

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.

**FREEDOM OF EXPRESSION AND THE RIGHT TO HONOR IN CASES INVOLVING
PUBLIC OFFICIALS
(LIBERTAD DE EXPRESIÓN Y DERECHO AL HONOR EN CASOS QUE INVOLUCRAN A
FUNCIONARIOS PÚBLICOS)**

CASE: *Amparo Directo En Revisión 2044/2008*

REPORTING JUSTICE: José Ramón Cossío Díaz

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

DATE OF THE DECISION: June 17, 2009

KEY WORDS: right to private life, right to honor, right to privacy, right to information, personality rights, freedom of expression, public officials, news stories.

CITATION OF THE DECISION: Supreme Court of Justice of the Nation, *Amparo Directo En Revisión 2044/2008*, First Chamber, José Ramón Cossío Díaz, J., decision of June 17, 2009, 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/ADR%202044-2008.pdf>

CITATION SUGGESTED FOR THIS DOCUMENT: Center for Constitutional Studies of Mexico's Supreme Court of Justice, Excerpt from the *Amparo Directo En Revisión 2044/2008*, Mexico.

SUMMARY OF AMPARO DIRECT EN REVISION 2044/2008

BACKGROUND: The Mayor of Acámbaro, Guanajuato filed a complaint against the director of a local newspaper claiming that a news story caused him dishonor and disgrace. The story contained an interview with a former official who worked as his personal driver. It had revealed some aspects of the intimate and sexual life of the Mayor, as well as an alleged use of public resources for purposes other than those approved. The trial court judge determined that the director of the newspaper was criminally liable for the crime of invasion of private life, imposing a prison term on the accused. The director filed an appeal that upheld the decision of the trial court. The director then filed an *amparo directo* lawsuit against that determination, alleging the violation of the freedom of expression and information and that the appellate court interpretation of the Press Law of the State of Guanajuato did not adhere to constitutionally legitimate objectives. However, the Collegiate Circuit Court that heard the case confirmed that the publication had violated the public official's rights to private life and privacy, so it denied him the *amparo*. The affected party filed a *recurso de revisión* that was sent to Mexico's Supreme Court of Justice for its decision.

ISSUE PRESENTED TO THE COURT: Whether the news story that refers to the private life of the Mayor is protected by the right to freedom of expression and if the Press Law of the State of Guanajuato is compatible with articles 6 and 7 of the Constitution.

HOLDING: The challenged decision was overturned and the *amparo* was granted to the director of the newspaper, for the following reasons. It was determined that the news story is protected by freedom of expression and that the Collegiate Circuit Court's reasoning was incompatible with the Constitution. First, by maintaining that the publication of an apparent allusion to the Mayor's sexual life is an invasion of his honor. Second, by maintaining that the constitutional protection of private life automatically made the public dissemination of the data, opinions and information contained in the news story impossible. And third, by not considering the regulation contained in the Press Law of the State of Guanajuato, which served as the basis for sentencing the director of the newspaper, constitutionally objectionable. In addition, articles 1 and 30,

section II of the mentioned law were declared unconstitutional for not satisfying the conditions necessary to ensure a necessary, ideal and proportionate legal reaction in future liability claims against forms of speech that could allegedly violate the honor of public officials or other persons acting in official capacity.

VOTE: The First Chamber decided by the unanimous vote of the five justices Olga Sánchez Cordero de García Villegas, José de Jesús Gudiño Pelayo, José Ramón Cossío Díaz, Juan N. Silva Meza and Sergio A. Valls Hernández.

The votes may be consulted at the following link:

<https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=104404>

EXTRACT FROM THE *AMPARO DIRECTO EN REVISION* 2044/2008

p.1 Mexico City. The First Chamber of Mexico's Supreme Court of Justice (this Court), in session of June 17, 2009, issued the following decision.

BACKGROUND

p.1-3 The case originated from the publication, on December 23, 2004, of a news story in the newspaper "La Antorcha", a regional media outlet in Acámbaro, Guanajuato, of which JSJOH was general director. In that publication, RGM –a former municipal public official– gave an interview and spoke about activities he had to perform and orders he received during the time he worked, as a driver, for the Mayor of Acámbaro. In summary, the content of the story is as follows:

RGM was the private driver of the Mayor and just over a month ago he resigned for family reasons.

