



Suprema Corte
de Justicia de la Nación



DERECHOS
HUMANOS

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.

WATCHDOG JOURNALISM AND RIGHT TO INTIMACY
(PERIODISMO DE DENUNCIA Y DERECHO A LA INTIMIDAD)

CASE: *Amparo Directo 3/2011*

REPORTING JUDGE: Arturo Zaldívar Lelo De Larrea

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

DATE OF THE DECISION: January 30, 2013

KEY WORDS: right to freedom of expression, right to intimacy, right to privacy, public interest, journalists, watchdog journalism, actual malice, confidentiality, public figures, private individuals with public renown, veracity, public domain.

CITATION OF THE DECISION: Supreme Court of Justice of the Nation, *Amparo Directo 3/2011*, First Chamber, Arturo Zaldívar Lelo De Larrea, J. decision of January 30, 2013, 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/2021-10/AD%203_2011.pdf

CITATION SUGGESTED FOR THIS DOCUMENT: Human Rights Office of Mexico's Supreme Court of Justice, *Extract of the Amparo Directo 3/2011*, Mexico.

SUMMARY OF THE *AMPARO DIRECTO* 3/2011

BACKGROUND: A woman (affected party) sued a journalist and a publisher for the violation of the right to privacy and her own image, since they included without her consent photographs and personal information in a book, related to sexual abuse and exploitation. A judge in Mexico City issued a decision and the journalist and the publisher filed appeals. On January 27, 2010, a chamber of the Superior Court of Justice of Mexico City decided against them. Both filed an *amparo directo* over which the First Chamber of Mexico's Supreme Court of Justice (this Court) asserted jurisdiction.

ISSUE PRESENTED TO THE COURT: Whether the intrusion in private life was reasonable and in line with the doctrine on the establishment of subsequent liabilities for the dissemination of private information of private individuals with a public profile.

HOLDING: The *amparo* was essentially granted for the following reasons. After analyzing the doctrine on the freedom of information and intrusions in private life, it was determined that the intrusion was reasonable, given that it was an individual with a public profile and the information was related to trafficking of persons and child pornography. In addition, measures were taken to protect her identity, which was uncovered by the public actions of the affected party and the Public Prosecutor. Therefore, the protection of federal justice was granted, so the Chamber could issue a new decision and exonerate them of liability.

VOTE: The First Chamber decided this matter unanimously with the five votes of judges Olga Sánchez Cordero de García Villegas, Arturo Zaldívar Lelo de Larrea, José Ramón Cossío Díaz (reserved the right to issue a concurring opinion), Alfredo Gutiérrez Ortiz Mena and Jorge Mario Pardo Rebolledo.

The votes cast may be consulted at the following link:

<https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=124353>

EXTRACT OF THE AMPARO DIRECTO 3/2011

- p. 1 Mexico City. The First Chamber of the Supreme Court of Justice of the Nation (this Court), in session of January 30, 2013, issues the following decision.

BACKGROUND

- p. 1-2 A woman (the affected party) sued a journalist and a publisher for the violation of her right to privacy and her own image on the grounds that they included without her consent photographs and personal data in a book related to experiences of sexual abuse and exploitation suffered by minors. On August 20, 2009, a judge in Mexico City issued a decision in which she determined that the action filed against the publisher was partially proven and the action against the journalist was not proven.
- p. 2 The journalist and the publisher filed appeals. On January 27, 2010, a civil chamber of the Superior Court of Justice of Mexico City (the Chamber) modified the decision determining the actions to be partially proven.
- p. 2-3 The journalist and the publisher filed an *amparo directo*. On July 15, 2010, a collegiate court in Mexico City remitted the case to this Court. On November 24, 2010, this Court decided to exercise its authority to assert jurisdiction over the case.

