

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.

**HOMOPHOBIC EXPRESSIONS AND LIMITS ON THE FREEDOM OF EXPRESSION
(EXPRESIONES HOMÓFOBAS Y LÍMITES A LA LIBERTAD DE EXPRESIÓN)**

CASE: *Amparo Directo en Revisión 2806/2012*

REPORTING JUDGE: Arturo Zaldívar Lelo de Larrea

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

DATE OF DECISION: March 6, 2013

KEY WORDS: right to freedom of expression, discriminatory language, homophobic expressions, right to honor, hate speech, media, journalism, free flow of ideas.

CITATION OF THE DECISION: Supreme Court of Justice of the Nation, *Amparo Directo en Revisión 2806/2012*, First Chamber, Arturo Zaldívar Lelo de Larrea, J., decision of March 6, 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/ADR%202806-2012.pdf>

CITATION SUGGESTED FOR THIS DOCUMENT: Human Rights Office of Mexico's Supreme Court of Justice, *Extract of the Amparo Directo en Revisión 2806/2012*, Mexico.

SUMMARY OF THE *AMPARO DIRECTO EN REVISIÓN* 2806/2012

BACKGROUND: APH, founder of a newspaper “S” in Puebla, sued the journalist EHQ for having issued a story in the newspaper “I”. APH considered that the story harmed his honor, image, fame and reputation, that it was an excessive exercise of the freedom of expression, with false allegations and groundless accusations on his performance and that of his collaborators, in which he also called them “*maricones*” and “*puñales*”. A civil judge in Puebla agreed with APH and ordered EHQ to pay compensation for pain and suffering (*daño moral*), and to publish an extract of the decision; the decision was confirmed on appeal. Subsequently, EHQ filed an *amparo directo* suit, which was granted by a collegiate court of Puebla. APH filed a *recurso de revisión*, which was taken up by the First Chamber of Mexico’s Supreme Court of Justice (this Court).

ISSUE PRESENTED TO THE COURT: Whether the expressions issued in a news story were homophobic, whether they were discriminatory and impertinent, and whether they were excluded from the Federal Constitution’s protection of free expression of ideas.

HOLDING: The decision was revoked for the following reasons. The use of the terms “*maricones*” and “*puñal*” in the note is considered homophobic speech and therefore discriminatory, since they are offensive and hateful expressions, given that they were not stated as simple criticisms with assertions or qualifiers formulated in strong terms, but rather constituted contempt for a personal category: sexual orientation. They were also impertinent because there was no relationship with the message that the author intended to send, which was to criticize the editorial line of the newspaper “S”, specifically the work done by APH in directing it; by mockingly vilifying them through those expressions, the conclusion was reached that the story contained completely degrading expressions, excluded from constitutional protection of the free expression of ideas. Furthermore, the fact that this matter involved two written media outlets did not imply overlooking that the expressions challenged formed discriminatory speech, which the media have a special responsibility to avoid.

VOTE: The First Chamber decided this matter by the majority vote of three judges, Olga Sánchez Cordero de García Villegas, Arturo Zaldívar Lelo de Larrea and Jorge Mario Pardo Rebolledo. The judges José Ramón Cossío Díaz (reserved the right to formulate a dissenting opinion) and Alfredo Gutiérrez Ortiz Mena (reserved the right to formulate a dissenting opinion) voted against.

The votes may be consulted at the following link:

<https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=143425>

EXTRACT OF THE *AMPARO DIRECTO EN REVISIÓN* 2806/2012

p. 1 Mexico City. The First Chamber of Mexico's Supreme Court of Justice (this Court), in session of March 6, 2013, issued the following decision.