A few weeks later, some statements came to light, in which RGM is accused of having illegally taken gasoline.

Thus, RGM now defends himself and asserts: That is a lie. On the contrary, I always served the Mayor in everything he asked of me, because I even transported fabric or uniforms from his factory to Guadalajara, Mexico City or other parts of the country.

Did you make those trips in the official truck and with fuel charged to the municipality? –Yes, that and more, I used the vehicle on orders of the Mayor and with fuel charged to the municipal treasury. Also to go where he has a cabin, to take tiles and bricks.

What other services were you sent to carry out? –To take his family shopping or to the airport, to Acapulco, to Manzanillo with their friends and to deliver merchandise from his factory. In everything he asked of me, I never refused, but I worked very long workdays.

Was there anything you refused, something you didn't want to do? -Well, one day at a hotel in Mexico City; he lay down naked on the bed and asked me to rub his back. There I did say "hey, no".

Does he have a lot of debt? –Yes, of course. I also handled many of his deposits. And I know he owes money to a lot of people. He is in the credit bureau (which means being on the list of the banks for defaulting).

And how is he doing with respect to his political relations? –He has made many mistakes, in my opinion, such as having lent a motor grader, which is a machine owned by the municipality, to the candidate of the National Action Party of Maravatío (who, by the way, lost the election).

Does that mean he used public resources to help the candidate from Maravatío, Michoacán, in the campaign? –Yes, that's right.

Was there anything that bothered you, especially about the Mayor's political conduct? –Yes, in a meeting with senior citizens which he attended with the decision not to help them and where he told them: 'You are just used to looking for a handout'.

p.3-4 On January 13, 2005, the Mayor filed a criminal complaint on the grounds that everything that had been published was a lie, that such statements caused him dishonor, disgrace, and harm, and that they disparaged him and made him look ridiculous as a public official.

p.4 On January 25, 2007, the judge hearing the criminal proceedings handed down a decision in which she determined that JSJOH was criminally liable for the crime of invasion of private life, imposing on the defendant a prison term of 3 years, 1 month and 15 days.

JSJOH filed an appeal. On January 18, 2008, a decision was issued amending the trial court decision with regard to compensation for damages.

p.4-5 JSJOH filed an *amparo directo* lawsuit against that decision.

p.5 The Collegiate Circuit Court in Criminal Matters admitted the claim. After following the legal procedures, on October 27, 2008, it issued a decision denying the amparo.

The affected party filed a *recurso de revisión* before the Collegiate Circuit Court that heard the case, whose president ordered it to be referred to this Court.

STUDY OF THE MERITS

I. The play between Constitution and law.

- p.15-16 In the opinion of this Court, the Collegiate Circuit Court starts from an erroneous understanding of the role that ordinary law can play in the guarantee, development, and realization of fundamental rights. According to its reasoning, fundamental rights only have the scope that the law that supposedly develops and materializes them decides to give them. The decision issued does not contain a true analysis of the constitutionality of the provisions of the Press Law of the State of Guanajuato (LIEG). The basic reasoning is that the freedoms enshrined in articles 6 and 7 of the Federal Constitution have limits (do not attack morals, rights of third parties and private life; do not provoke any crime and do not disturb the peace) and that the state law contemplates a crime aimed precisely at protecting private life, which is counted among those limits; for this reason, this law is not constitutionally objectionable and was correctly applied to the facts under analysis.
- p.16 In the view of this Court, the Collegiate Circuit Court's reasoning makes several unjustified argumentative leaps. It is true, as it claims, that the freedoms of expression, press and information provided for in the Constitution and in treaties have limits.
- p.16-17 However, this express mention does not imply that these are the only bases on which the mentioned freedoms can be limited, nor does it imply that, automatically, any legal regulation that is presented as a materialization of those limits is legitimate. Although part of the job of the legislator is to give form to those limits, their compatibility or incompatibility with the Constitution requires a substantive analysis of constitutionality.
- p.17-18 There is no substantive analysis of the broad and ambiguous terms used by articles 1, 3, 4, 5 and 6 of the LIEG, nor is there any analysis to determine under what conditions the need for limits can justify the application of criminal law.

The legal approach of the Collegiate Circuit Court, in conclusion, takes for granted what it must demonstrate.

