



Suprema Corte
de Justicia de la Nación



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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: "ACTUAL MALICE" STANDARD AND PUBLIC FIGURES
(LIBERTAD DE EXPRESIÓN: ESTÁNDAR DE "REAL MALICIA" Y FIGURAS PÚBLICAS)**

CASE: *Amparo Directo en Revisión 172/2019*

REPORTING JUDGE: Juan Luis González Alcántara Carrancá

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

DATE: April 10, 2019

KEY WORDS: right to freedom of expression, right to access to information, right to honor, right to one's own image, right to equality and non-discrimination, journalists, public figures, due process, actual malice, dual protection system.

CITATION OF THE DECISION: Supreme Court of Justice of the Nation, *Amparo Directo en Revisión 172/2019*, First Chamber, Juan Luis González Alcántara Carrancá. J., Decision of April 10, 2019, 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/ADR%20172-2019.pdf>

CITATION SUGGESTED FOR THIS DOCUMENT: Human Rights Office of Mexico's Supreme Court of Justice, *Extract of Amparo Directo en Revisión 172/2019*, Mexico.

SUMMARY OF THE *AMPARO DIRECTO EN REVISIÓN* 172/2019

BACKGROUND: In a *juicio ordinario civil* FVF sued CLMA for moral damages (*daño moral*), resulting from alleged injuries to privacy and the right to honor and one's own image. A Mexico City civil judge issued a final decision and absolved CLMA. FVF filed a *recurso de apelación* in which a civil chamber of the Superior Court of Justice of Mexico City confirmed the decision. FVF then filed a *juicio de amparo directo*, which was denied by a civil collegiate court of Mexico City on the grounds that the claims were ineffective. FVF filed a *recurso de revisión*, restating that the concept of "actual malice" was unconstitutional. The collegiate court ordered the transmittal of the case to Mexico's Supreme Court of Justice (this Court), and it was heard by the First Chamber.

ISSUE PRESENTED TO THE COURT: Whether the concept of "actual malice" contained in articles 30, section I, and 31 of the Civil Liability Law for the Protection of the Right to Privacy, Honor and One's Own Image in the Federal District (Privacy Law) is discriminatory and, therefore, unconstitutional and unconventional.

HOLDING: The appealed decision was confirmed for the following reasons. The content of the rights to freedom of expression, to equality and non-discrimination and of the standards of this Court on "actual malice" were discussed. An analysis determined that the provisions do not establish a differentiated treatment based on the categories prohibited by article 1 of the Federal Constitution, and therefore, under a rational basis review, it was said that the protection of the freedom of expression was a legitimate end, which can be achieved through the norms. On the other hand, it was considered that the cited articles of the Privacy Law coincide with the constitutional doctrine of this Court in relation to the standard of protection of the right to the freedom of expression and with the concept of actual malice, which guarantees their highest degree of protection. Therefore, this Court concluded that FVF was incorrect in arguing that the challenged provisions are unconstitutional, since they coincide with the constitutional

parameters of protection of the right to freedom of expression and information. As a result, it confirmed the decision and, consequently, the denial of the *amparo*.

VOTE: The First Chamber decided this matter unanimously with the five votes of the judges Norma Lucía Piña Hernández, Luis María Aguilar Morales, Jorge Mario Pardo Rebolledo (reserved the right to formulate a concurring opinion), Alfredo Gutiérrez Ortiz Mena and Juan Luis González Alcántara Carrancá.

The votes may be consulted at the following link:

<https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=248816>

EXTRACT OF THE *AMPARO DIRECTO EN REVISIÓN* 172/2019

- p. 2 Mexico City. The First Chamber of Mexico's Supreme Court of Justice (this Court), in its session of April 10, 2019, issues the following decision.

BACKGROUND

- p. 2 FVF sued CLMA in an ordinary civil suit for unlawful conduct generating moral damages (*daño moral*), to both privacy and the rights to honor and one's own image.
- p. 2-3 On March 15, 2018, a Mexico City civil judge absolved CLMA. FVF filed a *recurso de apelación*, which was decided on June 28 2018, by a civil chamber of the Superior Court of Justice of Mexico City, in which the appealed decision was confirmed.
- p. 3-4 FVF then filed an *amparo directo* suit. A collegiate court in civil matters of Mexico City decided to deny the *amparo*. On January 8, 2019, FVF filed a *recurso de revisión* against this decision and therefore the transmittal of the case record to this Court was ordered. On January 22, 2019, the appeal was admitted, and it was turned over to Judge Juan Luis González Alcántara Carrancá.
- p. 14 This Court considers this *recurso de revisión* to be valid, to the extent that FVF alleged a violation of articles 1, 6, 14, 16 and 17 of the Constitution considering that articles 30, section I and 31 of the Civil Liability Law for the Protection of the Right to a Privacy, Honor and One's Own Image in the Federal District (Privacy Law), generate discriminatory treatment of persons considered public figures, by imposing on them an exorbitant and unnecessary procedural burden to prove "actual malice".

