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**FREEDOM OF EXPRESSION AND THE PRACTICE OF JOURNALISM  
(LIBERTAD DE EXPRESIÓN Y EJERCICIO DEL PERIODISMO)**

**CASE:** *Acción de Inconstitucionalidad 87/2015*

**REPORTING JUDGE:** José Fernando Franco González Salas

**DECISION ISSUED BY:** Plenary of Mexico's Supreme Court of Justice.

**DATE OF THE DECISION:** June 30, 2016

**KEY WORDS:** right to freedom of expression, right to information, journalist, human rights defender, protection measures, restrictions on the right to freedom of expression, journalism.

**CITATION OF THE DECISION:** Mexico's Supreme Court of Justice, *Acción de Inconstitucionalidad 87/2015*, Plenary, José Fernando Franco González Salas, J., decision of June 30, 2016, Mexico.

The full text of the decision can be found at the following link:

<https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/sentencia/2021-10/AI%2087-2015.pdf>

**CITATION SUGGESTED FOR THIS DOCUMENT:** Human Rights Office of Mexico's Supreme Court of Justice, *Extract from the Acción de Inconstitucionalidad 87/2015*, Mexico.

## SUMMARY OF THE *ACCION DE INCONSTITUCIONALIDAD* 87/2015

**BACKGROUND:** The National Human Rights Commission [Comisión Nacional de los Derechos Humanos] (CNDH) filed an *acción de inconstitucionalidad* against Decree number 276 amending the Law for the Protection of Human Rights Defenders and Journalists of the State of Quintana Roo (Defenders and Journalists Protection Law). The CNDH argued that the decree violated Articles 1, 4, 5, 6, 7, 14, and 16 of the Federal Constitution; 4, 5, 11, and 13 of the American Convention on Human Rights (ACHR) and 6, 9, and 19 of the International Covenant on Civil and Political Rights (International Covenant).

**ISSUE PRESENTED TO THE COURT:** Whether the reforms to the Defenders and Journalists Protection Law were constitutional, in terms of the definition of freedom of expression, the conditions that journalists must meet to be considered journalists, the requirement that media outlets be accredited to attend events of public interest, and the way to suspend the protection granted to them.

**HOLDING:** The validity of articles 3, section XII, and 45 of the Defenders and Journalists Protection Law was recognized for the following reasons. First, it was decided that the definition of journalist was constitutional, provided that the requirement of permanence in the activity was not the only one that should be verified to provide the protection contemplated in the law. In another aspect, the rule relative to the termination of protection measures was considered constitutional, since this does not happen immediately, but is analyzed together with the beneficiaries and the possibilities of risk are considered. However, article 3, section VI, a portion of Article 6, section IX, and a regulatory portion of the second paragraph of Article 13, were declared invalid, essentially for the following reasons. First, it was determined that the Congress of Quintana Roo had no competence to define human rights enshrined in the Federal Constitution, given that its limits and scope are defined by the latter; in this regard, the normative portion that defined freedom of expression was considered unconstitutional. On the existence of a greater risk to determine the protection measures granted to a journalist or human rights

defender, it was reasoned that a low standard of protection was created, with which the person would not only have to prove the existence of a risk, but that risk would have to be maximum, which prevents the real protection that the law seeks. Finally, regarding the requirement to show accreditation to a media outlet at a public or private event, it was concluded that this limits the exercise of freedom of expression regarding access to information, by restricting the possibility for a journalist to cover, report or express his or her opinion regarding a certain act that could be of public interest to society.

**VOTE:**

The votes cast may be consulted at the following link:

<https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=187091>

## EXTRACT OF THE *ACCION DE INCONSTITUCIONALIDAD* 87/2015

- p. 1 Mexico City. The Plenary of Mexico's Supreme Court of Justice (this Court), in session of June 30, 2016, issues the following decision.

### BACKGROUND

- p. 1 By letter submitted on September 14, 2015, the National Human Rights Commission [*Comisión Nacional de los Derechos Humanos*] (CNDH) filed an *acción de inconstitucionalidad*, requesting the invalidity of various provisions of the Law for the Protection of Human Rights Defenders and Journalists of the State of Quintana Roo (Defenders and Journalists Protection Law), published by Decree 276, on August 14, 2015.
- p. 14 The provisions of the Federal Constitution that the CNDH considers were violated are articles 1, 4, 5, 6, 7, 14 and 16; as well as articles 4, 5, 11 and 13 of the American Convention on Human Rights and articles 6, 9 and 19 of the International Covenant on Civil and Political Rights.

