InDret

Freedom of Speech and Civil Clashes

Defamation, Privacy and Freedom of Speech in the Cases Decided by the First Chamber of the Spanish Supreme Court between 1998 and 2000

(II)

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Summary

- ***Beyond freedom of speech: civil clashes, individual rights and collective consciousness***

The freedom to disseminate true information, and the freedom to express ideas and opinions make it possible to develop knowledge and provide a basis for political debate. These freedoms are also the basis of political debate, but they are, in themselves, not enough to turn an enemy into a rival, and even less so to make that enemy a friend. In fact, the truth is usually one of the first victims in any armed conflict: all wars are based on deception, wrote Sun Tzu; and when war is being waged, the expression of ideas degenerates into propaganda.

Almost a generation has passed since we began publishing accounts and commentaries on developments in Spanish applied case law with a bearing on defamation and freedom of expression (Pablo SALVADOR CODERCH *et al.*, 1987 and 1990; Pablo SALVADOR CODERCH *et al.*, 1996; Pablo SALVADOR CODERCH, M.ª Teresa CASTIÑEIRA PALOU, 1997; Pablo SALVADOR CODERCH *et al.*, 1999). Our objective on this occasion is the same as it has been in the past: to attempt *to redirect civil conflict toward political confrontation under the guidance of two clear constitutional principles – a sincere pursuit of truth and an open debate of ideas.* As readers of InDret will soon see, this is not an easy task.

- ***Supreme Court, 1st Chamber, 8.3.1999. Children of Carlos Trías Bertrán v. "Corporació Catalana de Ràdio i Televisió" and others***

1. The case

The Civil War (1936-1939) was the most serious conflict of contemporary Spain. The review of an episode dating back to that period of struggle led to a significant ruling on defamation when the allegedly defamatory information that was the object of the suit referred to a deceased person.

On 27.11.1994 "TV3", the main Catalan public television channel, broadcasted a documentary entitled "*Sumaríssim 477*", which concerned the Court Martial, held in Burgos in August of 1937, of Manuel Carrasco i Formiguera (1890-1938), a Catalan politician who was the founder and president of *Unió Democràtica de Catalunya*, a Christian Democratic political party. The extremely brief trial concluded with a ruling that convicted Mr. Carrasco and sentenced him to death, and this sentence was carried out on 9.4.1938.

At one point in the documentary, the narrator stated that:

> "The court convicted Carrasco exclusively on the basis of the testimony of eight Catalans residing in Burgos. These witnesses appeared voluntarily before the

> examining magistrate. There is no doubt as to their identities: they were José Ribas Seba, head of the Falangist Movement in Catalonia, José Maria Fontana, member of the Falange, Antonio Martínez Tomás, journalist, José Bru Jardí, journalist, Diego Ramírez Pastor, journalist, Carlos Trias Bertran, lawyer, Josep Lluch Bonastre, lawyer, and Enrique Najés de Duran, lawyer. They had no compassion: Carrasco was 'a red and a separatist'. The defense called these "bogus witnesses -- rumor mongers with a chip on their shoulders".

At the end of the documentary, a text appeared on screen stating:

> "All the witnesses for the prosecution held high posts in the Administration and the pro-Franco press from 1940 on".

The plaintiffs were all children of Mr. Carlos Trías Bertrán († 1969), one of those named as witnesses in the documentary. They filed a suit against the author of such documentary, against "*Televisió de Catalunya, SA*" and against the "*Corporació Catalana de Ràdio i Televisió*", seeking a declaration of the existence of illegitimate interference constituting defamation against Mr. Carlos Trías Bertrán. They also sought compensation, to be determined later, the publication of the ruling, and the removal of specific sentences and images from the documentary.

> The Ley Orgánica 1/1982, de 5 de mayo, de protección civil del derecho al honor, a la intimidad personal y familiar y a la propia imagen (LO 1/1982 – basic laws and statutes for civil protection against defamation and invasion of privacy) supports protection against defamation and invasion of privacy as values of personality. Such rights are protected post mortem, and, along the same lines, art. 4 LO 1/1982 regulates the active capacity to bring an action for civil protection of the values of personality of the deceased. An order of preference is established. This provides for primary consideration of the will of the right holder: only in cases where there is no record of this is capacity granted to family members – spouse, descendents, ascendants and siblings – and, residually, to the Attorney General's office (María E. ROVIRA SUERIO, 1999, p. 280 and following).

