

## **JCC 117/1994 ,of 25 April 1994**

The Second Chamber of the Constitutional Court comprising Luis López Guerra, President, Eugenio Díaz Eimil, Alvaro Rodríguez Bereijo, José Gabaldón López, Julio Diego González Campos and Carles Viver Pi-Sunyer, Senior Judges have ruled

### **IN THE NAME OF THE KING**

the following

### **JUDGMENT**

In the appeal of infringement of fundamental rights number 2016/90, lodged by Ana García Obregón, represented by the Court Agent Ignacio Aguilar Fernández and assisted by Legal Counsel Carlos Usúa García, against the Judgment of the First Chamber of the Supreme Court of 16 June 1990, which dismissed cassation appeal no. 1.809/88 lodged against the judgment of the First Chamber of the Civil Court of the Territorial Court of Barcelona, on 19 July 1988, in an appeal (case no. 9/88) against the Judgment of the Court of First Instance no. 2 Barcelona of 9 November 1987, in proceedings of civil protection of the right to honour, privacy and one's own image number 506/1987. Luis Vigil García, Antonio Alvarez Méndez and «Editorial Origen, S.A.», entered an appearance represented by the Court Agent Luis Pozas Granero and assisted by Legal Counsel Luis Martí Mingarro. The Public Prosecutor also entered an appearance and the Senior Judge José Gabaldón López acted as Rapporteur expressing the opinion of the Court.

### **II. Legal conclusions**

1. This appeal addresses the question of the scope and effects of the reversal of the legitimating consent to invasion of privacy within the scope of article 18 of the Constitution. In the claimant's opinion, from the terms in which art. 2.3 of the Organic Law 1/1982 regulates the system of that reversal it may be concluded that this may occur at any time, irrespective of the degree of development of the invasion initially authorised, and without it being necessary to allege the presence of just cause or that it is worthy of interest, so that the contested Judgments, to the extent that they have analysed the question from the sole perspective of the third party acquiring good faith and from the damage this would have presupposed by addressing the petition for reversal, have unduly restricted the rights of the claimant by infringing articles 18.1, 20.4 and 24.1 of the Constitution.

The Public Prosecutor and the defendants in the aforementioned judicial proceedings oppose the claimants allegations, considering that the claimant is merely attempting to review questions which, since they are merely legal issues, have no constitutional relevance whatsoever, and that, insofar as they have been decided in a reasonable and well founded manner by the ordinary courts, they cannot be examined in an appeal for the declaration of fundamental rights; furthermore, even in the event that the essential nature of the debate were to transcend the boundaries of mere legality, the claim should ultimately be dismissed as the legal regulation of reversal of consent does not presuppose a system such as that proposed by the appellant; on one hand – for the Public Prosecutor–, because that reversal would only be able to have effects for the first beneficiary of the reversal of consent, that is– in this case– for the photographer, Mr. Cattarinich, and not against the defendants; because –in the opinion of the latter– the reversal cannot have effects in an indiscriminate manner, but should take into account the rights and

obligations arising from and based on –and around– the consent for which reversal is sought.

2. The infringement by the contested Judgments of articles 18.1, 20.4 and 24.1 of the Constitution alleged by the claimant, has to be redirected to a single constitutional infringement, that of the right to one's own image– contravened by publication of the photographs– and honour–infringed by the comments which accompanied said photos–. The reason for this is firstly, the alleged infringement of the right to effective judicial protection has no basis, as the claimant has obtained on three occasions court decisions which were reasoned and based on law, thus having satisfied the requirements deriving from the right acknowledged in article 24.1 S.C. according to reiterated and constant case law of this Court (CCJ 6/1992, 23/1992 98/1992, 114/1992, 154/1992, 161/1992 y 195/1992, to name some of the most recent judgments). Furthermore, she has not indicated the reasons in support of her opinion that the contested Judgments contravened her right to judicial protection, so that it must be assumed that any reproach aimed at said decisions have been confined to the argument that the courts have not acted correctly in respect of the claim of infringement of the right to honour, privacy and one's own image. In other words, by invoking article 24.1 S.C. it is not a failure of the effective right to judicial protection which is alleged, but the lack of judicial reparation for what the claimant considers to be a contravention of the right recognised by the Constitution in its article 18.1. Similarly, it is necessary to refer again to art. 18 S.C. in respect of what the claimant considers to be an infringement of art. 20.4 of the Constitution; because its invocation cannot be interpreted other than in the sense that the Judgments were unaware of its restrictive function in relation to the freedoms recognised in article 20 S.C.; however as such, once again, the arguments in the claim lead to infringement of art. 18.1 S.C. in this case from the perspective of that restrictive function of the law regarding freedom of expression and information.

To summarise, the question is reduced to determining whether the contested judgments, insofar as they have not given to the claimant's reversal of consent the effects which according to her were required pursuant to Organic Law 1/1982 have caused through reflex mode an infringement of the constitutional rights to one's own image and honour, as they do not adequately satisfy the intention of the claim.