The formation and registration of the case file was ordered on September 15, 2015. On September 17, 2015, this action was admitted.

### STUDY OF THE MERITS

#### I. Article 3, section VI, of the Defenders and Journalists Protection Law

- p. 41-42 The CNDH argues that article 3, section VI, of the Defenders and Journalists Protection Law is unconstitutional in that, in defining freedom of expression, it does not cover all the cases of prohibition of discrimination enshrined in article 1 of the Federal Constitution. However, it is considered that there is a different reason for declaring the provision invalid.
- p. 42-43 This Court, in resolving the *Acción de Inconstitucionalidad* 75/2015, reaffirmed the recognition of various legal orders in the Mexican legal system, noting that each of them has its own jurisdictional assignments that, in general, are mutually exclusive, the corresponding authorities having autonomy in their exercise.

- p. 43 In particular, it was pointed out that although the regulatory regime for the union of federal states recognizes the existence of federated entities with freedom of self-determination in terms of their internal regime, nevertheless the exercise of State autonomy must respect the provisions of the Federal Constitution.
- p. 44 A harmonious interpretation of articles 40, 41 and 124 of the Constitution leads to the conclusion, as a premise, that the states will have full autonomy so that, without transgressing the principles established in the Constitution, they may resolve freely in matters which the Constitution itself has reserved for them.
- p. 45 Regarding the possibility that States may legislate with respect to human rights from a constitutional source, this Court recognizes the possibility that the state legislators, in accordance with their respective powers of competence, may develop or even expand the content of a human right provided for in the Federal Constitution and in international treaties containing human rights provisions to which the Mexican State is a party.
- p. 45-46 However, it does not imply that the state legislatures can introduce in their respective laws, specific definitions regarding a human right recognized in some constitutionally based law to contextualize its nature, although the content and scope of the right is already protected and delineated by the supreme law from which it derives, and can only be restricted in the cases and conditions that the Constitution itself establishes.
- p. 46 This Court considers that the state legislator lacks the competence to establish definitions of human rights that are recognized by the supreme law, since being derived from the constitutional order, their content and scope is not available to the states, because otherwise their normative, hierarchical, universal, and superior content with respect to the rest of the norms of the legal order would be distorted.

Thus, it is clear that the legislative body of the State of Quintana Roo exceeded its powers by seeking to introduce a definition of the right to "freedom of expression", since regardless of whether it is delineated for the purposes of that system, the definition replaces the power of the constitutional lawmaker to recognize and give content to a human right.

p. 48 Therefore, this Court concludes that section VI of article 3 of the Defenders and Journalists Protection Law must be declared invalid.

## **II. Article 3, section XII, of the Defenders and Journalists Protection Law**

The CNDH challenges the normative portion that establishes the definition of journalist, because the status of journalist is delineated by the condition that the activity be exercised in a "permanent" way, which in its opinion does not protect citizens who wish to seek and disseminate information and opinions. In addition, it states that this norm generates a criterion lacking objectivity to determine the status of journalist.

p. 49 The purpose of the definition is to ensure the protection of natural or legal persons who may be at risk because they engage in the promotion and/or defense of human rights or the practice of journalism. The failure to include any person under this definition would prevent their access to protection mechanisms.

p. 50 From the aforementioned provision, there are two aspects to the definition of a journalist. The first one mentions any person who exercises the freedom of expression permanently and the second one includes natural persons who perform certain activities and require protection from the risks involved in their professional work.

This Court considers that this rule allows an interpretation in accordance with the constitutional text. This is so given that the definition of journalist does not refer exclusively to the permanence in the exercise as a characteristic for any subject to fall under this case, but this is simply one of several aspects that can be considered to define a journalist, since it establishes other characteristics that may also be applicable.

Thus, the text of the provision itself does not indicate that the characteristic of permanence must be satisfied in addition to another requirement, but that these are established independently.

p. 51-52 This Court considers that the definition provided also makes broad reference to the actions performed by the person such as "storing, generating, processing, editing, commenting, opining, disseminating", as well as, through any means of dissemination and

communication. In this way, it is considered that the characteristic of permanence to define a journalist, in order to be granted the measures provided for by the law, exists alongside another series of characteristics broadly established.

p. 54 This Court considers that the definition of journalist determined by the legislator of the State of Quintana Roo is constitutional provided that it is understood that the requirement of permanence, constancy or stability in the activity is not the only requirement that must be verified by the authority for the purpose of defining who can request the protection mechanisms provided for by law, but that it is sufficient if any of the modalities provided for in any of the normative phrases are satisfied, so that the person who requests any of the protection mechanisms provided for in this law can be considered a journalist.

p. 54-55 Consequently, the concept of invalidity is declared unfounded and the validity of article 3, section XII, of the Defenders and Journalists Protection Law is recognized.

