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 *amparo* trial, there were elements to consider that a relationship of kinship existed between the affected parties and 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 *amparo* against the cremation order and in relation to the dismissal of the *amparo* for lack of standing of the civil association, FJEDD. The appealed decision is amended and the *amparo* and protection of federal justice is granted to AYRA and BPO, for the Assistant Prosecutor to recognize them as victims in the preliminary investigation, permit them to have access to the cited investigation and issue the copies requested by the affected parties.