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**CITY OR ARTS
(CIUDAD DE LAS ARTES)**

CASE: *Amparo en Revisión 566/2015*

REPORTING JUSTICE: Arturo Zaldívar Lelo de Larrea

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

DATE OF THE DECISION: February 15, 2017

KEY WORDS: right to culture; economic, social and cultural rights; essential core; principle of progressive realization; progressive realization; principle of non-regression; standing.

CITATION OF THE DECISION: Supreme Court of Justice of the Nation, *Amparo en Revisión 566/2015*, First Chamber, Arturo Zaldívar Lelo de Larrea, J., decision of February 15, 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/2022-02/AR%20566-2015.pdf>

CITATION SUGGESTED FOR THIS DOCUMENT: Center for Constitutional Studies of Mexico's Supreme Court of Justice, Excerpt from the *Amparo en Revisión 566/2015*, Mexico.

SUMMARY OF AMPARO EN REVISION 566/2015

BACKGROUND: 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. In July 2013, LABM, OCH, LCPLG, MSVH, MAAC, LDG, RGB, GMQR, CRLS, ADSA, AME, CCS, JOCA, RAAM and JAHG filed an *amparo* lawsuit 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 *amparo* lawsuit. The affected parties filed a *recurso de revisión*, which was admitted by the Collegiate Circuit Court. The affected parties also presented a petition for the Mexico's Supreme Court of Justice (this Court) to assert jurisdiction over the *amparo en revision*. This Court decided to exercise its power to assert jurisdiction regarding the case.

ISSUE PRESENTED TO THE COURT: Whether 1) the affected parties had standing to challenge the failure to finish the project called "City of Arts" and 2) the failure to finish the project violates the right to culture of the affected parties.

HOLDING: In relation to the affected parties MAAC, LDG, RGB, GMQR, CRLS, ADSA, AME, CCS, JOCA, RAAM and JAHG, the *amparo* was dismissed because they did not demonstrate their standing. Regarding LABM, OCH, LCPLG and MSVH, the district court's *amparo* decision was amended and the *amparo* 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, this 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.

VOTE: The First Chamber 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.

The votes may be consulted at the following link:

<https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=181069>

EXTRACT FROM THE *AMPARO EN REVISIÓN* 566/2015

p.1 Mexico City. The First Chamber of Mexico's Supreme Court of Justice (this 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 *amparo* lawsuit 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 *amparo* 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 *amparo* lawsuit.

p.5-6 The affected parties filed a *recurso de revisión*, which was admitted by the Collegiate Circuit Court. The affected parties also presented a petition for this Court to assert jurisdiction over the *amparo en revisión*. Finally, this Court decided to exercise its power to assert jurisdiction regarding the case.

STUDY OF THE MERITS

I. Study of standing

p.14 This Court has consistently understood that 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 *amparo* 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 *amparo* 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.

II. 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 *Amparo Directo* 11/2011, the First Chamber of this 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, this 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.

III. 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 *Amparo en Revision* 323/2014, the First Chamber of this 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 the *Amparo en Revision* 750/2015 First Chamber of this Court established that the right to education has a minimum content that must be protected absolutely, although that minimum can be expanded. Furthermore, in the *Amparo en Revision* 378/2014, the Second Chamber of this 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 *Amparo en Revision* 1219/2015, the Second Chamber of this 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. This 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 This 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.

V. 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 *Contradiccion de Tesis* 366/2013, the Plenary of this 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 *amparo* 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 *amparo* lawsuit, 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 *amparo* lawsuit 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 *amparo* requested against the failure to finalize the project called "City of Arts" is denied.