BACKGROUND

- p. 1-6 APH is founder of the newspaper "S", a media outlet in the State of Puebla. On August 21, 2003, in that newspaper, a story was published commenting on various members of the newspaper "I", another media outlet in Puebla. In that story references were made concerning Mr. ENQ, as General Director of the newspaper "I ". As a result of the above, on August 14, 2009, in a column of the newspaper "I", Mr. ENQ published a story referring to the columnists of "S" with the terms "*maricones*" and "*puña*".
- p. 6-7 On August 13, 2010, APH filed an ordinary civil suit against ENQ, through which he requested the declaration that the above indicated story was unlawful, for containing serious false allegations, as well as groundless accusations, which were malicious for externalizing an aversion that in his judgment caused harm to his feelings, decorum, honor, public image, renown and good reputation, and therefore he asked for pecuniary damages, as well as the publication of the decision issued. According to the then plaintiff, the defendant excessively and harmfully exercised his freedom of expression. That suit was heard by a civil judge in Puebla. On August 23, 2011, a final decision was issued ordering ENQ to pay pecuniary damages and to publish an extract of that decision.
- p. 7-8 On September 9, 2011, ENQ filed a *recurso de apelación*. That appeal was heard by a civil chamber of the superior court of Puebla, which issued a decision on April 18, 2012, through which it confirmed the appealed decision.
- p. 9-12 To challenge this, ENQ filed an *amparo directo* suit on May 23, 2012. A collegiate court in civil matters in Puebla issued a decision on August 16, 2012, through which it determined to cover and protect ENQ, in view of the fact that the recipient of the criticisms is a public figure and therefore must tolerate a greater degree of intervention in his personal sphere;

the story has public relevance; and the limits of freedom of expression were not surpassed.

- p. 12,15 Disagreeing with the decision, APH filed a *recurso de revisión* submitted on September 4, 2012. The collegiate court ordered to send the appeal to this Court. On September 19, 2012, it was admitted for processing and turned over to Judge Arturo Zaldívar Lelo de Larrea.

STUDY OF THE MERITS

- p. 20-21 The case involves a conflict between two fundamental rights, the freedom of expression and the right to honor. To be able to resolve it, the collegiate court engaged in an interpretive exercise in which it considered that, due to the fact that the challenged opinion was protected by the freedom of expression, this right had a specific weight greater than the right to honor and, therefore, it must prevail in this case.

I. Doctrine of this Court regarding freedom of expression and its relationship to the right to honor

- p. 23-25 The right to honor is one of the rights derived from the recognition of human dignity, contained in article 1 of the Constitution and implicitly recognized as a limit on the freedoms of expression, information and the press. In the judgment of this Court, it is possible to define honor as the concept that a person has of him or herself or that others have formed of them, based on their behavior or the expression of their ethical and social qualities, which legally means a right that involves the power of each individual to ask to be treated with decorum and the obligation of others to respond to this treatment. As an undetermined legal concept, its content must be evaluated each time depending on the current social norms, values and ideas.
- p. 25-26 Objectively, the right to honor covers the good reputation of a person in their moral and professional qualities, protecting them from expressions or messages that demean them in the eyes of others, by discrediting or disparaging them. For this reason, in certain cases and under particular circumstances, the critical judgment or the information disclosed

regarding professional, or work conduct of a person may constitute an authentic attack of their honor.

- p. 26 In these situations, completely degrading messages of a person are directed against their behavior in the arena in which they perform their work or occupation and can demean them in the opinion of others with equal intensity and harm as if the disqualification was directed directly to them personally or their moral qualities. This is so because the professional activity is one of the most important forms of external manifestation of personality and the relationship of the individual with the rest of the public.
- p. 26-27 In this light, this Court deems that the simple criticism of professional expertise in the performance of an activity with nothing more should not be confused with a threat to honor. They will be injuries to honor when, not being an expression protected by the freedom of expression or the right to information, they constitute: (i) a disqualification of the professional probity of a person that can seriously and unjustifiably or groundlessly harm their public image, or (ii) criticisms that, in spite of being formally directed to the professional activity of an individual, underneath imply a personal disqualification, by directly impacting their individual consideration and dignity.
- p. 27-28 Furthermore, all people enjoy the right to free expression of ideas, whose exercise may only be restricted through the demand for subsequent liabilities in those cases where the rights or reputation of others are affected.
- p. 28 The freedom of expression as well as the right to information are two functionally essential rights in the structure of the constitutional rule of law that have a double facet: on one hand, in their individual dimension they ensure essential spaces for people to display their individual autonomy, which spaces must be respected and protected by the State; and on the other hand, regarding their social dimension, they enjoy a public, collective or institutional aspect that makes them core components for the adequate functioning of representative democracy.

