Constitutional Court Judgment No. 20/1990, of February 15 (Unofficial translation)

Preamble:

First Chamber of the Tribunal Constitucional ("Constitutional Court") made up of Mr. Francisco Tomás y Valiente, Presiding Judge; and Mr. Fernando García-Mon y González-Regueral, Mr. Carlos de la Vega Benayas, Mr. Jesús Leguina Villa, Mr. Luis López Guerra and Mr. Vicente Gimeno Sendra, Judges, have pronounced

ON BEHALF OF THE KING

the following

JUDGMENT

In the individual appeal for protection of a fundamental right no. 1503/1987, filed by the Procurador de los Tribunales [solicitor] Mr. José Manuel Dorremochea Aramburu, for and on behalf of Mr. Juan José Fernández Pérez, assisted by the Letrado [counsel] Mr. Fernando Salas Vázquez, against the Decisions of the Second Chamber of the Supreme Court of 19 October 1987, pronounced in the appeal for cassation for infringement of statute law filed by the Public Prosecutor against a Decision dated 12 April 1984 of the Second Criminal Section of the Audiencia Nacional ["National Court"]. The Judge-Rapporteur was Mr. Fernando García-Mon y González-Regueral, who states the Court's opinion,

Grounds:

II. Points of law

1. The analysis of the violation of fundamental rights and freedoms as alleged by the appellant – ideological freedom and freedom of expression and information acknowledged respectively in articles 16.1 and 20.1, sections a) and d) of the Constitution – requires prior clarification:

As contained in the facts declared proven by the Decision of the National Court which, unaltered, are also used as the basis for the Tribunal Supremo ["Supreme Court"] Decision, the paragraph transcribed in them – reproduced in the background under the heading "Spain is not different?", and which has led to contradictory judicial decisions – one acquitting and the other convicting – formed a small part of the article entitled Junio de los mundiales agosto de las multinacionales ("The World Cup – rich pickings for the multinationals"), written by the appellant and published in number 270 of the magazine Punto y Hora, corresponding to the week of 18 to 22 June 1982. That article made adverse criticism of the organisation, resources and aims of the Football World Cup soon to be held in Spain. The criticism, certainly harshly put, set out from different perspectives – historical, political, social, sporting and economic – the author's criteria about this type of event which, mixing the world of big business with mass interest in sport and emphasising the millions of viewers which are achieved thanks to the media, provide a very important opportunity and are used as a world sounding board so that, through these events, there is exorbitant political propaganda from the host country and its leaders and at the same time provides huge business opportunities for the organisers and the multinationals who

sponsor them.

The freedoms that the appellant considers violated must therefore be examined in the context of the general criticism throughout the article about an event of general interest and clearly topical at the time of publication, and not only the part in which it goes beyond the general and becomes more specific, censuring the current democratic system in Spain and the manner and background preceding the political transition, which the author looks back on in terms which, as they were held to be contemptuous rather than strictly defamatory against His Majesty the King, merited the criminal conviction now under appeal.

2. The contradictory solution reached by the Judgments pronounced in the case leading to this appeal for protection of a fundamental right – acquittal by the National Court and conviction by the Supreme Court – does not lie in the strict criminal trial of the facts by their being subsumed within the meaning of the applicable definition of a criminal offence, but rather in the different interpretation and scope that each Judgment makes of the Constitutional precepts pleaded from the beginning by the appellant and which are repeated in this appeal for protection of a fundamental right. For the Decision of the National Court, the basis of which we have copied in background 2, section c), the article being judged must be classified within the scope of the rights and freedoms enshrined by articles 16.1 and 20.1, sections a) and d) of the Constitution – rights to ideological freedoms, freedom of expression and information – and which leads to the acquittal of the accused. While the Supreme Court Decision, upholding the appeal for cassation filed by the Public Prosecutor, puts more emphasis on the limits on the freedoms of expression and information imposed in number 4 of article 20, than on the content of those rights, without referring to the ideological freedom enshrined by article 16.1, presumably taking the view that it is absorbed or included in its external manifestation by sections a) and d) of number 1 of article 20.

And this is where, in the constitutional dimension offered by the problem and in the different positions adopted by the courts in relation to it, by virtue of article 53.2 of the Constitution and 41 et seq of the Organic Law of the Constitutional Court, this Court must exercise its duty to protect the fundamental rights and freedoms enshrined in the Constitution in order to decide whether such rights and freedoms have been respected or otherwise in order to proceed, in the negative case, to recognise them and restore to the appellant, as stated in article 41.3 of the Organic Law of the Constitutional Court, "the rights and freedoms for which the appeal was formulated".