3. The right to one's own image, acknowledged in art. 18.1 of the Constitution along with those of honour and personal privacy, forms part of the rights of personality, and as such ensures the scope of freedom of a person with respect to their most characteristic, proper and immediate attributes, such as physical image, voice or name, qualities which define a person and are attributed as an inherent and irrepressible possession of all persons.

To the extent that this freedom of an individual in the physical world is manifested through the action of his/her body and its qualities, it is clear that with the protection of one's image the scope of one's privacy is safeguarded and, at the same time, the decision making power over the purposes for which those physical manifestations of the person may be put to use, through his/her image, identity or voice. The right to privacy restricts the intervention of other persons and of public authorities in private life, an intervention which in the law which concerns us here may be manifested in respect of the observation and capture of the image and its manifestations and the dissemination or subsequent disclosure of what has been captured.

These rights, as an expression of a particular person enjoy the most stringent protection in our Constitution and consist of an exempt area able to prevent or restrict the intervention of third parties against the wishes of the holder of said rights

Without prejudice to the exceptions which may exist in respect of images taken in public, in particular those of public personalities or those who are professionally renowned, when those rights conflict with those of art. 20.1 d) and 4 SC since they are concerned with image, they are essentially inalienable in nature and therefore although it is permissible to authorise their capture or disclosure this will always be reversible

It is true that with the holder's authorisation the image may acquire an autonomous value with a capital content subject to traffic in trade and this may lead to confusion in respect of whether the effects of the reversal are restricted to the scope of contracting or derive from the rights of the personality. This is what situations such as that under scrutiny here may determine because professional artists in the entertainment world (or those who aspire to be such) who make use of their right to their image just like any other person except for the restrictions deriving from advertising of their performances or their own notoriety frequently consent to the capture or reproduction of their image, including when their privacy is invaded, so that it may be used for commercial purposes; it should furthermore be stated that also in such cases consent may be reversed because the right to personality prevails over other rights created by the contractual assignment. In addition, in those cases of voluntary assignment of the image or certain images the regime of the effects of the reversal (established in art. 2.3 of the Organic Law 1/1982 as absolute) should address the legal relations and rights created, including in favour of third parties, conditioning or modulating some of the consequences of their exercise; and it corresponds to the ordinary courts to weigh up the rights in conflict in such cases, without prejudice to the fact that this Court is also competent to judge solely from the constitutional perspective.

4. In the case of these proceedings and despite the fact that in this instance the appellant attempted to place this in doubt, the existence of her initial consent (which has, furthermore, been attested) for the dissemination – for "journalistic" purposes or for professional promotion – of the photographs, publication of which has given rise to the legal proceedings. The contention has been firstly, whether said consent was genuinely subject to reversal and, if so, whether its effects should have been immediate in respect of the accused publisher. The consequence would of necessity be influenced by the fact that the initial authorisation was for use of the photographs assigned for a fee, as although the claimant had not received a price for capture of the images, nor their subsequent publication, she did expect some personal material gain in the form of professional promotion through the dissemination of those images.

5. The Public Prosecutor's allegation that the reversal should only be in respect of the photographer Mr. Cattarinich, and should affect those who, through a contract acquired from him the corresponding rights to publish the photos, as since this was the exercise of a faculty deriving from constitutional right of the personality the possibility of reversal was not exhausted by exercising it against whomsoever was originally the beneficiary of the licence, but conversely extended to all those who subsequently were able to acquire entitlement to the images transferred, since the question is to reclaim the right to one's image, which is indisputable and inalienable in essence, rendering without effect the authorisation, which is an exceptional faculty granted. In the case of Mr Cattarinich the reversal could only have the effect of refusing him authorisation to make any further contractual transactions using the photographs. However, in the case of the publisher against whom the claim is lodged, it would also be necessary to ensure that it would be prevented from publishing the photographs in the future. The doubt regarding whether the publication was already underway could be considered a future event or a past action –or at the very least –simultaneous, thus inaccessible with regard to the immediate consequences of the reversed consent, was the question resolved by the appealed Judgments.

6. The literal wording of article 2.3 of the Organic Law 1/1982 leaves no doubt regarding the fact that the reversal can occur "at any moment in time" a prescription which refers to the moment of exercise of that reversal, however not always to the time of its effects, nor therefore does this authorise these to be applied to past situations, becoming retroactively illegal invasions of privacy which had previously been consented to. Furthermore, when there is a contractual authorisation, thus imbuing the image with a capital value by placing it in trade, the effects of the reversal, irrespective of whether they are directed at the initially authorised person

or to third parties deriving therefrom, it will be necessary to take into account (as we mentioned previously) the conditioning or requirements resulting from existing contractual relations. At the very least, as may be deduced from the legal regulation, it will be necessary to attest to some circumstances, such as whether it proceeds from the actual holder of the right, expressing in a specific and unquestionable manner the desire for reversal, the categorical and full knowledge of the person or persons to whom it is directed (including publication if necessary), taking place at a time in which the right assigned may still be exercised, without attributing to it a retroactive nature (that is, one which would invalidate effects which have already been produced) and, finally, by means of compensation for damages; this last requirement which in many cases cannot be fully relegated in the future without having to influence the manner, time and circumstances of the reversal, particularly in respect of ensuring the appropriate compensation. And the effects of these circumstances, which was indubitably taken into account by the Civil Courts, may be examined by this Court only insofar as their judicial opinion could have been detrimental to the fundamental right.