### **III. Article 6, section IX, of the Defenders and Journalists Protection Law**

p. 55-56 According to the CNDH, this article does not contemplate parameters that determine what will be understood for "high risk", which substantially affects the determination of who can receive protection from the Quintana Roo System for the Protection of Human Rights Defenders and Journalists (Protection System), since the mere existence of risk or expectation of danger is not protected. It adds that this principle becomes an open and broad normative criterion, which restricts the standards of protection to extreme situations, and to a discretionary determination, in addition to the fact that aggressions that could be assessed as low risk and that subsequently result in serious aggressions or harm impossible to remedy are unprotected, because their effects are not immediately appreciable.

p. 58-59 This Court warns that the benefit of the positive measures for the protection of human rights implemented by the State cannot be conditioned on compliance with enormous requirements or the framing of excessive normative assumptions; rather these measures must be accessible and with the least obstacles possible, taking into account that the essential purpose of the State's obligation of protection is the deployment of multiple

actions in order to protect people from interference from its own agents and private individuals. Thus, the more requirements envisaged for access to a State's positive protection measures and the more difficult it is to determine the beneficiaries of these measures, the more difficult it becomes for the State to comply with its obligation of protection.

p. 59 As indicated, it is considered that establishing that the measures should be intended for people who are at "high risk" is unconstitutional.

In this regard, the requirement of "high risk" does not have a parameter defined by the law so it is not clear when it will occur.

p. 61 Restricting protection to those who are at "high risk" potentially prevents protection in necessary cases, generating a different and more complex parameter. Thus, requiring the existence of a greater risk to determine the possible beneficiaries of protection measures creates a standard of protection under which the journalist or human rights defender will not only have to prove the existence of a risk, but that it is high, which prevents the real protection that the law seeks.

p. 62 In this law, the margins of protection provided vary according to the existence of the risk determined, even for the same, different measures are established, and hence, it does not make sense to establish that they may be intended exclusively for people who are at a "high risk", generating an unnecessary obstacle to request and, where appropriate, have access to these measures.

p. 63 In this regard, it is clear that in the determination of the risk to which a journalist or a human rights defender may be exposed, the existence of other elements such as their reality and immediacy, and the specific circumstances and context, must be weighed, all of which must be examined for their determination, without requiring proof of a "high risk" as provided for in the challenged provision that, instead of preventing irreparable harm to such persons, would leave them defenseless in the face of real threats.



For all the foregoing, it is appropriate to declare the invalidity of section IX, of article 6 of the Defenders and Journalists Protection Law, in the normative portion that says "a high".

#### **IV. Article 13, second paragraph of the Defenders and Journalists Protection Law**

- p. 64 The CNDH challenges the content of article 13, second paragraph, considering that requesting the accreditation of a social media outlet to access acts of public interest violates freedom of expression. The CNDH states that the article obstructs the right to collect information, since it excludes those subjects who do not have the accreditation of a social media outlet because they do not work for one, generating a tacit distinction that lacks a justification. Furthermore, the CNDH states that the article lacks objective parameters for determining the "accreditation of a social media outlet".
- p. 65-66 In the *Acción de Inconstitucionalidad 29/2011*, this Court considered that the Federal Constitution, the ACHR and the International Covenant establish that the right to freedom of expression should not lead to the conclusion that it is an unlimited right, since it is also noted that these laws are concerned with setting forth specifically how these limitations must be in order to be considered legitimate.
- p. 69-70 The legality of restrictions will depend on whether they are designed to satisfy a compelling public interest and whether, where there are several options for achieving that objective, the one that restricts the right on a lesser scale is chosen. The restriction must be proportionate to the interest that justifies it and be closely aligned with achieving that legitimate objective.
- p. 71 The freedom of expression and its aspect consisting of the right to information have a double facet, individual and social, which require not only that individuals not be prevented from expressing themselves freely, but also that their right as members of a group to receive any information and to know the expression of thought of others be respected.