The Trial Court number 13 of Barcelona (20.12.1996) allowed the suit in full and declared the existence of illegitimate interference by the defendants constituting defamation against Mr. Trías Bertrán. The defendants were ordered to publish the ruling at their cost, to remove from all copies of the documentary the text quoted above and the on-screen text at the end of the documentary, and to pay compensation (purely symbolic) in the amount of 5 pesetas (approximately 3 euro cents), in addition to legal fees.

The defendants appealed, but the Court of Appeals of Barcelona upheld the ruling of the Court. In their subsequent appeal to the Supreme Court, the defendants alleged the violation of arts. 7.7 LO 1/1982, art. 20.1 CE, and the applied case law based on these articles (rulings of the Constitutional Court, 4th Chamber, 21.1.1988; 1st Chamber, 12.11.1990 and of the Supreme Court, 1st Chamber, 13.10.1998 and 5.2.1998). The Supreme Court reversed the initial ruling and dismissed the plaintiffs' allegations: it was the view of the Court that the historical events related were well-founded, and that these events along with the opinions and value judgments expressed were of relevance to the public:

> "(T)he historical circumstances of the pre-war period and the civil war dealt with in the documentary are of public relevance and general interest (…). The truth of the narrated events is also beyond debate. The essential fact is that Carlos Trías Bertrán was a witness for the prosecution (along with other Catalans) in a summary court martial in which the accused was the Catalan politician Manuel Carrasco i Formiguera. Furthermore, as the initial ruling points out, it is unlikely that as a lawyer he would not be aware of the probable consequences of an accusation of that nature, at that place and time (…).
>
> The truthfulness of two adjectives (sic) used – 'exclusively' and 'voluntarily' – must be examined. In the documentary it states that 'the Court convicted Carrasco exclusively on the basis of the testimony of eight Catalans…' and the fact is that the ruling says no such thing; but neither does it say the opposite: the Court that condemned the accused to death does not indicate specific facts that justify a death sentence, but rather political positions; it did not pass judgment on facts, but rather on political behavior and political opinion. These were the charges that led to the execution of Carrasco. As the initial ruling points out, it was a symbol that was being executed: 'Carrasco is everything: he is Catalonia and he is the Republic; therefore, it cannot be said that he was convicted exclusively on the basis of the declarations made by witnesses, but neither can it be said that it was on the basis of other evidence (evidence of what?). In conclusion, the adjective 'exclusively' is a value judgment, an opinion, (protected under freedom of expression), not a fact (protected under freedom of information, if true). This is also the case with the statement 'they appeared voluntarily before the examining magistrate': they appeared following a legal summons; there is no indication that they appeared 'voluntarily', but neither is there any indication that they appeared against their will. A legal summons does not exclude either of these possibilities. Moreover, as in the case of 'exclusively', the use of 'voluntarily' constitutes a value judgment, an opinion, not a fact.
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> In the documentary, it states that 'they had no compassion'. This is a value judgment, an opinion formed of one who was a witness for the prosecution in a summary trial at that particular historical moment. It also states that the witnesses for the prosecution, including the father of the claimants, 'held high posts in the Administration and the pro-Franco press from 1940 on', which is objectively true; if the claimants maintain that this statement is made in relation with their testimony as prosecution witnesses, then it is indeed a value judgment. The statement made in the documentary is true, and there is no room for qualifications or discussion" (4th Section of Legal Reasoning).

For the Supreme Court, the discussion of the truthfulness of the facts related focused on two adverbs: the first – ***"exclusively"*** – in the statement "the Court convicted Carrasco exclusively on the basis of the testimony of eight Catalans…"; and the second -- ***"voluntarily"*** – in the statement "they appeared voluntarily before the examining magistrate". Adverbs may be classified as ***nuclear*** or ***peripheral*** based on whether or not

their omissions affects the sense of the rest of the sentence (Ignacio BOSQUE and Violeta DEMONTE, 1999, p. 725): "he wounded him fatally" (nuclear); "he greeted them politely" (peripheral). The authors of this paper are not professional grammarians, members of any jury, nor judges in the case, but it is the view of the majority of them that in "*Sumaríssim*", the adverbs were peripheral. This is, in the final analysis, an arguable conclusion: we leave it to the reader to judge.