II. The right to honor and private life of public officials. The freedom of journalists to report.

p.19 The Collegiate Circuit Court incorrectly and incompletely interprets what should be understood as protected by the rights enshrined in articles 6 and 7 of the Constitution and by "private life" which must be respected thereunder. The interpretation is incorrect in drawing an automatic equivalence between "sexual life" and "private life" and in ignoring or mixing the various meanings of this expression, and incomplete because it fails to analyze the type of *subjects* that in this case exercise the constitutional rights in conflict: the fact that the holder of the right to private life is or has been a *public official*, and the fact that the affected party is not just any citizen, but a professional journalist.

Both the abstract and the concrete rules for weighing the different rights had to consider these circumstances because the weight they should be given is linked in part to this factor, which obviously does not lie in the quality or intrinsic characteristics of the mentioned subjects, but in the type of public interest associated with the activities they carry out.

A) The right to a private life

p.21 This Court has evoked characteristic features of the notion of "privacy". It has related it to: what does not constitute public life; the sphere reserved from the action and knowledge of others; what you want to share only with those you choose; the activities of individuals in the private sphere, related to home and family; that which is not performed as a public official.

p.24-25 The constitutional protection of private life implies being able to conduct part of one's life protected from the gaze and interference of others, and it has various connections with more concrete pretensions that the current constitutions sometimes recognize as related rights: the right to be able to freely make certain decisions regarding one's own life plan, the right to see certain manifestations of physical and moral integrity protected, the right to honor or reputation, the right not to be presented under a false appearance, the right to prevent the disclosure of certain facts or the unauthorized publication of certain photographs, protection against spying, protection against the abusive use of private

communications, or protection against disclosure of information communicated or received confidentially by an individual.

p.25 The content of the right to "private life" is intended to vary, legitimately and normally, both for reasons that are *internal* and *external* to the concept itself. The internal variability of the right to privacy refers to the fact that the behavior of the holders of this right may influence the determination of its scope of protection. It is not only that the understanding of what is private changes from one culture to another and that it has changed throughout history, but as we understand it now, the possibility that its holders modulate its scope is also part of the right to privacy.

p.26 However, the most important source of variability derives not from the play of internal limits, but from the variability of external limits. The external variability of the right to private life refers to the normal and expected difference between the *prima facie* content of fundamental rights and the real protection they offer in specific cases once counterbalanced and harmonized with other rights and interests that point in different and even opposite directions to those derived from their normative content.

Although it is true that aspects relating to a person's sexual life can be counted *prima facie* among those they usually want to be protected from the public eye, their final legal protection is subject to a legitimate modulation, both internal and external, in the terms just mentioned. That is why the automatism established by the Collegiate Circuit Court is incorrect.

B) Freedom of expression and the right to information

p.27 If on one side of the analysis there is private life, on the other there are freedom of expression and the right to information. As is known, these are two functionally essential rights in the structure of the constitutional rule of law that have a double facet: on the one hand, they assure people essential spaces to deploy their individual autonomy, spaces that must be respected and protected by the State and, on the other hand, they enjoy a public, collective or institutional dimension that makes them cornerstones for the proper functioning of representative democracy.

p.28 Having full freedom to express, collect, disseminate and publish information and ideas is essential not only as an instance of self-expression and self-creation, but also as a premise to be able to fully exercise other fundamental rights –that of association and peaceful assembly with any lawful purpose, the right of petition or the right to vote and stand for election– and as a functional element that determines the quality of democratic life in a country: if citizens do not have full assurance that the law protects them in their ability to freely express and publish ideas and facts, it will be impossible to advance in obtaining a large body of active, critical citizens, committed to public affairs, attentive to the behavior and decisions of the governing authorities, and capable of fulfilling the function that corresponds to them in a democratic regime.

p.29 This makes it necessary to highlight three other points:

p.30 The first is that the mass media play an essential role in the unfolding of the collective function of freedom of expression.

p.31 One of the most powerful limitations on the circulation of information and public debate is the threat of civil or criminal liability against journalists, for their own or others' acts.