The fundamental rights to the freedom of expression and information recognized in articles 6 and 7 of the Federal Constitution have limits.

p. 30 In principle, it should be said that there is no internal or abstract conflict between the rights to the freedom of expression and to honor. As a general rule, it is considered that there is an attack on honor when others are devalued as a result of defamatory or insulting expressions, emitted to discredit or disparage someone.

The right to honor is limited by the fundamental rights to freely opine and inform, all being in the constitutional range and, therefore, requiring co-existence. Therefore, depending on the circumstances of the case, it is possible that reputation has to endure restrictions, being questioned when the public relevance of what is being informed or opined so requires.

p. 30-31 Concerning the limits on the freedom of expression, it is necessary to start from the general presumption of constitutional protection of all expressive speech, which is explained by the primary obligation of neutrality of the State regarding the content of opinions and, therefore, by the need to guarantee that there no persons, groups, ideas or means of expression are excluded *a priori* from the public debate. Nevertheless, among the limits that must be respected for an expression to be constitutionally protected are the rights and reputation of others.

p. 31-32 Since the *Amparo Directo en Revisión* 2044/2008 decided by this Court, the “dual system of protection” was adopted, according to which the limits of criticism are broader in the case of persons who, due to engaging in public activities or the role they perform in a democratic society, are exposed to a more rigorous control of their activities and manifestations than private citizens without any public protection, since in a system inspired by democratic values, the subjection to that criticism is inseparable from any relevant public position. The main consequence of the system is the application of the doctrine known as “actual malice”. This doctrine results in the imposition of civil sanctions exclusively in those cases where there is false information (in the case of right to information) or it has been produced with “actual malice” (applicable to both the right to information and the freedom of expression).

p. 33 The standard of constitutionality of the opinions issued in exercise of the freedom of expression has public relevance, which depends on the general interest in the matter and in the persons involved in it, when the news communicated or the expressions proffered result in discrediting the affected person, since otherwise there would not even be a conflict between fundamental rights, because there is no intrusion on the right to honor.

p. 34 Thus, not all criticisms that supposedly harm a person, group or even society or the State can be disqualified and subject to legal liability. Nevertheless, the use of the freedom of expression to criticize or attack using excessively strong terms and without articulating an opinion, can lead to a sanction that would not be in violation of the freedom of expression. It is important to emphasize that the Constitution does not recognize a right to insult or cause gratuitous harm; however, it also does not prohibit unusual, alternative, indecent, scandalous or eccentric expressions or those simply contrary to majority beliefs and positions, even when they are expressed accompanied by non-verbal but symbolic expressions.

This Court has also determined that the freedoms of expression and information reach a maximum level when those rights are exercised by professional journalists through the institutionalized vehicle of formation of public opinion, which is the press understood in its broadest sense.

p. 35-36 Therefore, the right to honor prevails when the freedom of expression uses abusive, offensive or hateful phrases and expressions –for involving a personal disparagement or an unjustified indignity– that is beyond the scope of constitutional protection, for which it is necessary to analyze the context and whether or not it is related to the ideas or opinions expressed, since otherwise they will be considered unnecessary or impertinent.

p. 36 In conclusion, the expressions that are excluded from constitutional protection are those completely degrading, which are understood as those being: (i) offensive or hateful, based on the context; and (ii) impertinent to express opinions or information, depending on whether or not they are related to what is expressed.

II. Completely degrading expressions and discriminatory language

a) The expressions must be offensive or hateful, according to the context

- p. 37 Offensive or hateful expressions should not be confused with criticisms that are made with strong qualifiers or assertions, since as this Court has indicated, the freedom of expression is most valuable in the case of expressions that can bother or upset.
- p. 37-38 Those expressions in which cruel inferences are made that incite a similar response, by containing a personal disparagement, cannot be considered simply as strong or bothersome qualifiers, but rather as offensive expressions that cause complete humiliation.

b) The expressions must be impertinent for expressing opinions or information

- p. 38 This implies that the expressions have been unnecessary for getting the message across, since they must be linked to the message intended to be sent, and therefore the lack of the relational requirement would make evident the unjustified use of the expressions and, therefore, their impertinence in the message questioned.