2. The difficulty of putting history on trial

In any case, the 4th Section of Legal Reasoning in the ruling being reviewed did not follow this course, but rather it reduced the empirical question concerning the historical events related in the controversial documentary to 'value judgments' – mere opinions. In this manner, the object of the suit became a debate about the symbols that make up our historical memory. For the Court, the term "exclusively" is a value judgment, an opinion, protected by freedom of expression: the Court went so far as to say (rather implausibly) that "it was a symbol that was executed by the firing squad". The same procedure is used to take the use of the word "voluntarily" from the realm of facts and place it in that of value judgments and opinions: in the absence of evidence of the voluntary or forced character of the conduct in question, maintaining either position is "a value judgment, an opinion, not a fact", according to the Court. However, in this case, the authors of this Note take a different view: ***the fact that certain aspects of events are not known does not mean that statements about them are simply opinions***. The fact that it is impossible to disprove a conjecture does not legitimate its affirmation for the same reason that it does not justify its negation. There are some puzzling cases.

Nevertheless, it must be admitted that the flight from the concrete reality of the case being judged and the reformulation of the debate in symbolic terms had already been initiated by the claimants themselves. In their suit, and to some extent in the case resolved by Decision of the Supreme Court, 1st Chamber, 2.6.2000, they sought essentially to vindicate the memory of their father and to suppress or partially suppress the subsequent broadcast of "*Sumaríssim 477*". Fundamentally, their objective was to avoid the formation of a collective memory that they viewed as incorrect. They sought to reclaim the memory of their deceased father; their primary interest was not to obtain economic reparation. It is true, as we have already indicated, that in the suit they sought compensation, but when the initial ruling awarded damages that were solely symbolic, the plaintiffs took no interest in the question of compensation. Consequently, neither did they take any interest in those aspects of the case that might make it possible to establish damages – what art. 139.2 de la Ley 30/1992 (article 139.2 of Law 30/1992) describes as harm that is "actual, possible to value economically and individualized". Thus, the suit took on a symbolic dimension, at the expense of any individual and private protection sought. In the final formulation of the case, if there is indeed harm, it is to the collective historical consciousness: the matter became an exclusively social phenomenon. First on appeal and then before the Supreme Court, the theme of the debate moved away from the correct application of the legal

provisions governing compensation for harm caused by defamation, to focus instead on the meaning of history that the documentary sought to narrate. However, once placed on this level, the debate could only focus on the events that sustained the opinion that was to be transmitted about those events: only if the events narrated clearly did not take place would the claim be well founded. However, if the events were essentially true, any opinion about them is free and is protected by freedom of expression, unless perhaps that opinion is unnecessarily slanderous or libelous.

It is reasonable to pass judgment on conducts, but to judge identities is a perversion of justice. It amounts to reducing the various branches of the legal system (criminal, civil, constitutional) to a question of the rights of authorship: judging identities presupposes that it is possible to seek the conviction of a person or group of people not for their behavior, but rather for what they are, or were at some point in their lives. During the Civil War and in the post war period, many died violent deaths for what they were or what they had been, rather than for what they had done, or even for what they had not done. The ruling being reviewed is a paradigmatic example of this. It is not easily subjected to legal discussion, and concerns collective identities, or, in other words, the historical memory of a community, rather than individual behavior. "*Sumaríssim*" is not a civil law suit for damages that concerns the possible behavior that hypothetically led to those damages; it is not even a suit that concerns absolute rights (as defamation does), being free of specific forms of intrusion: it is rather fundamentally a conflict that concerns the shared ideas that are the basis of the social identity of a community. From this point of view, the problem transcends individual questions of the right to protection from defamation, that is, questions concerning the reputation and self-esteem of a person, or, if that person is deceased, of his/her descendants: the focus of the conflict is the common, shared knowledge of a group of people that allows each of them to identify himself or herself as a member of a community. The claimants took a different view of the accuracy of this shared knowledge and sought, literally, to suppress it as an element of the collective consciousness of the community. Their interest was not economic: they did not claim to have suffered any damages. They sought to avoid what they understandably saw as a distortion of historical events – a false image of reality.

"*Sumaríssim*" is, therefore, a suit about ideas, situated, even for the plaintiffs themselves, outside of the ambit of civil actions concerning compensation. However, civil law and constitutional civil law contemplate absolute rights, such as the fundamental right to protection from defamation. The violation of this right would be a sound basis for negatory actions, such as that taken by the claimants in this case. In any case, the empirical basis of plaintiff's case was probably weak: the core of the expressions that were the object of the suit consisted of opinions – value judgments protected by freedom of expression (broader in its application than freedom of information). Furthermore, the aspects of these expressions that could be empirically disproved were put in a manner that was general enough to make them substantially true: the father of the claimants had been called as a prosecution witness; he had indeed testified in the legal process in question; and he had held public positions during the years following the Civil War. The claimants could have