STUDY OF THE MERITS

I. The constitutional doctrine on the conflicts between freedom of expression and personality rights

a) Freedom of expression in a representative democracy

- p. 71-72 Freedom of expression has two dimensions. In the individual dimension, it constitutes a mechanism for exercising the autonomy that is essential to building the life model that one wants and the model of society where one wants to live. The collective dimension is structurally related to the democratic system.

p. 74 The instrumental relationship with the proper development of democratic practices gives this fundamental right a preferred position over the rights of personality. However, this does not mean that it should prevail in all cases.

b) The media and public opinion

p. 75-76 In the *Amparo Directo 28/2010*, the First Chamber of this Court held that the freedoms of expression and information reach a maximum level when these rights are exercised by professional journalists through the institutionalized vehicle of formation of public opinion, which is the press. The journalist must have a certain autonomy and independence which will affect the quality of the opinions he expresses and the information he conveys to the public.

c) Freedom of opinion and freedom of information

p. 78-79 In the *Amparo Directo en Revisión 2044/2008*, the First Chamber of this Court clarified that it makes no sense to advocate the truth or falsehood of opinions. However, this does not mean that from a constitutional point of view the information disseminated in the exercise of freedom of expression must be true. It requires something weaker: the veracity of the information, a requirement of a reasonable exercise of investigation and verification aimed at determining whether it has sufficient basis in reality.

p. 79-80 The journalist pointed out that in the book he carried out a compilation and documentation of the experiences of sexual abuse and exploitation suffered by minors entrusted to JSK. He argued that all the data are backed up with official documents and direct testimonies, among which are photographs, the statement at prosecution and personal data of the affected party. Based on this, the issue in dispute is not the value judgments in the book but the facts in it. Thus, there is a conflict between the right to privacy of the affected party and the right to information of the journalist and the publisher.

d) Freedom of information, truthfulness and public interest

p. 80-81 In the *amparo directo 6/2009*, this Court stated that the veracity of the information is irrelevant if it transgresses the limit of the right to intimacy. The truth of the information is

the prerequisite of any violation of intimacy. In any case, if the information published was false, some other right would probably be violated.

- p. 82 The victim claimed the violation of her right to privacy and her own image by the inclusion in the book of: (i) photographs of the affected party and her relatives; (ii) the statement she made to the prosecuting authority; and (iii) a psychological study.

In this type of case, the criterion that justifies the legitimacy of an invasion of privacy is not truthfulness, but the public interest in the dissemination of the information.

- p. 83-84 If the information about intimate facts or data of a person is in the public interest, it can be said that freedom of information must have greater weight and, consequently, the disclosure of the information and the impact on privacy will be justified.

II. The constitutional doctrine on the conflicts between freedom of information and the right to intimacy

a) The public interest as a justification

- p. 85 The identification of a public interest in the dissemination of intimate information is considered a justification since it is a legitimate use of a right: freedom of information.
- p. 87 The public interest must be based on information that the public considers relevant to community life. Information is in the public interest when the community can reasonably justify a legitimate interest in its knowledge and dissemination.
- p. 89 The dissemination of information about people's private lives may be covered by freedom of expression in some cases. The public interest is indirect because it is not determined by examining its content, but its connection or relationship to a matter.
- p. 89-90 Journalists have a margin of appreciation to disclose information about a person's intimate life. However, this does not necessarily imply that there is also a public interest in knowing the private details of the persons involved.
- p. 91 To decide whether certain private information is in the public interest the following is required: (i) a clear connection between the private information and a topic or information

of public interest; and (ii) the invasion of intimacy must be proportionate to the public interest.

The first component has the function of discarding cases in which private information is completely irrelevant, for which it is sufficient to show that there is a more or less obvious connection between the information disclosed and the public interest.

- p. 91-92 The second seeks to discard cases where the intensity of the intrusion is not reasonably matched by the importance of the information of public interest. Where the public interest is substantial, a very significant intrusion into privacy is required to attribute liability for the improper exercise of freedom of expression.

1. The constitutional doctrine on public figures

- p. 92 The Court has adopted the so-called "dual system of protection", according to which public figures have less resistance than private individuals to intrusions in the rights of personality associated with the exercise of freedom of expression.