The collegiate court failed to decide with respect to the constitutionality or conventionality of the indicated articles, for discriminating against public figures by imposing on them an inequitable evidentiary burden to prove actual malice.

STUDY OF THE MERITS

- p. 15 This Court has studied on various occasions the form in which the principle of actual malice should be analyzed and proven in matters of freedom of expression, as well as when it should be considered a discriminatory norm. In this case it will be studied under

the following topics: (i) the freedom of expression as a pillar of a democratic State; (ii) the constitutional doctrine of this Court on “actual malice”; (iii) the constitutional doctrine of this Court on discriminatory norms; and (iv) the study of the grievance in light of the above considerations.

I. The freedom of expression as a pillar of a democratic State

p. 15-16 In the *Amparo Directo* 28/2010, the First Chamber held that the right to the freedom of expression and the right to information are functionally essential rights in the structure of a constitutional rule of law, which have a double facet: an individual dimension, which ensures to individuals an essential space for the display of their freedom of choice, which space must be respected and protected by the State; and, on the other hand, a social dimension, since they enjoy a public, collective or institutional aspect that makes them core components for the adequate functioning of representative democracy.

p. 16 In this respect, specifically in public interest matters, this Court, in the mentioned *amparo directo*, held that the debate must be uninhibited, robust and open, and may include vehement, caustic and disagreeably edgy attacks on public personalities or, in general, ideas that may be unfavorably received by their targets and public opinion in general, such that not only ideas that are favorably received or perceived as unoffensive or indifferent are protected. These are the requirements of a plural, tolerant and open society, without which there is no true democracy.

Thus, it was established that while any individual participating in general public debate must refrain from exceeding certain limits, like respect for the reputation and rights of others, it is permitted to make use of a certain dose of exaggeration, including provocation; it is precisely in the expressions that can offend, clash, perturb, bother, make uncomfortable or upset where the freedom of expression is most valuable.

p. 16-17 Furthermore, in the *Amparo Directo en Revisión* 1434/2013, the First Chamber determined that freedom of expression and access to information fulfill numerous functions, since they hold open the channels for dissent and political change; there are a

counterweight to the exercise of power; and, fundamentally, contribute to the formation of public opinion on political matters and the consolidation of a duly informed electorate.

- p. 17 Thus, given the importance of the freedom of expression, in every democratic State any act of authority that could generate a “discouraging effect” on the public should be avoided. In democratic societies the risk of damages generated by the effective exercise of expression is more tolerable than the risk of its general restriction.

II. The Constitutional doctrine of this Court on “actual malice”

- p. 22 The “actual malice” standard adopted by this Court entails the following:

To analyze the limits on the freedom of expression, the “dual protection system” has been adopted, according to which the limits of criticism are broader when it refers to persons who, because they are involved in public activities or given the role they perform in a democratic society, are exposed to a more rigorous control of their activities and manifestations than private parties without any public projection, since in a system inspired by democratic values, subjection to this criticism is inseparable from any relevant public position.

The principal consequence of the dual protection system is the doctrine of “actual malice”, under which civil sanctions are only imposed for the issuance of opinions, ideas or judgments containing “false information” or produced with “actual malice”, which is to say with the sole intention of causing harm.

- p. 22-23 “Actual malice” is the subjective allocation criteria adopted to resolve cases of civil liability for the exercise of the freedom of expression. This means that in order to decide against a person in a civil case in these matters, all the elements of extra-contractual civil liability that is not strict liability must be present: (i) the unlawfulness of the conduct (violation of the right to privacy); (ii) the subjective allocation criteria (willful misconduct or negligence); (iii) the existence of damages (harm to reputation (*patrimonio moral*) of the person); and (iv) a causal relationship between the unlawful conduct and the harmful result.

p. 23 For “actual malice” to exist, it is not sufficient that the information disseminated be false, since this would lead to imposing sanctions on informants that are diligent in their investigations but cannot effectively prove every aspect of the information disseminated, which, in addition to violating the standard of truth applicable to information, would lead to the hiding the information instead of disclosing it, smothering robust debate on matters of public interest that are pursued in constitutional democracies.