We do not therefore enter, in the following grounds, into the issues of ordinary criminal legality which may be raised in the appealed Decision, nor do we select from that angle which of the two conflicting decisions pronounced by the courts better reflects it, because that function does not correspond to this Court via the appeal for protection of a fundamental right and has been exercised in accordance with article 123.1 of the Constitution by the Supreme Court, "superior jurisdictional body in all areas except in relation to constitutional safeguards". Those being the safeguards we shall now exclusively examine in order to verify whether they have been respected by the Supreme Court.

3. In order to adequately settle the appeal, examining the complaint set out therein, as we have said, from its constitutional dimension exclusively, we must remember that without the ideological freedom enshrined in article 16.1 of the Constitution, the higher values would not be possible in our legal system which are supported in its article 1.1 in order to constitute the social and democratic State under the rule of law which is established in that provision. In order for freedom, justice, equality and political pluralism to become an effective reality and not a technical enunciation of ideal principles, it is necessary that when it comes to regulating conduct and therefore judging it, those higher values are respected without which the democratic regime set out in the 1978 Constitution cannot be implemented. To interpret the laws according to the Constitution as stated in article 5.1 of the Judiciary Act [Ley Orgánica del Poder Judicial] requires the utmost respect for the higher values proclaimed therein.

However, although it is true that, as stated by the Court in numerous Decisions and as recalled by the Public Prosecutor in his pleadings, there are no absolute or unlimited rights, it is also true that the ideological freedom pleaded by the appellant, being essential, as we have seen, for the effectiveness of the higher values and particularly for political pluralism, requires that the scope of this right is not curtailed or comes under "no more limitation (article 16.1 of the Spanish Constitution has this word in the singular) in its manifestations than as necessary in order to maintain the public order protected by the law". The limitation, due to the singularity and necessity with which it is specified in the very provision that determines it, cannot coincide in absolute terms, despite the assertions of the Public Prosecutor, with the limits which on the rights of freedom of expression and information recognised by article 20.1.a) and d) C. E. are imposed by number 4 of this statute. Equivalent application of both kinds of limitation in any event requires that, as in this case, when the accusation against a citizen mainly affects their right to ideological freedom, their trial must consider, and also analyse how their eternal declaration has violated the "public order protected by law".

From the point of view of ideological freedom discussed in this ground, it must first of all be said that the Decision of the Supreme Court, unlike the ruling of the National Court, does not contain express reasoning which relates the appellant's ideological freedom with its constraints under article 16.1 of the Constitution. It focuses on considering the document being judged from the criminal perspective of articles 147.1 in relation to article 457 of the Criminal Code [Código Penal] as an offence of defamation of the King. It does so because this is how it was set out – due to non-application of the said provisions of criminal law – by the Public Prosecutor in the grounds for appeal for cassation before the Second Chamber of the Supreme Court, but the fact is that it forgets a specific incriminatory reference against the author's ideological freedom, despite acknowledging that it contains "a certain component of political criticism". The Decision considers that this component is "of interest in order to adjust the scope of the defamatory facet of the document and mitigate the sentence", but apart from this the Decision does not attribute any other scope to that freedom or expressly analyse whether or not the document in question exceeds the limit contained in article 16.1 of the Constitution on ideological freedom.

The omission is important because by transferring all of the problem to the limits indicated in number 4 of article 20 – which is the framework exclusively focused on by the Decision of the Supreme Court – to the rights which are recognised and protected in sections a) and d) of

number 1 of this article, it puts the ideological freedom on a level as regards limitations with those other fundamental rights and thereby restricts the wider scope granted in the Constitution to the former.

It is naturally not the case that the ideological freedom in its external manifestation through a journalistic article can be used to avoid the limits on freedom of expression imposed by article 20.4 of the Constitution, but the overall vision of both rights, or of the limitations with which they must be exercised, cannot only be used "in order to graduate the scope of the defamatory facet of the article and to personalise the sentence", as affirmed by the appealed Decision, but rather they must also and principally be used in order to determine whether the "defamatory facet", as this is not the aim of the article, as can clearly be seen by reading it in full, may or must disappear vis-à-vis the protection of the author's ideological freedom as enshrined in article 16.1 of the Constitution. One must therefore start with this fundamental right and not consider it merely absorbed in the freedoms of expression and information of article 20.

4. In the above statement of grounds we wish to emphasise the broadest extent acknowledged to ideological freedom in article 16.1 of the Constitution, as it is the basis, together with the dignity of the person and his or her inherent inviolable rights, as proclaimed in article 10.1, of other fundamental freedoms and rights including those enshrined in article 20.1, sections a) and d), of the Constitution, the intimate connection which, with ideological freedom, is also invoked by the appellant as having been infringed by the appealed Decision.