7. Since the reversal could not be projected into the past, the issue in the proceedings was whether or not the publication of the photographs by the accused publisher was a future act, for the purposes of reversal.

The Courts delivering the contested Judgments coincided in noting that due to the facts of the case, it was necessary to consider that the publication of the photographs was an event in the past since, for the purposes of reversal of consent it should be considered as having already occurred because, according to the facts the accused publisher only knew about it when it was materially impossible to prevent, without serious detriment and damage, publication of the magazine. This is opposed by the appellant who, if the magazine issue had not been published was liable through the reversal in its full extent, to the defendant, without possibility of arguing in terms of financial loss to deny its effectiveness, since should there be any damage, the publisher would have had the the right to compensation as established in art. 2.3 of the OL 1/1982.

It is on this point that the effects of the reversal have undoubtedly been conditioned by the circumstance that the authorisation for use of the photographs had a contractual origin and generated a series of financial rights, and that the appellant should exercise here right to reversal in the context of those contractual relations. Because that would necessarily affect the relations set up and the rights acquired, including third parties and, whether for its effectiveness, or for its requisite compensation, the capital rights affected had, of necessity, to be taken into account by the courts; not only that of the claimant to recover her exclusive rights to the photographs but also that of the editor not to suffer capital damages deriving from the suspension of the publication without the correlative obligation of offering sufficient guarantee of compensation for said damages. These are evidently ordinary legal questions which the Judgments of the civil courts contested herein have resolved with facts and reasoning that do not contravene the fundamental right, as they only affect the requirements essential for personal and temporal effectiveness of the reversal, in order to produce effects in rehabilitation of the appellant's right to the image package which was contractually assigned.

8. The decision therefore, of the civil Judgments in the three cases was made on the basis that publication was not a singular and instantaneous event but rather a process consisting of a number of successive phases, some of the most important of which had occurred prior to the reversal, and to the publisher's knowledge, and other phases were in a very advanced state of execution so that the removal of the images from the commercial world would need to have been adjusted to a situation of urgency deriving from previous contractual relations; which furthermore, did not determine in the appellant's right to her image a invasion differing from that deriving from its initial authorisation. Said Judgments, therefore, have considered that this was a question of an event which –due to its plural and successive content– had to be taken as

practically concluded when the reversal occurred. The Civil Courts therefore accorded decisive relevance to the contractual assignment of the images in relation to the moment of the effectiveness of the reversal and, without doubt, the prevention of the necessary compensation for damages given the imminence of a costly publication which was considered to be in progress already.

This opinion should be deemed to be reasonable and well argued as may be deduced from its legal findings; however, in addition according to the constitutional evaluation incumbent on this Court in respect of its effects on the fundamental right invoked, it cannot be considered contrary to that right, nor does it oppose the reasonable effects of the reversal of the authorisation provided, particularly if the aforementioned lack of guarantee of financial compensation by the person revoking the consent is taken into account.

9. Finally and with respect to the claimant's complaint regarding the comments accompanying the photographs which were eventually published, similarly the grounds presented in the appealed Judgment can be found wanting, based (as the Public Prosecutor and the defendants claimed) on the fact that if the claimant consented at the time to allow the photographs to be published, it must be assumed, given their nature that- without any doubt whatsoever- they could only have been published in magazines of the kind such as the contested publication and most probably accompanied by captions similar to those which she now contests. This dissemination does not constitute defamation in itself, and moreover, despite the evident vulgarity and lack of finesse, those comments, even though they are crude are not offensive to the appellant, however, finally, within the context of their style, they aim rather to provide a coarse tribute to the physical attributes revealed in the photographs. If such consent for both the publication and for the inevitable "photo captions"- was valid and its reversal cannot affect, as has been said, the publication of the November 1986 issue of the magazine "PlayBoy España" it is quite clear that, nor can her complaints in this respect be admitted.

Ruling:

**RULING**

In the light of the foregoing, the Constitutional Court GIVEN THE AUTHORITY CONFERRED BY THE CONSTITUTION OF THE SPANISH NATION has ruled to dismiss the appeal lodged by Ana García Obregon.

This Judgment shall be published in the Official State Gazette

Given in Madrid, on the twenty fifth of April nineteen hundred and ninety four.