chosen another forum for debate to defend their position, but they resolved instead to seek judgment of a particular fragment of history before the Courts. It is, however, highly difficult to objectively put in question before the Courts positive or negative evaluations of history and of the image that successive generations within a community decide to form of that history. This is particularly true when one of the most common, barbaric and well-known characteristics of the Civil War was the annihilation of ideological adversaries. There are occasions when the Law may attempt to enter into the difficult terrain of the ideas that constitute our social personality – occasions when it is possible to take legal action against those who defend or publish certain ideas. It is the view of *InDret*, however, that at least as a general rule, it should only be possible to succeed in doing this if the empirical basis of the historical images is clearly nonexistent.

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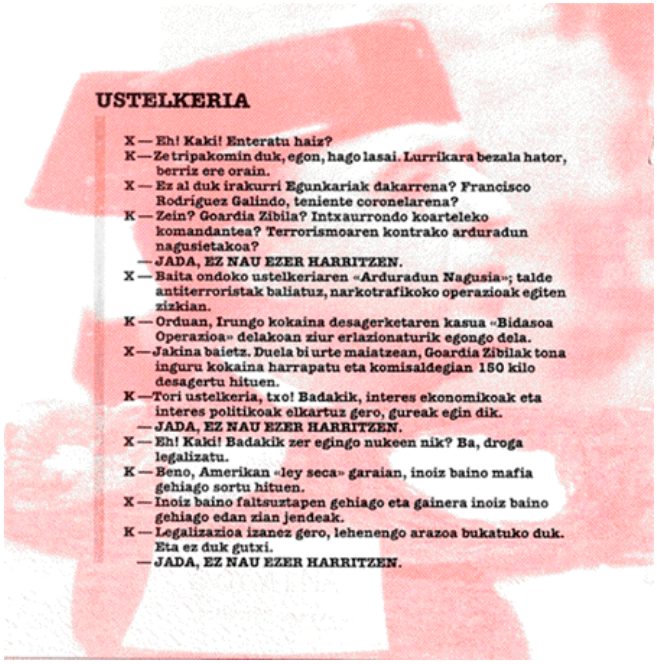
History continues to unfold: at the time of the writing of this paper, a resolution is pending for an appeal for protection (*amparo*) -filed in response to the ruling of the Supreme Court that we have just reviewed- before the Spanish Constitutional Court on April 13, 1999, and certiorari was granted. There will be ample time to continue (or modify) the reflections that have merely been sketched out in this paper.

- ***Supreme Court, 1st Chamber, 2.6.2000. Enrique Rodríguez Galindo v. Fermín Muguruza and others***



> ***ROTTENNESS*** *X.- Hey! Kaki! Have you heard? K.- What's all the fuss about, man? Take it easy. X.- Haven't you read the news in Egunkaria? About Lieutenant Colonel Francisco Rodríguez Galindo? K.-Who? The Guardia Civil officer? The commander of the Intxaurrondo[1] barracks? One of the main guys in charge of the fight against terrorism? X.- And one of the main people responsible for the rottenness* [podredumbre] *I'm going to tell you about now. He used the anti-terrorist groups to carry out drug trafficking operations. K.- So, he must also be mixed up in the disappearance of the cocaine in Irún in the Bidasoa operation. X.-For sure! Two years ago, in May, the Guardia Civil snatched a ton of coke, and 150 kilos disappeared at the police station. K.-Fucking hell! That's how it goes: between political interests and economic interests, we're all screwed. X.- Hey! Kaki! You know what I'd do... legalize drugs K.- Yeah, during Prohibition in the States, there were more mafias than ever. X.-A lot more cutting (adulterations) and on top of that people drank more than ever. K.-Legalization would at least solve the first problem, and that'd be something. Nothing surprises me any more.*[2]

Negu Gorriak, a well-known Basque band, included *Ustelkeria* (Rottenness) on their second album, *Gure Jarrera* (Our Position), released in 1991 by *Esan Ozenki Records*.

The plaintiff, Mr. Enrique Rodríguez Galindo, filed suit against various components of the group *Negu Gorriak*, *Esan Ozenki Records* and others, for protection against defamation. The plaintiff sought two remedies: on the one hand, to enjoin the defendants to refrain from similar interferences in the future, to have the song *Ustelkeria* excluded from subsequent re-releases of the album, and to prevent the group from performing the song in public. The second dimension consisted of an action seeking compensation in the amount of €90,151.82, in addition to legal costs and interests.