However, this Court has ruled repeatedly in relation to these other rights, establishing a doctrine which, relating to cases which are quite similar to the case being heard here – criminal limits on the exercise of the rights in article 20 – we could summarise as follows:

a) From the Constitutional Court Judgments 6/1981 and 12/1982, to the Constitutional Court Judgments 104/1986 and 159/1986, the Court has held that "the freedoms of article 20 (the Constitutional Court Judgment 104/1986) are not only fundamental rights for each citizen, but further involve the recognition and the guarantee of a fundamental political institution, which is free public opinion, indissolubly linked to the political pluralism which is a fundamental value and a requirement for the functioning of the democratic State" (the Constitutional Court Judgment 12/1982) or, as already stated in the Constitutional Court Judgment 6/1981: "Article 20 of the Constitution, in its different sections, guarantees maintaining free public communication, without which other rights enshrined in the Constitution would be vacated of any real content, the representative institutions reduced to vacuous forms and completely distorting the principle of democratic legitimacy enunciated in article 1.2 of the Constitution, which is the basis of all our legal-political regulations." The Constitutional Court Judgment 159/1986 rules on the same lines when it affirms that "in order that citizens can freely form their opinions and reasonably participate in public matters, they must also be widely informed so that they can ponder diverse and even contrasting opinions." This Judgment reiterates the doctrine stated in those mentioned above, to insist that the rights recognised in article 20 not only protect an individual interest but rather they guarantee freely formed public opinion, "indissolubly linked to political pluralism".

b) The preferential position which, due to the stated doctrine and because of their institutional dimension, must be recognised for the rights enshrined in article 20 of the Constitution, and – we add – at least for the same reason as the ideological freedom which is guaranteed in article 16.1, involves on the one hand, as stated in the Constitutional Court Judgments 159/1986 and 51/1989, "a greater moral and legal responsibility on the violating party, but on the other hand requires rigorous deliberation about any rule or decision which restricts their exercise." As such – these Judgments add – when freedom of expression enters into conflict with other fundamental rights and even with other significant social and political interests, as in this case, with the criminal legislation, the restrictions which may derive from such conflict must be interpreted in such a way that the fundamental right is not denatured.

c) Based on the stated doctrine, the Constitutional Court Judgments 107/1988 and 51/1989 declare that the constitutional recognition for the freedoms of expression and communication and to receive information has deeply altered the problems of offences against honour in those cases where the action which affects this right is in performance of those freedoms. Their constitutional dimension "makes the animus iniurandi [intent to defame] criterion insufficient, traditionally used by the criminal case law when trying this type of offence." This insufficiency stems from the fact that, as we have already seen, the fundamental rights enshrined in article 20 of the Constitution, and also for the same reason the freedoms guaranteed in article 16.1, exceed the personal ambit due to their institutional dimension and because they involve the recognition of and guarantee free public opinion and, therefore, the political pluralism advocated by article 1.1 of the Constitution as one of the higher values of our legal system.

d) Finally, we have to remember that, although it is true that the fundamental rights and freedoms are not absolute, as pointed out in the Constitutional Court Judgment 139/1986, "such character cannot be attributed to the limits on the exercise of such rights and freedoms." Due to the fact that, as stated in this Judgment, "both the rules of freedom and the limiting rules are integrated into a single rule inspired by the same principles in which, ultimately, the comparison is fictitious between the individual interest underlying the former and the public interest which, in certain cases, suggests their restriction." There is therefore a regime of regulatory concurrence, not one of exclusion, "so that both the rules that regulate the freedom as well as those that establish limits on their exercise are equally binding and act reciprocally. As a result of this interaction – this Judgment adds – the expansive force of every fundamental right restricts the scope of the limiting rules acting on it; hence the requirement that the limits on the fundamental rights must be interpreted restrictively and in the most favourable sense for the effectiveness and essence of such rights."

5. In view of the doctrine set out in the above grounds, the problem must be examined from the perspective of the fundamental rights invoked by the appellant, in order to determine whether their express or implied consideration by the Supreme Court, in relation to the right to protect one's reputation, also protected by the Constitution (article 18) and a determinant of an express limitation on them (article 20.4 of the Spanish Constitution), has been performed so that the protection of the latter contained in the Decision has clearly violated the protection of the ideological freedom and freedom of expression by virtue of which, according to the appellant, he has written and published the critical article about a then topical sports event which, due to the

contemptuous tone of some of the phrases included in it, more than the defamatory nature of the words used, merits the criminal conviction to six years and one day in prison and the accessory features of such conviction.