In each specific case the expressions must be analyzed as a whole, as well as the context in which they were uttered, in order to determine if the expressions had any functional utility, which is to say if their inclusion in the message was necessary to reinforce the critical statement supported by the corresponding ideas and opinions, since otherwise they would be impertinent.

- p. 39 It should be indicated that completely degrading expressions not only can be present when reference is made to a particular person, but it is also feasible that they refer to a recognizable public or group and, therefore, they transcend to their members or components, provided they are identifiable as individuals within the group. Otherwise, the constitutional legitimacy of degrading expressions made ignominiously, generically or imprecisely would have to be admitted.

With respect to a person's honor, as a limit on the exercise of the freedom of expression when the expressions refer to particular social groups, it reaches a higher standard of

protection when they refer to groups that for dominant historical, sociological, ethnic or religious characteristics, have been offended collectively by the rest of the community.

p. 39-40 This protection of the honor of social groups is intensified when in a particular society there has always been a constant rejection of the people who belong to them, in which case, the language that is used to offend or disqualify them acquires the qualifier of discriminatory, which is characterized by emphasizing categories of those indicated in article 1 of the Constitution to classify persons. Where there are social conflicts, and in particular collective claims, the use of language can permit the elimination of practices of exclusion and stigmatization.

p. 40 It is undeniable that language influences the perception that people have of reality, causing social prejudices, which serve as a basis for practices of exclusion, to take root in the society through expressions that predispose the marginalization of certain individuals.

p. 41 This Court concludes that discriminatory language constitutes a category of offensive or hateful expressions, which, being impertinent in a particular message, result in the presence of completely degrading expressions, which are excluded from the protection that the Constitution provides to the exercise of the freedom of expression.

III. Homophobic expressions as a category of discriminatory expressions and of hate speech.

p. 41-43 Homophobia is a term that unifies physical, work, social, psychological and criminal discrimination, in relation to homosexual persons. It constitutes discriminatory treatment, through an assignment of hierarchy to sexual preferences, conferring to heterosexuality a superior rank. Such aversion is characterized primarily by the indicating of homosexuals as inferior or abnormal. Those expressions give rise to what is known as homophobic speech, which consists of the spouting of a series of qualifiers and critical evaluations relative to the homosexual condition and its sexual conduct. Such discourse often occurs in the daily spaces, and therefore, generally, is characterized by insinuations of homosexuality in a degrading, mocking and offensive sense, using a language that is strongly rooted in society.

- p. 43 Those homophobic expressions that imply an invitation, encouragement or justification of intolerance toward homosexuality, whether through openly hostile or rejecting terms, or through mocking words, should be considered as a category of discriminatory expressions.
- p. 44-45 These homophobic expressions can become a category of hate speech. The difference between the expressions in which a rejection of certain persons or groups is manifested and hate speech lies in the fact that while the first may be contrary to majority beliefs and positions, even generating discomfort or disagreement regarding their content, their purpose is exhausted in the simple establishing of a position, while the second is intended for a practical end, consisting of generating a climate of hostility that in turn may result in acts of violence in all its manifestations.
- p. 47 For the above, homophobic expressions constitute discriminatory expressions and, on occasions, hate speech, and are excluded from the protection that the Constitution gives to the free expression of ideas.

IV. Analysis of the expressions of the specific case in light of the postulates developed in the previous sections.

a) Were the expressions offensive or hateful?

- p. 49 This Court considers that the use of the terms “*maricones*” and “*puñal*” in the story by Mr. ENQ falls under homophobic speech, since through those expressions a reference is made to homosexuality, but not as a personal sexual preference, but as an aspect of pejorative differentiation.
- p. 49-50 There is no doubt that ENQ attributed the presumed condition of homosexuality of the columnists of newspaper S to the fact that their work was insufficient, in order to counter the criticisms that have been issued against Mr. APH. Thus, in order to evidence the deficient editorial line implemented by the latter, the author of the questioned story sought to discredit the columnists through the term “*maricones*”, using it with a clear pejorative nuance, in order to evidence debility in their work.

p. 50 Additionally, the term “*puñal*” is used to refer to a series of qualifiers that a columnist should not have. This makes it clear that Mr. ENQ used mocking expressions toward homosexual persons and associated them with negative aspects of journalistic work.