In cases of collision between freedom of expression and the right to intimacy, this system is relevant (i) in determining the public interest of the information disseminated and (ii) in the application of the standard of actual malice.

- p. 93 In a case of civil liability for the exercise of freedom of expression, it must be analyzed whether or not the person concerned has the status of a public figure. This Court has maintained that public officials and private individuals with a public profile are public figures.

- p. 94 A private individual has a public profile when he or she acquires notoriety that justifies the interest of society in knowing information related to that person.

2. The public domain of private information

- p. 96-97 The fact that private information has been previously disseminated is a factor that decreases the intensity of the violation of intimacy. If the event has been widely disseminated, due to a voluntary or involuntary exposure of the affected party, subsequent disseminations constitute invasions of lesser intensity. Thus, when the information

became public knowledge prior to the intrusion into private life, the publication of such information should be privileged even when its social utility is minimal.

- p. 97-98 The intensity of the invasion of a person's intimacy will be much lower when the person disclosed information in the public domain, since it only gave greater publicity to information that had already been made public or when information that the person him or herself left visible is publicized.

3. The confidentiality of information

- p. 98 When information about private life has been voluntarily transmitted to a third party who subsequently makes it public, it must be considered whether or not there was an expectation of confidentiality. A communication is confidential when it is carried out in circumstances where the desire to keep such information confined can reasonably be assumed, but excludes communication that is made at a public meeting or in other circumstances in which the parties can reasonably expect the communication to be heard or recorded.

b) Actual malice as a subjective criterion of imputation

- p. 99-100 The subjective criterion for imputation of liability is what is called "actual malice". In the case of private individuals with a public profile, it is only necessary to prove that it has been disseminated knowing its falsity. In the case of private individuals it must have been disclosed with inexcusable negligence.
- p. 102-103 The irrelevance of the veracity of the information when privacy is at stake means that the criterion of actual malice must undergo some modulation. The adjustment is to stop considering the elements of the actual malice standard related to the truthfulness requirement.

III. Application of constitutional doctrine to the specific case

- p. 109-110 The argument is unfounded where it is alleged that various provisions of the Civil Liability Law for the Protection of the Right to Privacy, Honor and One's Own Image (Privacy Law)

do not meet the requirement of legal coverage and clarity because they do not permit anticipating when it will be considered that an impact was caused.

p. 111-112 The Inter-American Court, in the case of *Fontevicchia and D'Amico v. Argentina*, held that the precision of a civil rule may be different from what is required in criminal matters and that the civil rule cannot be required to establish the factual assumptions with extreme precision.

p. 112-113 The requirements of clear and precise wording of the principle of specificity in criminal matters cannot be transferred to civil liability, and therefore they are not required to be clearly and precisely described in a law prior to the event. Thus, the articles do not violate the principle of legal coverage and clear and precise wording.

p. 113 Also unfounded is the argument alleging that the Privacy Law does not comply with the principle of materiality and proof of harm. Specifically, article 37 provides for pre-established evidence of the impact.

p. 114 This Court established that the rules of imputation of liability must require that whoever alleges that a certain expression or information causes harm to his honor has the burden of proving it.

Article 37 complies with this requirement. First, it assigns the burden of proof to the person alleging the impact. Second, it clearly establishes that the plaintiff must prove the damage. Thirdly, it also does not contemplate pre-established evidence of the impact; what it regulates is the way to quantify or assess the damage.

p. 115 The arguments that the facts were never proven to be false and, on the other hand, that the Privacy Law violates the doctrine of *exceptio veritatis* are unfounded. The journalist and the publisher allege that in the case of people outside politics, the origin of the action of moral damages is not subject to the veracity of the facts, but simply to the fact that the person considers himself aggrieved.

p. 116 The requirement of veracity of information becomes irrelevant when what is alleged is an intrusion into private life. The fact that article 32 of the Privacy Law provides for stricter

requirements for the verification of an offensive expression for those affecting public officials, less stringent for those relating to public figures and more lax for private individuals is compatible with the doctrine of this Court.

p. 118-119 The irrelevance of truthfulness means actual malice must undergo some modulation. This Court understands that in the case of private individuals with a public profile and private individuals without a public profile, the actual malice is reduced to the hypothesis that the information has been disseminated with inexcusable negligence.