The claim was rejected in the first instance by Trial Court number 4 of San Sebastian, 3.1.1994, and substantially affirmed on appeal by the Court of Appeals of San Sebastian, Section 1, 25.5.1995.

In the fourth motive of the appeal before the Supreme Court, which was accepted by the Supreme Court, the defendants had alleged violation of article 1139.1 of the Código Civil (Civil Code - CC) in relation with arts. 1151 and 1137 CC, and of case law doctrine regarding necessary passive joinder of defendants, given that the suit had not been directed against Miguel Ángel C. L., one of the co-authors of the lyrics and music for the song. In point 4 of the opinion, the Supreme Court said:

> "According to the evidence documents provided for the proceedings, issued by the *Sociedad General de Autores de España* (pages 685 to 703 of the first instance proceedings), the indicated authors for the lyrics of the work 'Ustelkeria' are Fermín M. U., Íñigo M. U. and Miguel Ángel C. L., and as authors of the music for

[1] Mr. Enrique Rodríguez Galindo, then lieutenant colonel in the *Guardia Civil*, was in command of the Intxaurrondo barracks (command 513 of the *Guardia Civil)*, as head of the barracks from 1983 to 1995.

[2] Translation of the Basque song lyrics as indicated in ruling of the Supreme Court, 1st Chamber, 2.6.2000.

this work, the three individuals already referred to and Ignacio A. B. The work is, therefore, one which is the result of the involvement of various persons working together to achieve a single work, to which they all hold title; the work is one based on collaboration, covered by the terms of article 7.1 of the Law of Copy Right, both in the November 11, 1987 version of the text, and in the Revised Text currently in effect (approved by Legislative Royal Decree 1/1996 of April 12), according to which 'The rights to a work that is the unitary result of the collaboration of various authors correspond to all of them'. In matters not contemplated by this law, this situation of commonality will be governed by the regulations established in the Civil Code for common ownership (article 7.4. of the Law of Intellectual Property), that is to say, by articles 392 and following of the Code".

"[The] claims [of the plaintiff accepted in] the ruling under appeal directly affect the moral right and the rights of exploitation of the authors of the work, which are practically annulled or extinguished. Among these authors is Miguel Angel C. L., who is deprived of these rights as an author of the text of the song without having been heard in court. In relation to proceedings of this type, this court has issued a doctrine that establishes joint and several liability between author, director of publication, and publisher. This doctrine denies lack of necessary passive joinder of defendants if a suit is not filed against all of the defendants, precisely because of the joint character of the work derived from a set of distinct conducts of distinct natures that can be imputed to each of the defendants. This doctrine is not applicable in the case being considered, in which a single action can be imputed to various authors (the creation of the text): differing degrees of participation cannot be established, given that the action is the product of various individuals working together in a coordinated fashion. In conclusion, it must be stated that Miguel Ángel C. L. should have been called to the proceedings".

The ruling of the First Chamber is commendable. Apart from the material sense of the decision, the court skillfully redirects the terms of a civil conflict of difficult resolution to the space of a meticulous technical-legal debate: if the claims of the plaintiff had been strictly focused on the question of damages, it could have been argued that the doctrine of necessary passive joinder of defendants was inapplicable. In spite of some vacillation, it has for many years been the view of the First Chamber of the Supreme Court that various defendants involved in causing the harm are jointly and severally liable. This is the case, at least, when it is not possible to determine the degree to which each party contributes to the production of the harmful result, and when, therefore, it is necessary to apply art. 1144 CC, according to which "[t]he creditor may take action against any of the joint debtors or against all of them simultaneously".

The recent decision of the Supreme Court, 1st Chamber, 3.11.1999 constitutes an exception to this line of case law. In this case, an association of owners of semi-detached chalets filed suit against a builder "Selecciones Inversoras, SA" ("Selesor"), claiming damages based on the deterioration of their residences. The plaintiff sought compensation of € 6,759 corresponding to the cost of urgent repairs that had been carried out in the absence of any action on the part of the builder, and the