The main consequence of the preferred position of freedom of expression and the right to information is the general presumption of constitutional coverage of all expressive or informative speech, which is justified by the primary obligation of neutrality of the State regarding the content of the opinions and information disseminated, as well as by the need

to guarantee that, in principle, there are no persons, groups, ideas or means of expression excluded a priori from public debate.

- p. 72 Moreover, article 13 of the Defenders and Journalists Protection Law indicates a right for anyone who engages in journalism to have access to acts of public interest, both official and private. However, in the second paragraph, it is specified that the journalist may be asked for his or her official identification and, in addition, the accreditation of the social media outlet for which he or she works.
- p. 73-74 This Court considers that the requirement of accreditation of the social media outlet constitutes a restriction on the exercise of freedom of expression regarding access to information; it implies that not every journalist will be able to have access, even when that public interest exists, but only those that have the accreditation of the social media outlet for which they work. This requirement does not correspond to a democratic state in which the search for the exchange of information is fundamental.
- p. 74 Likewise, it can be noted that the lack of such accreditation restricts the possibility of access to an event of public interest and, consequently, limits the exercise of freedom of expression regarding access to information, by limiting the possibility that a journalist can cover, report, or issue his or her opinion regarding a certain act that could be of public interest to society.
- p. 76 Although the Court recognizes that the use of accreditation mechanisms for journalists will be valid when this gives them greater security and access to their activity, they must be granted according to proper regulation that does not give rise to discriminatory practices in which an authority can arbitrarily determine who can or cannot cover a certain news event of a public nature.

The challenged provision is unconstitutional since it does not establish any type of procedure for determining the accreditation of a journalist, which generates uncertainty.

- p. 78-79 Thus, the interpretation of this provision presumes that every journalist can have access to any event of public interest developed by public entities or events held by private entities of a public nature, provided that a person demonstrates that he or she is engaged in this

profession, even independently, and if requested, identifies him or herself in this regard, and therefore such request, to the extent it is for an official identification, is constitutional.

- p. 79 Therefore, this Court considers that the second paragraph of Article 13 should be declared invalid in the wording that states "and the accreditation of the social media outlet for which they work".

#### **V. Article 45 of the Defenders and Journalists Protection Law**

- p. 80 The CNDH challenges the constitutionality upon considering that this article establishes that the persons benefited by the mechanism for the protection of journalists may be separated from the measure declared for them at any time, it being sufficient that they simply send a written communication to the Governing Board or to the Executive Secretariat of that entity, without requiring the authority to verify that the reasons for which protection was granted have ceased or changed or that the benefited persons consent to their separation or ratify such request, which leads to the absence of legal certainty, thus threatening personal security.
- p. 85 According to the challenged article 45, the beneficiaries may be separated from the measure at any time, for which purpose they must submit a written request to the Governing Board or the Executive Secretariat, as the case may be; however, contrary to what the CNDH has said, this does not occur immediately.

In the case of preventive, protective and social measures, their suspension or modification is determined by the Governing Board, following a risk assessment study carried out by the Executive Secretary.

Urgent protection measures must be followed up regularly by the Executive Secretariat, which, where appropriate, will recommend their continuation, adjustment, or conclusion.

- p. 86 It should be noted that, although the law does not expressly require a ratification by the beneficiary of a measure for his or her separation from the measures, the termination of those measures is not immediately generated, since that requires a prior analysis by the authorities in charge of granting it.

Thus, in the case of preventive, protective, and social measures, it is important to note that everything related to their implementation and evaluation will be analyzed in agreement with the beneficiaries, considering the possibilities of risk or unforeseen events or problems, while regarding urgent protection measures, the power of the Executive Secretariat to recommend their continuity or conclusion is also noted.

Therefore, this Court concludes that the article does not generate a situation of defenselessness of the beneficiary of a measure because, upon the presentation of the request for separation, the authority has an obligation to evaluate the feasibility of declaring the suspension or termination of the measure, noting that it cannot be declared immediately with just the submission of a request to that effect.

Consequently, the validity of article 45 of the Defenders and Journalists Protection Law is recognized.

### **DECISION**

p. 87-88 This *acción de inconstitucionalidad* is valid and partially grounded. The validity is recognized of articles 3, section XII, and 45 of the Defenders and Journalists Protection Law; and the invalidity is declared of articles 3, fraction VI, 6, fraction IX, in the normative portion 'a high', and 13, second paragraph, in the normative portion 'and the accreditation of the social media for which they work' of the same law.