Also unfounded is the argument alleging that articles 29 to 44 of the Privacy Law violate the principle of gradation of means of demanding liability.

p. 120 In the *amparo directo en revision* 2044/2008, the First Chamber of this Court warned that the legal system cannot contemplate a single legal responsibility requirement, because the requirement that the impacts of rights are necessary, adequate and proportional demands the existence of minor measures to react to minor impacts and more serious measures for more serious cases. Furthermore, we must bear in mind that alongside the requirement of civil and criminal liability there is the right of reply.

p. 121-122 Furthermore, the Privacy Law fully complies with the doctrine on the ranking of the legal responsibility requirement, since it contemplates different measures to repair the damage and criteria for setting compensation, which precisely allows for ranking the liability. Finally, consequences that from the legislator's perspective could be considered disproportionate are prohibited.

a) Minimizing indirect constraints

p. 123-124 The journalist and the publisher maintain that the Privacy Law indirectly restricts freedom of expression by allowing a conviction for moral damages not only against the person who expresses or disseminates information, but also those natural or legal persons who are part of the chain of dissemination.

p. 124-125 In the *amparo directo en revision* 2044/2008, the First Chamber of this Court explained that freedom of expression can be indirectly restricted through the rules of distribution of

liability among those involved in the news broadcast chain. It tries to avoid generating dynamics of distribution of liability that lead to finding interest in the silencing or expressive restriction of others.

- p. 125 The interpretation in the decision led to the publisher being held liable in contravention of this prohibition. The criteria by which the publisher should be judged are very different from those that should be used for the conduct of the author of a publication.

In the *Amparo Directo* 6/2009, the First Chamber of this Court held that it is not required for publishers, when they only publish or disclose information authored by others, to verify the intrusion into intimacy since it would generate a distribution of liabilities among all those who participate in the communication, which would unjustifiably restrict freedom of expression and the right to information.

- p. 126 However, they must assume a certain responsibility towards third parties, a duty of care where, rather than using a prior control, the obligation is imposed of ensuring certain requirements that will prevent the invalidating of rights of third parties that could be considered affected.

- p. 127 In the *Amparo Directo* 8/2012, the First Chamber of this Court explained that the people who engage in the editing and publishing of media stories transfer the liability to the authors thereof as long as: (i) they identify and keep the identification data of the authors of the stories; and (ii) publish and distribute the articles respecting their content. Consequently, if the media complies, the rights of people who could see their non-pecuniary property affected are safeguarded to be asserted against the real perpetrators: the authors.

This standard of diligence also applies to publishers. In this specific case, the publisher only published the book. Consequently, the journalist is solely responsible for what has been published.