> completion of work for the definitive consolidation of the properties (necessary to repair a series of deficiencies in the construction). The Trial Court number 48 of Madrid (7.7.1992) fully allowed the suit. The Court of Appeals of Madrid reversed in part the decision of the Trial Court, absolved "Selesor" of payment of the amount claimed, and held that the builder and the architects were jointly and severally liable. The Supreme Court allowed the appeal filed by "Selesor", affirmed the existence of necessary passive joinder of defendants, reversed the previous rulings, and cancelled the actions ordered by the lower court:
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> "The consequences drawn from joint and several liability are not correct, but its establishment is: the contribution of each party involved in the damage caused cannot be individualized. However, this joint and several liability is "born" with the ruling – it is generated to protect the injured party. This requires that various subjects have been declared liable in the ruling, which in turn requires that these defendants have intervened as defendants in the process. There is no manner in which a party not called to the process can be declared liable, and, consequently subject to an action for recovery on the part of the convicted party who pays the entire cost of damages (article 1145) (…). It cannot be deduced from the joint and several liability born in the ruling that the rules of such liability were already in effect at the time that the suit was filed. This is the deduction made in the ruling of the Provincial Court, which is in accordance with a majority orientation in the case law of this Court" (4th Section of Legal Reasoning).

Nevertheless, the most substantial part of the plaintiff's claim consisted of injunction-type remedies, formulated on the basis of the model of a Property Rule property rights and other absolute rights, such as the right to protection from defamation, which has never been limited to compensatory remedies. It was, therefore, relatively simple for the Court to follow a line of reasoning from the association of property owners to the right of authorship and to the moral right of the author, and thus to apply to the case the good old doctrine according to which rulings won against one joint owner cannot be to the detriment of the others (José María MIQUEL GONZÁLEZ, 1991, p. 1077), and suit must be filed against all of the joint owners, thus giving rise to what is known as necessary passive joinder of defendants (José Luis LACRUZ BERDEJO *et al.*, 2001, p. 353; Angel M. LÓPEZ y LÓPEZ and Vicente L. MONTÉS PENADÉS (coordinators) *et al.*, 1994., p. 395; Jorge CAFFARENA LAPORTA, 1991, p. 122; Vicente GUILARTE ZAPATERO, 1980).

At this point, *InDret* readers may conclude that in this case the Supreme Court evaded a resolution of the specific conflict, instead taking refuge in procedural questions. No answer was given to the basic question: what to say about the "rottenness" and about the "drug trafficking operations" attributed to the plaintiff by the defendants. In fact, during the period under consideration, the Supreme Court had three occasions to respond to this question, and took advantage of all of them. Readers interested in the answers and the reasoning of the Supreme Court may consult Annexes I and II of this paper.

- ***Table of rulings referred to***

Rulings of the Supreme Court

Chamber and Date	*Ar.*	*Opinion expressed by*	*Parties*
1st, 13.6.1987	9964	Jaime Santos Briz	Josefa R. F. and others v. Fernando J. S. and others
1st, 5.2.1998	405	Ignacio Sierra Gil de la Cuesta	Enrique Múgica Herzog v. "Silex Media" and others
1st, 13.10.1998	8069	Alfonso Villagómez Rodil	Emilio O. P. v. "Difusora de Información Periódica, SA" and others
1st, 8.3.1999	1407	Xavier O'Callaghan Muñoz	Children of Carlos Trías Bertrán v. "Corporació Catalana de Radio i Televisió" and others
1st, 3.11.1999	9043	Antonio Gullón Ballesteros	Comunidad de Propietarios v. "Selesor, SA"
1st, 2.6.2000	3998	Pedro González Poveda	Enrique Rodríguez Galindo v. Fermín Muguruza and others

Rulings of the Constitutional Court

Chamber and Date	*Ar.*	*Opinion expressed by*	*Parties*
1st, 21.1.1988	6	Luis Díez-Picazo and Ponce de León	Javier Crespo Martínez v. STS, 4th, 22.11.1986
1st, 12.11.1990	171	Miguel Rodríguez-Piñero and Bravo-Ferrer	Juan Luis Cebrián Echarri and «Promotora de Informaciones Sociedad Anónima» v. STS, 1st, 7.3.1988

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Vicente GUILARTE ZAPATERO, Commentary on articles 1139 and following CC, in Manuel Albaladejo (director), *Comentarios al Código Civil y Compilaciones Forales*, Section XV, Volume II, Edersa, Madrid, 1980.

José Luis LACRUZ BERDEJO *et al. Elementos de Derecho Civil.* Section III. Volume II. Derechos reales. Derechos reales limitados. Situaciones de cotitularidad, Dykinson, Madrid, 2001.

Angel M. LÓPEZ y LÓPEZ and Vicente L. MONTÉS PENADÉS (coordinators.) *et al. Derechos reales y derecho inmobiliario registral*, Valencia, Tirant lo Blanch, 1994.