This question makes it possible to conclude that Mr. ENQ used the words as a category of differentiation in terms of inferiority. Sexual preference cannot constitute a valid element to criticize journalistic work, since it represents an irrelevant aspect of its performance. Otherwise sexual preference would be linked to the lack of professional expertise, thereby generating a clear reference to an inferior rank.

p. 51 This is so because, although the above indicated expressions are not, in abstract, openly hostile or aggressive, their formulation in a denigrating, mocking or joking tone leads to an encouragement of social rejection toward homosexual persons, which situation implies in the end a discriminatory position.

p. 51-52 Homophobic language generally transpires in habitual expressions. However, while particular expressions can be found rooted in the language, their use disseminated by a large number of the members of a society under no circumstance can lead to a premise of exclusion from the sieve of control of constitutionality, since that would lead to the absurd conclusion of validating violations of fundamental rights because that is the dominant opinion of a society.

p. 53 This Court does not ignore that certain expressions that could be considered homophobic speech may validly be used in scientific, literary or artistic studies or works, without thereby implying the occurrence of discriminatory expressions.

p. 53 However, the terms used in the story, while they are qualifiers denigrating or mocking in tone that are strongly rooted in the language of Mexican society, generate an incitation or encouragement of intolerance toward homosexuality, since the position that a person’s choice of such sexual preference justifies referring to that person through jokes, undeniably implies conceiving homosexuals in an inferior rank.

The above leads this Court to qualify the above indicated homophobic expressions as discriminatory expressions, which in turn constitute offensive or hateful expressions, since

they were not spoken as simple criticisms with assertions or qualifiers formulated in strong terms, but constitute a disparagement regarding a personal category –sexual preference– regarding which the Constitution expressly excludes any kind of discrimination.

b) Were the expressions impertinent to express the opinions contained in the note?

- p. 54,56 From a complete study of the story, it is seen that through it, Mr. ENQ attempted to show that Mr. APH has a soiled image in the State of Puebla. In the consideration of this Court, it is clear that the work produced by a journalist and any ideas that it exteriorizes, have no relationship with the possibility that the person that speaks them is homosexual.
- p. 56 It is clear that these homophobic expressions lack any functional utility in the questioned story, since its intention was to raise a series of questions regarding the professional practice of Mr. APH, and therefore it cannot be considered that the inference that his collaborators are homosexuals implies a reinforcement of the critical opinion contained in the story, and therefore the homophobic expressions were impertinent for expressing the opinions of the author.
- p. 56-57 Consequently, and since the expressions contained in the story were homophobic speech and therefore discriminatory, they fall under offensive or hateful expressions, which being impertinent since no link was found with the message that the author wanted to get across, allows this Court to reach the conclusion that the questioned story contains expressions completely degrading, which are excluded from constitutional protection of the free expression of ideas.
- p. 58 The homophobic expressions turned the journalistic story into discriminatory speech, and such expressions formed part of a message: to criticize the journalistic work of APH in the newspaper S, and therefore such homophobic expressions cannot be disconnected from the ultimate end of the message to which they belonged.
- p. 60-61 In addition, the fact that this matter involves two written media outlets cannot mean that the challenged expressions containing discriminatory speech should be overlooked; in fact media outlets due to their nature and functions have a special responsibility to avoid their propagation, since they play a fundamental role in the formation of a public culture that

encourages the diminishment and, ultimately, the eradication of discriminatory speech, since they have a key role to perform in the struggle against prejudices and stereotypes, and therefore can contribute to improving equality of opportunities for all.

- p. 61 Finally, this collegiate body clarifies that the fact that this decision determines that the expressions analyzed contained homophobic speech, does not necessarily imply that they have produced pain and suffering (*daño moral*). The study corresponding to that aspect should be taken up elsewhere.

DECISION

- p. 62 In view of the above arguments, it is appropriate to revoke the appealed decision, so that the collegiate court may invalidate the challenged decision and issue a new one in which, based on the determination of this Court – in this case the questioned expressions exceeded the limits established in the Constitution for the freedom of expression – it restates the arguments contained in this decision, and begins the study of the claims that ENQ stated in his *demanda de amparo*, and that were not addressed by the collegiate court since it considered their study unnecessary having granted the *amparo*.