b) The public interest test on intimate information

1. The evident connection requirement

- p. 129-130 The journalist stated that the book was published in order to expose to the public a complaint about a pedophile network, child pornography and child trafficking. Thus, the publication belongs to what the First Chamber of this Court has called, in the *Amparo Directo* 16/2012, "watchdog journalism".
- p. 130 This Court proved that the main theme of the book is a series of facts of public interest. This is seen from various pieces of evidence that were not taken into account by the Chamber, as well as from the extensive coverage by the media.
- p. 133-134 What occurred regarding the figure of the businessman JSK constitutes a notorious fact, whose clarification is undoubtedly a matter of public interest, as it is related to crimes of high social impact and involving characters of public importance. If we start from the premise that criminal acts have a negative impact on society, it is undeniable that journalistic investigations aimed at clarifying and disseminating them are endowed with broad public interest.
- p. 135 This Court considers that there is a clear connection between the private information disclosed and the information of interest. The information contributes to making visible the consequences of pedophilia and child prostitution on its victims and the collusion of economic and political interests that allow the commission of this type of act with impunity.
- p. 136 It has value not only as a public complaint. It also helps to understand the reasons people commit such crimes, as well as the circumstances of the criminal phenomenon. Thus, not only is the social utility of journalistic work indisputable, but also the connection is evident between the criminal acts dealt with in the book and the intimate information disclosed.
- p. 137 The argument that the journalist could have excluded from the book data and images of an intimate nature without lessening the value of the work is not relevant. Journalists must have a margin of appreciation to assess whether disclosure is justified.
- p. 137-138 The courts must not set themselves up as editors of the press. The media must be able to decide on the basis of journalistic criteria how they present information or cover a story.

Allowing the courts very strict or intense scrutiny of these decisions would be an indirect restriction on freedom of expression.

- p. 138 The Chamber should have asked itself whether the publication of the intimate information was connected with the facts described in the book, not simply assume that its publication was due to mere curiosity or morbid interest in disseminating details of the private life of the affected party.

2. The proportionality requirement

- p. 139 The matter of public interest is of the utmost importance; it involves a complaint about a pedophile and a child pornography network. There are certainly few more alarming and reprehensible crimes. To attribute liability to a journalist for publicizing private information that is connected with this issue, there must be a much more intense impact on intimacy. Several factors should be addressed.

i) Factors related to the affected person

- p. 140 The journalist took several precautionary measures to hide the identity of the affected party: she used a pseudonym and placed a band on people's faces in the photographs. These measures sought to prevent linking intimate information with the person. In this sense, the intrusion into privacy is considerably diminished.
- p. 140-141 The protection of the intimacy of the person concerned must be reduced because it involves a private person with a public profile, an aspect completely neglected. The Chamber had to assess the evidence related to the conduct assumed by the affected party. This Court concludes that the affected party voluntarily made herself a figure of public importance.
- p. 141 On the one hand, the affected party gave an interview where she talked about several facts related to the complaint and the investigation of the Attorney General's Office of Quintana Roo (Public Ministry). While that story was published after the book appeared: (i) she voluntarily agreed to be photographed, without requiring her face to be covered; and (ii) she is identified by her real name. We must not lose sight of the fact that the

journalist had used diligent measures aimed at avoiding identification. The attitude of the affected party not only deprived these measures of any effectiveness, but also voluntarily made her an individual with a public profile.

p. 141-142 In another television interview, she voluntarily agreed to talk about the events. While there is no shot of her face, her voice was not distorted. If this situation is linked to the fact that she subsequently gave another interview to a local newspaper where her face was uncovered, it must be concluded that her own behavior rendered ineffective the measures taken in the television interview to avoid her identification.

ii) Factors related to the information disclosed

p. 145 The Chamber maintained that the fact that the photographs were published in various media was not an exemption from liability, since they required the consent of the affected party to disseminate them. This is contrary to the provisions of articles 10 and 11 of the Privacy Law, which expressly state that the existence of a public interest may justify the dissemination of private information.

p. 145 The public interest is a justification that eliminates the anti-legality or wrongfulness of the conduct, regardless of whether there has been no consent. The fact that the information has been previously disclosed is an element to be taken into account in determining the proportionality of the invasion of intimacy. While intimate data do not lose that nature when they have been unlawfully disclosed, the impact on privacy is considerably less.

p. 146 From the evidentiary material, this Court concludes that the photographs had indeed been disclosed before the book was published.

p. 147 In addition, both from the statements made by the affected party herself and from the evidence provided, it can be inferred with a sufficient degree of probability that all the photographs entered the public domain for reasons attributable to the Public Prosecutor's Office.