José María MIQUEL GONZÁLEZ, Commentary on articles 394 and following CC, in Cándido Paz Ares Rodríguez, Luis Díez-Picazo and Ponce de León, Rodrigo Bercovitz and Pablo Salvador Coderch (directors), *Comentario del Código Civil*, Volume II, 2nd ed., Ministry of Justice, Madrid, 1993.

María E. ROVIRA SUERIO. *La responsabilidad civil derivada de los daños ocasionados al Derecho al Honor, a la Intimidad Personal y Familiar y a la Propia Imagen*, Cedecs, Barcelona, 1999.

Pablo SALVADOR CODERCH *et al. ¿Qué es difamar? Libelo contra la ley del libelo*, Civitas, Madrid, 1987.

Pablo SALVADOR CODERCH *et al. El mercado de las ideas*, Centre for Constitutional Studies, Madrid, 1990.

Pablo SALVADOR CODERCH *et al.* "Honor y libertad de expresión en 1995. Una reseña jurisprudencial", *Derecho Privado y Constitución*, issue 10, September-December 1996.

Pablo SALVADOR CODERCH y M.ª Teresa CASTIÑEIRA PALOU. *Prevenir y castigar. Libertad de información y expresión, tutela del honor y funciones del derecho de daños*, Marcial Pons, Madrid, 1997.

Pablo SALVADOR CODERCH *et al.* "Honor, intimidad personal y familiar y derecho a la propia imagen en la jurisprudencia civil del Tribunal Supremo del bienio 1996-1997", *Revista del Poder Judicial*, General Council of the Judiciary, issue 53, January-March 1999, p. 455 and following.

ANNEX I

Defamation and accusations of corruption concerning a senior officer in the *Guardia Civil*

The three cases mentioned in the body of the article and which formed the basis of the accusation of "rottenness" were the following:

a) Supreme Court, 1st Chamber, 15.1.1999: Between 14.11.1990 and 15.3.1991, "*Diario 16*", a Spanish newspaper, had published 11 articles on a report made by the public prosecutor of the Provincial Court of Guipúzcoa, Luis Navajas. Navajas was investigating the possible existence of a group of drug traffickers, which could include Enrique Rodríguez Galindo as one of its members. Rodríguez Galindo filed a suit against the journalists and the publisher of the newspaper, seeking compensation of 50,000,000 pesetas (€300,506.05) and the publication of the ruling. The suit was rejected in both instances and the Supreme Court declared that there were no grounds for appeal: the published information was substantially true, of general interest, and reproduced for the most part articles published in the newspaper "*Egin*" in a previous edition.

b) Supreme Court, 1st Chamber, 18.4.2000: "*Egin*", in 6 articles published between 15.11.1990 and 17.1.1991, had referred to the previously mentioned report and to the alleged involvement of Mr. Rodríguez Galindo in the recounted events. Rodríguez Galindo filed a suit against two journalists, the director and the publisher of "*Egin*", seeking damages of 30,000,000 pesetas (€180,303.63) and the publication of the ruling. The Trial Court number 2 of Bilbao (3.3.1993) held in part for the plaintiffs and ordered the defendants to pay 10,000,000 pesetas (€60,101.21). In appeal, the Court of Appeals of Bilbao (Section 4, 3.4.1995) reversed the decision of the Trial Court. The Supreme Court rejected the plaintiff's appeal: the defendants had done no more than reproduce the substantial content of the information published in "*Diario 16*" previously referred to. Note that the 1999 ruling stated that "*Diario 16*" reproduced information published by "*Egin*" ("the Court *a quo* established that "*Diario 16*" had done no more than provide information concerning what had been published by the newspaper *'Egin'* the day before. This information had been literally transcribed without any alterations, additions, annotations or commentaries; it was clear to the reader at all times and repeatedly indicated that this was a reproduction of information provided by another newspaper"). The 2000 ruling states that "*Egin*" reproduced information previously published by "*Diario 16*" ("the information in question… simply reproduces

information… just as it was published in the source, that is, in the newspaper "*Diario 16*", without adding any commentary or evaluation).

c) **Supreme Court, 1st Chamber, 13.10.2000**: In the book entitled "La red Galindo" (The Galindo Network), published by the defendant "Txalaparta", and written by the co-defendant José Benigno R. R., the events that were the object of the two cases referred to were narrated in the form of a novel. Mr. Rodríguez Galindo filed a suit seeking compensation of 60,000,000 pesetas (€360,607.26), the publication of the ruling, and that the defendants refrain from similar interference in the future. The instance rulings awarded compensation of 5,000,000 pesetas (€30,050.61) and the Supreme Court upheld the decision. On this occasion, the Supreme Court agreed with the Provincial Court that the content of the information was incorrect.