Regarding the level of diligence or negligence of the informant, the “actual malice” doctrine indicates that mere negligence or carelessness is not sufficient to fall under it, since inexcusable negligence is required, or a “reckless disregard”, referring to a possible willful misconduct, which presumes the existence of objective elements that can show that the perpetrator, although he may not have had direct knowledge of the inaccuracy of the information contributed, was aware of that inaccuracy by the factual circumstances of the specific case and, in addition, had the resources to verify that inaccuracy immediately and without greater effort, and in spite of this awareness and the means to corroborate the information, disregards them and decides to voice the information.

p. 24 Therefore, the intention to harm is not evidenced through proof of a certain negligence, an error or an elementary investigation without satisfactory results; rather it is necessary to prove that the informant had knowledge that the information was inaccurate, or at least had doubts about its veracity, and a total disregard for verifying it, since only then can the intention to harm be proven.

III. The Constitutional doctrine of this Court on discriminatory norms

p. 24-25 According to the constitutional regularity control parameter, the right to equality and non-discrimination permeates all legal regulation, such that any treatment that could be discriminatory with respect to the exercise of a human right is, in itself, incompatible with the constitutional order.

p. 25 This Court has stated that “*formal equality*” is a protection against arbitrary distinctions or treatment and is composed, in turn, of “equality before the law”, such as uniformity in the application of the legal rule by all the authorities; and of “equality in the legal norm”, which

is directed toward the legislative authority and consists of the control of the content of the norms in order to avoid differentiations without constitutional justification or violations of the principle of proportionality broadly speaking.

- p. 26 Therefore, violations of this latter facet of the principle, like equality in the legal norm, give rise to *direct* discriminatory acts when the distinction in the application or in the norm explicitly relates to a prohibited or constitutionally unjustified factor (suspect categories); or to *indirect* discriminatory acts if in the application of the norm, or its content, it is apparently neutral, but its effect or result leads to a disproportionate differentiation or exclusion of a certain social group, without an objective justification.

In addition to the above, the doctrine has held that the prohibition on discrimination and the duty to promote and protect are normatively undetermined; this is so because the constitutional provision that establishes them does not establish when a treatment is discriminatory.

For this reason, the decision was made to study, based on the norm or act of authority, the different levels of scrutiny or equality test, establishing a triad of levels to determine the application of the equality principle.

- p. 27-28 The elements of the triad of levels are the following: a) Rational basis review: for the norm or act of authority to be constitutional, it is sufficient that the differentiated treatment found in them is a potentially adequate measure to achieve a purpose that is not prohibited by the law; b) Strict scrutiny: is applied when a differentiated treatment is based on suspect categories, such as race, social or economic condition, sexual orientation, age, among others; and c) Intermediate scrutiny: for the cases in which the State differentiates based on suspect categories in order to favor the groups or individuals traditionally disfavored in an effort to achieve equality.
- p. 28 This Court has determined that once it is established that the norm makes a distinction based on a suspect category, strict scrutiny must be given to the legislative measure, which is different from ordinary scrutiny.

p. 29-30 Taking into account that this Court decided regarding the fundamental rights to equality and non-discrimination that when a person alleges discrimination, a parameter or term of comparison to demonstrate a differentiated treatment must be provided. This is to prevent the existence of norms that, intended to be projected on situations of equal facts, produce as an effect of their application: i) a rupture of that equality upon generating a discriminatory treatment between analogous situations; or, ii) similar effects on persons in disparate situations.

p. 30 Thus, the cases of discrimination resulting from a differentiated normative treatment require an analysis divided into two successive and non-simultaneous stages:

The first involves a review based on which it is determined whether the situations to compare in fact can be contrasted or whether, on the contrary, they have significant divergences that prevent a clash between them for not really entailing a differentiated treatment.

The second, in which it is studied whether the distinctions in treatment are admissible or legitimate, which requires their justification to be objective and reasonable, utilizing, as applicable, strict scrutiny – to confirm the rigorous need of the measure – or ordinary scrutiny – to confirm its instrumentality.

IV. The study of the grievance in light of the above considerations

p. 32 This Court states that the question to be resolved in this case consists of determining whether the concept of “actual malice” contained in the cited articles 30, section I, and 31 of the Privacy Law is discriminatory and, therefore, unconstitutional and unconventional; especially since, as argued before, there was no pronouncement by the collegiate court in this respect.

p. 32-33 The provisions indicate that public officials whose reputations (*patrimonio moral*) are harmed by opinions and/or information disseminated through the media must prove the existence of actual malice demonstrating that the information was disseminated knowing

it was false; and that, in the case of public figures, the action will be valid provided this is proven.

p. 33 This Court holds that neither of the two normative provisions challenged establishes a differentiated treatment and, therefore, FVF's grievance is groundless.