The second is that the rights in question cover both the expression of opinions and assertions of facts. It is important to keep in mind that it makes no sense to speak of the truth or falsehood of opinions. On the other hand, information whose collection and wide dissemination is in principle constitutionally protected is truthful and impartial information.

p.31-32 This does not imply that it must be "true", clear, and incontrovertible information. What the mention of veracity encompasses is simply a requirement that reports, interviews and news stories intended to influence the formation of public opinion be supported by a reasonable exercise of investigation and verification to determine a sufficient basis in reality. Reporters must be able to show that they have respected a certain standard of diligence in checking the status of the facts about which they report and, if they do not reach irrefutable conclusions, the information must be presented to the reader indicating that there are other points of view and other possible conclusions about the facts or events described.

Impartiality is a barrier against open misrepresentation, against the intentional dissemination of inaccuracies and against the unprofessional treatment of information whose dissemination always has an impact on the lives of the people mentioned in them.

p.33 The third point is that freedom of the press and the right to give and receive information especially protects the expression and dissemination of information in political matters and, more broadly, in matters of public interest. Therefore, the protection of its free dissemination is especially relevant for these freedoms to fully perform their strategic functions in forming public opinion, within the structural scheme of representative democracy.

III. Specific rules for conflict resolution: expression, information and honor in cases involving public officials.

p.34-35 The collective or systemic role of freedom of expression and the right to information must be carefully considered when such freedoms conflict with the so-called "personality rights", which include the right to privacy and the right to honor.

p.36-37 Persons who perform or have held public responsibilities, as well as candidates for public office, have a right to privacy and honor with less general normative resistance than those which ordinary citizens are entitled to against the mass media exercising the rights to express themselves and inform.

This is so for reasons strictly linked to the type of activity they have decided to carry out, which requires intense public scrutiny of their activities.

p.38 In order for the imposition of liability to constitute a necessary, ideal, and proportionate legal reaction in cases of speech allegedly invasive of the honor of public officials or other persons connected with the exercise of public functions, at least the following conditions must be met:

p.38-39 a) Legal coverage and clear drafting: the causes for which the imposition of liability may come into play must be included in a law, both formally and materially. Laws establishing limitations on freedom of expression should be drafted in clear and precise terms to ensure legal certainty, the protection of citizens against arbitrariness by the authorities and the

creation of a legal environment hostile to deterrence of expression and self-censorship; vague or ambiguous formulas do not allow citizens to anticipate the consequences of their actions, give too broad discretionary powers to the authorities and have a very clear deterrent effect on the ordinary exercise of freedoms. When the liability rules are criminal in nature, the above requirements take on even more importance.

- p.39 b) Specific intent or obvious negligence: expressions and information must be analyzed under the standard of "malice"; that is, under a standard that requires that the expression that allegedly causes damage to the reputation of a public official has been issued with the intention of causing that damage knowing that false facts were being disseminated, or with clear negligence with respect to the review of their apparent veracity or lack of veracity.
- p.40 c) Materiality and proof of harm: the rules of imputation of subsequent liability must require that whoever alleges that a certain expression or information causes harm to their honor has the burden of proving that the harm is real, that it actually occurred.
- d) Double play of *exceptio veritatis*: those who speak must always be able to block an imputation of subsequent liability by proving that the facts they refer to are true and, in addition, they cannot be obligated to prove, as a *sine qua non* condition to avoid that liability, that the facts on which they spoke are true.
- p.41 e) Gradation of means to impose liability. The legal system cannot contemplate a single way of imposing liability because the requirement that the impacts on rights be necessary, adequate, and proportionate requires the existence of mild measures to react to minor impacts and more serious measures for more serious cases. It must also be borne in mind that there is an alternative to the imposition of civil and criminal liability, now expressly mentioned in article 6 of the Constitution: the right of reply.
- p.41-42 f) Minimization of indirect restrictions. The full guarantee of the freedoms enshrined in articles 6 and 7 of the Constitution requires the avoidance of not only direct unjustified restrictions but also indirect ones. The point is to avoid generating dynamics of distribution of liability among citizens, journalists, editors, and media owners that lead some to find interest in the silencing or expressive restriction of others.

p.42 The above analysis supports the affected party's argument that the Collegiate Circuit Court pursued reasoning incompatible with the Constitution. First, by maintaining that what was published constituted, by the mere fact of containing a brief allusion to what some may consider sexual life, an invasion of private life (more specifically, honor) of the person concerned; second, by maintaining that the constitutional protection of private life automatically made it impossible to disseminate the data, opinions and information contained in the news story to the public and that, consequently, it made the criminal prosecution of the editor of the newspaper in which it had appeared legally irreproachable; and, third, by not considering the regulation contained in the LIEG, on which the affected party was prosecuted and sentenced, constitutionally objectionable.