- p. 148 The hypothesis that both the images and the information of the affected party became public knowledge from "leaks" from the Public Prosecutor's Office, also finds corroboration in several indications that emerge from the content of published stories.
- p. 150-151 However, the dissemination of the photographs was also claimed to be a violation of the right to one's own image. In this regard, article 19 of the Privacy Law provides for the possibility of disseminating images without authorization when they are in the public interest.
- p. 151 Two photographs do not contain any image of the affected party; with these no violation of her right to her own image could have occurred. In the same vein, neither do two other images, since they are images captured at a press conference that the affected party gave to the media, in a public place on the occasion of an event of public interest. Finally, the evident connection is sufficient to justify the public interest in the dissemination of a fifth image. Consequently, it must be ruled out that its publication has been a violation of the right to one's image.
- p. 151-152 It was also argued that the right to privacy had been violated by the publication of a psychological report and part of the statement at prosecution. And there are elements to consider that this report was also part of the preliminary investigation and could also have been "leaked" by prosecutorial authorities.
- p. 152-153 It is also incorrect that the Chamber did not take into consideration that the affected party expressly acknowledged that she had transmitted the intimate information published to the journalist. Assuming that she voluntarily transmitted that information to the journalist, it is relevant to determine whether or not there was a reasonable expectation of confidentiality.
- p. 154. This Court considers that there was no reasonable expectation of confidentiality. The affected party knew she was in conversations with an active member of the press. Although she alleges that she had these communications with the journalist in her capacity as director of a civil association in Cancun, she was aware of the activity she engaged in.

- p. 154-155 When someone speaks freely with a member of the press, and knows that that person is a journalist, it is reasonable to anticipate that such communication may be made public, and therefore the disclosure cannot be considered to be unexpected or unusual. This means that the invasion of privacy of which she complains was not intense or profound enough to justify attributing liability to the journalist.
- p. 155 With regard to the dissemination of statements at prosecution, the intensity of the invasion of privacy is not considerable, since the journalist did not make a direct identification of the victim. Otherwise, the information published was in the public interest.
- p. 155-156 The invasion of privacy was proportional. On the one hand, the issue of crime is of the utmost public interest. On the other hand, the invasion of privacy was not of great intensity, taking into account the measures adopted by the journalist to avoid the identification of the individual with a public profile, whose notoriety was achieved to a large extent by virtue of her own conduct. And finally, the intimate information was already in the public domain and there was no reasonable expectation of confidentiality in relation to the psychological information disseminated.
- p. 156 Consequently, the publication of information on the private life of the injured third party passes both tiers of the public interest test.

c) Actual malice in the dissemination of intimate information

- p. 158-159 The standard of actual malice, which corresponds to the impacts on private individuals with a public profile, must be applied. In this type of case, the criterion that governs the impacts on individuals must also be used: that the information has been disclosed with inexcusable negligence on the part of the defendant.
- p. 160 In the case of the press, the legislator made the decision to impose a very high standard in order to be able to attribute civil liability. By requiring that this be inexcusable negligence on the part of the defendant, the legislature intended that not just any kind of negligence in the exercise of freedom of expression could justify a conviction.

p. 161 Consequently, if a journalist who disseminates intimate information about a person he considers to be in the public interest took various measures, he was diligent in disseminating that information. While such measures may not be fully effective, because the journalist does not control all the factors that may lead to the identification of the person, no liability should be attributed because the standard requires that his negligence be of a very considerable magnitude.

This is what happens in this specific case. The journalist used the measures of diligence required by her profession in order that the identity of the person whose personal information she was revealing could not be known. It is clear that the journalist's conduct does not satisfy the subjective criterion of imputation. Consequently, the dissemination of information is protected by the journalist's freedom of expression.

DECISION

p. 162 The Court grants the amparo to the publisher and the journalist for the effect that the Chamber cancels the decision and issues another that, following the guidelines of this final decision, considers the action filed by the affected party unfounded and absolves them of all the claims, since the intimate information disseminated in the book is undoubtedly of public interest and they complied with the standard of diligence.