It should be stated again that it is precisely on the importance of the right to the freedom of expression where the need lies for the law to contain concepts that permit its optimization and strengthening, as is the case with "actual malice".

p. 34-35 In order to promote an open, vigorous and uninhibited debate, the lawmaker, based on the importance of the fundamental right in question, sought that, on the one hand, all the consequences for the expressions made always be subsequent and, on the other hand, that when the falsity of the information is argued, it must be proven by, in the first instance, and in particular cases – public officials and public figures – the one that is harmed. This is in order to prevent an inhibitory effect on the circulation of ideas and expressions.

p. 35-36 Regarding the *purpose* of "actual malice", this Court identifies that it consists of the strengthening of the protection of the principle of the freedom of expression. "Actual malice", by classifying the receivers of opinions or information that, in turn, may have a greater or lesser degree of public protection, is a concept whose sole purpose is to expand the margin of action in the exercise of the right to the freedom of expression since, if this were not the case, the functioning and the organization of the democratic State would be directly affected.

p. 36 Finally, this Court concludes that the *policy or directive* that the concept of "actual malice" pursues consists of: promoting free manifestation and flow of information, ideas and opinions; prevent thought control; maintain the channels of discourse open; and, consequently, avoid the generation of a "discouraging effect" on the public tending to absolutely inhibit the right to the freedom of expression.

Having determined the legislative rationality of “actual malice” it must be indicated whether its application can be discriminatory, as FVF argues, by establishing a procedural burden for persons considered public figures.

This Court has held that, in accordance with the “dual protection system”, the subjects involved in journalistic notes may have, generally, two different natures: they may be public persons or personalities, or private persons without public projection.

p. 37-38 In this specific case, FVF falls within the definition of a public figure, since he held the position of Governor of the State of Michoacán de Ocampo; nonetheless, the facts that gave rise to this matter occurred after he left office. In other words, while the facts that gave rise to this matter did not happen when FVF held public office, FVF did possess at that time notoriety and collective importance.

p. 38 It is clear that *public figures* are not categorized by the Federal Constitution as “suspect”, because they are outside the categories stated in the last paragraph of article 1 of the Constitution; and outside of the categories established in article 1 of the American Convention on Human Rights.

Therefore, in this particular case, the requirements for applying strict scrutiny to the legislative measure that is challenged are not applicable. Thus, it is appropriate to apply a rational basis review of those provisions, which requires: a) that the different treatment have a legitimate end; and, b) that such treatment is rationally related to reaching it and it is not constitutionally and conventionally prohibited.

p. 38-39 With respect to the requirement that the different treatment have a legitimate end, this Court concludes that the two provisions challenged, by establishing the concept of actual malice as a probatory element of the existence of harm to the reputation (*patrimonio moral*) of public persons (this is the differentiated treatment in contrast with private subjects, to whom this requirement does not apply), strengthens the right to the freedom of expression.

p. 39 Regarding that the treatment be rationally related to reaching that legitimate end and that it is not constitutionally or conventionally prohibited, this Court concludes that the

legislative inclusion of “actual malice” in fact permits broadening the margin of action of citizens in the exercise of the right to the freedom of expression; this is in view of the fact that it makes it possible to guarantee that the free manifestation of ideas and opinions is maximized when topics of public interest are involved, specifically referring to the actions of those persons who have national public projection. Which, clearly, cannot be prohibited by either the Federal Constitution or the conventional standards of protection of human rights.

Indeed, when the recipient of the publications is a figure with public projection, the margin of protection of the right to freedom of expression is broader.

Therefore, “actual malice” as a procedural burden of persons with public projection is a legislative measure that does not result in discriminatory treatment, since it is appropriate for expanding the margin of protection of the right to the freedom of expression, which is to say that it lies on a compelling constitutional justification.

p. 40 This probatory burden, furthermore, does not eliminate the obligation to verify the elements of every kind of extra-contractual civil liability that is not strict liability.

In this way, articles 30, section I, and 31 of the Private Life Law coincide with the constitutional doctrine that this Court has established in relation to the standard of protection of the right to freedom of expression and with the concept of actual malice, which guarantees its maximum degree of protection.

DECISION

Based on all of the above, this Court concludes that FVF is incorrect in arguing that the normative provisions challenged are unconstitutional, since they coincide with the constitutional parameters of protection of the right to the freedom of expression and information.

p. 40-41 In view of the above, the appealed decision is confirmed and the *amparo* and protection of the federal system of justice is denied.