IV. Inapplicability of the LIEG

p.49 The problems of article 1 of the LIEG, which supported the criminal conviction of the complainant, are evident. First, there is a clear initial lack of clarity given that the article refers to "attacks on private life" when what it describes is conduct that threatens the right to honor.

p.49-50 Secondly, article 1 of the LIEG should target particularly serious and clearly established attacks on a person's good name. What happens is exactly the opposite: by simply referring to manifestations or expressions that expose a person to hatred, contempt or ridicule, or may diminish their reputation or their interests, the provision criminalizes even cases in which the impact on good reputation is purely possible.

The article even expands the broad impacts on "reputation" covered by the criminal law to include those people may suffer "in their interests". The presence of this last expression irremediably blurs the interest or right that the legislator is supposed to preserve against abusive exercises of freedom of expression and leaves the crime completely open.

p.51 This is so because article 4 of the Press Law of Guanajuato indicates that the expression or manifestation will be "malicious" not only when it "necessarily implies the intention to offend", but also "when by the terms in which it is conceived it is offensive".

p.51-52 Article 5 of the LIEG indicates that a statement or expression shall not be considered malicious, even if its terms are objectively offensive, "when the defendant proves that the

facts attributed to the complainant are true or that he had well-founded reasons to consider them true and that he published them for honest purposes." As we have seen, for the exercise of freedom of expression and information to be full and effective it is not possible to require that people can be protected from criminal conviction only if they referred to something they can prove is completely true.

- p.52-53 Article 6 of the LIEG broadens the scope of the criminalization of the expression: "In no case may criticism of a public official or employee be considered criminal if the facts on which it is based are true and if the assessments made in that regard are rational and are motivated by those facts, provided that no insulting phrases or words are included." It cannot be said that this provision embraces the *exceptio veritatis* because it allows people to free themselves from accusations of defamation only if they show that the statements are true, and also "rational" and "motivated by the facts", with the additional condition that "no insulting phrases or words are included".
- p.53 The accumulation of these clauses imposes extraordinarily demanding conditions and, in the opinion of this Court, carries the norm beyond the standards of reasonableness of the mentioned limitations.
- p.53-54 In conclusion, the articles of the LIEG on the basis of which the affected party was convicted do not allow the criminal judge to make the kind of global analysis of the facts required in this type of case. They do not allow the case to be judged adequately considering all the elements and circumstances that we have indicated as relevant in that decision: persons involved and their own professional activities and social function, public interest in the information disseminated, political and social context in the municipality at the time of publication, predominant purpose of the interview, mode of presentation, etc. Nor do they allow the necessary distinction to be made between the judging of facts and the judging of opinions, or take into account that opinions cannot be considered in terms of their truth or falsity. Nor can the requirement that facts be truthful be considered equivalent to the requirements established in articles 4, 5 and 6 of the said Law. The regime of criminal liability provided for in the LIEG allows criminal liability to be attributed to persons who did not intend to offend, and for mere possible, not actual, invasions of the right to privacy and

the right to honor. The broad terms in which the law describes the criminal conduct and the absence of qualification of the subjects, allow the criminalization of both the people who make the expression and the rest of the participants in the chain of dissemination of news and opinions and ensure that it will generate self-censorship and all kinds of direct and indirect restrictions on freedom of expression. Finally, it does not allow fair treatment to be given to conduct whose adequate and proportionate legal treatment, in view of the provisions of our Constitution, would require the use of less burdensome alternatives for the fundamental rights, far from criminal law.

DECISION

- p.54-55 This Court declares unconstitutional not only article 1 of the LIEG, which contains the crime that served to encompass the conduct of the complainant, but also, in substitution for the deficiency of the allegations of the affected party, that of section II of article 30 of the mentioned law which establishes the penalty with which "attacks on private life" will be punished, on which the criminal conviction of the affected party was also based.
- p.55 Therefore, it overturns the decision under appeal and grants the affected party, plainly, the protection of the Federal Courts.