The function of this Court in the appeal for protection of a fundamental right is to review, respecting the facts that the courts considered proven and in relation to which there can be no doubt, as it is a written text attached to the proceedings, whether the balancing of the fundamental rights in question has been done in a manner tolerated by the Constitution; or whether there has been an imbalance between them which means that the protection of one of them – the right to protect one's reputation – has clearly and disproportionably infringed the guarantees of ideological freedom and freedom of expression as enshrined in articles 16.1 and 20.1 of the Constitution.

In that regard, without the need to perform a hierarchical assessment of which is the preferential value between the said rights, the fact is that the document being judged, examined as a whole and not merely in the minimal part which is contained in the facts declared as proven, shows that it does not exceed the limits that articles 16.1 and 20.4 of the Constitution establish for the fundamental freedoms and rights guaranteed therein. It is true that, only taking the phrases contained in the proven facts, the author's conduct could be classified within the criminal offence applied by the appealed Decision and, despite the disproportionate sentence associated with it, this Court could do nothing to mitigate a sentence which is in accordance with the law; but if, as indicated in the first ground of this Judgment, the article had the objective indicated therein and the contemptuous words against His Majesty the King were used, without doubt in conflict with the respect due to the highest authority in the State, with the overriding purpose of bolstering the critical idea which runs throughout the article, such words, however morally and socially repulsive in that they are unnecessary, unfair and conflicting with conduct which has won the support of a majority of the Spanish people and made the political transition and democratic consolidation possible, as even acknowledged in the appeal for protection of a fundamental right, they cannot be sanctioned with a criminal conviction without violating the freedoms invoked by the appellant, who, using them given their relevance for the effectiveness of the democratic regime and as such their broad interpretation by this Court's doctrine, sees himself deprived of his liberty and his occupation due to expressing, in a manner censurable in the political and social ambi, his own ideas, criteria and impressions about a sporting event, where such criticism constituted the overriding aim of the article being judged.

And this is where the Supreme Court's Judgment fails to find a correct balance between the different fundamental rights in question. It has focused more on the limitations of the appellant's rights and freedoms than on the scope of their consideration. Thus, against the ideological freedom of article 16.1 of the Constitution, it does not indicate how the article being judged, or even the part copied in the proven facts, affects the only limitation on this freedom ("the need to maintain the public order protected by law"); it conflates the limitations which number 4 of article 20 imposes on the freedoms of information and expression, whereby the latter – which is the one applicable to this case – as it is obviously not constrained by the veracity which is established for the former, the measure of this limitation is more flexible or less rigorous; and finally it overlooks the fact that the "defamatory facet" or the "contemptuous

words" used are nothing more than an argument by the author in order to reinforce the critical thesis that he maintains throughout the article.

Under these circumstances and although the terms with which the author expresses his own opinions are reproachable – and they are in the paragraph on which the conviction is based – they do not reach the limits of conduct which deserves such a severe criminal sentence, given that they were issued in the exercise of the fundamental rights invoked by the appellant. They would be on the basis of the traditional criteria for judging offences of criminal defamation, as the animus criticandi [intent to criticise] would maybe not afford licence to such expressions; but on the basis of the Constitution they cannot, because the ideological freedom enshrined in article 16.1 and the correlative right to express it as guaranteed by article 20.1.a) are not compatible, as seen by the doctrine of this Court which is contained in the above grounds, with a criminal penalty for the exercise of those freedoms. The ideological freedom which is indissolubly linked to the political pluralism which the Constitution establishes as a core value of Spanish law, requires the broadest licence for its exercise and, naturally, not only in agreement with the Constitution and with the rest of Spanish law, but also in contrast with the values and rights enshrined therein, always excluding violence in order to impose one's own views, but allowing their free exposition under the terms imposed by an advanced democracy. Hence the indispensable restrictive interpretation of the limitations on ideological freedom and the right to express it, without which it would lack any effect.

To sum up, the criminal conviction imposed on the appellant by the Decision of the Supreme Court overturning the decision at trial has not sufficiently considered the safeguards granted by the Constitution to ideological freedom and the freedom of expression and, therefore, the appellant must be reinstated in all of his rights.

Judgement:

JUDGMENT

Now, therefore, the Constitutional Court, UNDER THE AUTHORITY CONFERRED BY THE CONSTITUTION OF THE SPANISH NATION,

Has decided

To grant the protection requested by Mr. Juan José Fernández Pérez, and therefore:

1. To set aside the Decisions of 19 October 1987, pronounced by the Second Chamber of the Supreme Court in appeal for cassation number 2479/1984.

2. To recognise the appellant's fundamental rights to ideological freedom and freedom of expression.

3. To restore all of such rights to the appellant by the nullity declared in section 1 of this judgment.

Publish this Judgment in the Boletín Oficial del Estado [official gazette of Spanish central

government].

Carried out in Madrid, this fifteenth day of February, nineteen ninety.