The last three rulings reviewed, which are the only antecedents to which *InDret* has had access for review, (and, in fact, which are the only relevant rulings for the creation of case law) do not suggest a common criterion for resolution. Nevertheless, there are some clear elements of judgment. One such element is the deference that any Supreme Court must show in relation to the facts that Lower Courts have declared proven. The second point concerns the contrast between the resolution of the first two cases, which referred to newspaper reports, and the third, which concerned a book. Possibly, the difference stems from an hypothetical requirement for greater rigor on the part of the author of a book than is demanded of a journalist. However, the Supreme Court does not expressly indicate this, and nor would it be reasonable to establish such a general criterion: it would be arbitrary to apply different tests to the same content simply because it appears in a bound form. Another possible explanation is that the unverified statements that were the basis of the book were far greater in number and significance than was the case for those supporting the newspaper reports that were the object of the first two rulings. Finally, the difference may stem from the confessed intent in the third case to novelize reality, which the Supreme Court may have seen as an unacceptable license to propagate falsehoods.

In the period being examined, other rulings have resolved cases involving accusations of corruption and influence peddling: the plaintiff is accused of having obtained a position in the Treasury Department thanks to the assistance of Alfonso Guerra (Supreme Court, 1st Chamber, 12.6.1998); the plaintiff is accused of having used his position as Under-secretary of the Ministry of Education and Science to provide inside information to Jesús de Polanco (Supreme Court, 1st Chamber, 22.6.1998); a report on an urban development scandal in the municipality of Llanes which implicated various people in a scheme to illegally finance the PSOE , the Spanish socialist party (Supreme Court, 1st Chamber, 30.7.1998); a member of Benemérita (*Guardia Civil*) is implicated in drug trafficking activities (Supreme Court, 1st Chamber, 25.11.1998); a judge is accused of breach of trust (Supreme Court, 1st Chamber, 16.2.1999); the mayor of Algeciras is implicated in a €120,202.40 urban development fraud. (Supreme Court, 1st Chamber, 23.3.1999); the members of an association are accused of corruption (Supreme Court, 1st Chamber, 5.7.1999); a mayor is accused of fraud and breach of trust in relation with the approval and implementation of certain urban development plans (Supreme Court, 1st Chamber, 16.7.1999); a Deputy Director at the Ministry of Foreign Affairs is accused of collecting commissions for the purchase of IT equipment from a German company (Supreme Court, 1st Chamber, 31.12.1999); a court official is

accused of breach of confidence and of employing a system of bribes (Supreme Court, 1st Chamber, 27.5.2000); a city councilor is accused of drug trafficking (Supreme Court, 1st Chamber, 24.6.2000); accusations of corruption are made in relation with the re-zoning of land (Supreme Court, 1st Chamber, 8.7.2000); the plaintiffs are accused of "favoritism" and of giving special treatment to "buddies" in the renovation of the "Coliseo" building in Eibar and in the municipal contracting process (Supreme Court, 1st Chamber, 13.10.2000).

ANNEX II

Counter-terrorism and the dirty war: news of an unfinished process

The ruling of the Supreme Court, 2nd Chamber, of 20.7.2001, which confirms the substance of the ruling of the First Section of the Penal Chamber of the National Court; 26.4.2000, convicted Mr. Enrique Rodríguez Galindo of two counts of murder and of false imprisonment. In this case, José Antonio Lasa and José Ignacio Zabala had been arrested in Bayona on 15.10.1983, killed by shots to the back of the head and then buried in quicklime in Busot (Alicante) a few days later.

The Supreme Court ruling referred to is one of many that have been made in relation with a historical episode in Spain: the formation, under the protection of holders of high public office in the Spanish government, of so-called *"Grupos Antiterroristas de Liberación"* ("anti-terrorist liberation groups"). GAL was an armed group, illegally constituted to combat terrorism using the same means as the terrorists themselves. The ruling of the Supreme Court, 2nd Chamber, 29.7.1998, which resolves the so-called "Marey Case", convicted various members of GAL - not however, Mr. Enrique Rodríguez Galindo - of misappropriation of public funds, kidnapping and false imprisonment of Segundo Marey, a French businessman who they mistook for a member of the terrorist group ETA.