

The Constitutional Court, in full bench,, composed of the Honour Judges Francisco Pérez de los Cobos Orihuel (President), Ms. Adela Asua Batarrita, Ms. Encarnación Roca Trías, Mr. Andrés Ollero Tassara, Mr. Fernando Valdés Dal-Re, Mr. Juan José González Rivas, Mr. Santiago Martínez-Vares García, Mr. Pedro José González-Trevijano Sánchez and Mr. Enrique López y López, has pronounced

IN THE NAME OF THE KING

the following

JUDGMENT

In the Amparo appeal 10846-2009, brought by Asociación Colectivo Cuadernos del Sureste and by Mr. Jorge Antonio Jiménez Marsá, represented by the Attorney Mr. Eduardo Muñoz Barona and assisted by the Lawyer Mr. Jacinto J. Lara Bonilla, against the Judgment delivered by the Civil Chamber of the Supreme Court, on 24 September 2009, upholding the cassation appeal 1752/2005, lodged against the Judgment delivered by Section Four, Provincial Appellate Court of Las Palmas de Gran Canaria, dated 16 May 2005, upholding remedy of appeal 597/2004 brought by the now Amparo appellants against the Judgment delivered by First Instance Court No. 2 in Arrecife, on 2 December 2003, declaring violation of Mr. Fernández Camero's right of honour. Mr. Felipe Fernández Camero has been party to the proceedings, represented by the Attorney Mr. José Carlos Caballero Ballesteros, and the Public Prosecution Office has also been party to the proceedings. The judgment has been drawn up by Judge Mr. Enrique López y López, who expresses the opinion of the Court.

I. Background Facts

1. By means of a writ received at the General Registry of this Court on 30 December 2009, Mr. Eduardo Muñoz Barona, acting on behalf and in the name of Asociación Colectivo Cuadernos del Sureste and Mr. Jorge Antonio Jiménez Marsá, lodged Amparo appeal against the Supreme Court Judgment referred above, which quashes the judgment on appeal and upholds the judgment of First Instance Court No. 2 in Arrecife.

2. The facts on which this Amparo appeal is based are, briefly, as follows:

a) The attorneys representing Mr. Felipe Fernández Camero filed a claim in ordinary proceedings before the First Instance Courts of Arrecife against Ms. Carlota Gutiérrez, Mr. Jorge Jiménez Marsá and the “Colectivo de Cuadernos del Sureste” Association, on the grounds of a violation of his right of honour further to the publication of an article entitled “The [S]ecretary: the fifth power” in magazine no. 11 of “Revista Cuadernos del Sureste” and subsequent statements on the matter, during a press conference and an interview given to the local media. In this article, Carlota Gutiérrez (the *nom de plume* of the magazine’s Editorial Board) expressly referred to Mr. Fernández Camero (then Secretary of the City Council of Arrecife) in relation to his behaviour as Secretary and how he balanced it with his work as a lawyer, defending individual interests, and his position in certain private companies. The article was located in a file or collection dedicated to analysing corruption cases, which included other articles: “The flow of corruption,” by Cuadernos de Sureste (analysing corruption on the island of Lanzarote); “Citizenship and Corruption,” by Carlos Espino Angulo, and “Corrupt democracy” by Alejandro Nieto (actually consisting of a fragment of a previously published book). In turn, “La Voz de Lanzarote” newspaper announced the introductory event of the magazine’s new issue, during which Mr. Jorge Jiménez Marsá (one of the magazine’s collaborators and a member of the Association) explained that the aim was to disclose to the public “a key character in the Island’s corruption schemes, the Secretary of Arrecife, Felipe Fernández Camero; because, in our opinion, corruption does not just involve politicians and businessmen, but may also affect senior posts in the Administration and civil servants.” The next day, the newspaper published an interview with Mr. Jorge Jiménez Marsá, spokesman for “Revista Cuadernos del Sureste”. The interviewee, when asked whether Mr. Fernández Camero was being accused of receiving payment for “certain shady activities,” referred to the involvement of technicians and senior posts in the Administration “in very peculiar schemes and activities,” specifically stating the following about Mr. Fernández Camero: “we are not saying that he’s doing it for money. We are simply stating that his attitude is corrupt, irrespective of whether it is legal or not. His full-time dedication was approved by the City Council with retrospective effects in a very strange manner. It is inconceivable for

someone to work in the morning for the public interests and then work in the afternoon against those very interests ...”

b) Prior to the filing of the claim in ordinary proceedings, Mr. Felipe Fernández Camero’s attorney applied for interim measures, consisting of the seizure of copies of the “Cuadernos del Sureste” magazine and an order forbidding any further publication and dissemination by any means or support; this was initially agreed and the measure was subsequently lifted in a Court Order dated 5 May 2003.

c) On 2 December 2003, First Instance Court No. 2 in Arrecife delivered a Judgment, partially upholding the claim on the grounds that the plaintiff’s right to honour had been violated; however, it ordered lower damages than requested. By means of a Court Order dated 16 December 2003 the ruling was clarified.

d) Asociación Colectivo Cuadernos del Sureste and Mr. Jorge Antonio Jiménez Marsá filed an appeal against this Judgment, which was resolved by Section Four of the Provincial Appellate Court of Las Palmas in Judgment dated 16 May 2005. The Provincial Appellate Court upheld the appeal entirely indicating, first of all, that the information related to Mr. Fernández Camero’s professional activity as Secretary of the City Council and as a practising lawyer, providing his services both to various Island City Councils and to private entities, were considered true and sufficiently evidenced, both by the documentation held in the court records and the plaintiff’s own statements. Next, it recalled that when fundamental rights of freedom of expression and information, on the one hand, collide with the right to honour, on the other, the matter should be resolved on a case-by-case basis; taking into account during this “weighting or proportionality task” the prevalence of the right of freedom of expression and information should prevail over so-called personality rights, provided that the relevance and general interest of the divulged information is ascertained, as well as the public nature of the person to whom the information relates and the veracity of such information, which means the information that is evidenced and contrasted according to the standards applied by media professionals. As a result, the Judgment on appeal, after considering that a general interest existed in the information distributed and, furthermore, that it referred to a civil servant who held a prominent post, concluded that the term “corruption” was being used colloquially and that, since it was related to

(truthful and publicly relevant) the information that was being communicated, it was not guided by “simple and pure criticisms of a personal nature”, thereby rejecting the alleged violation.

e) Mr. Felipe Fernández Camero’s attorney then filed an appeal for procedural infringement (which was rejected) and a cassation appeal before the Civil Chamber of the Spanish Supreme Court, which upheld it in its Judgment of 24 September 2009, overturning the Judgment of the Provincial Appellate Court “further to Article 487(2) of the Civil Procedure Law accepting the instance decision and, as may be gleaned from what has been described until now, upholding the claim in the same way as the first instance judgment” (Ground 3). Consequently, the ruling upheld the appeal and declared: “we hereby ratify and uphold, in all respects, the judgment delivered at first instance”. The Civil Chamber of the Supreme Court therefore considered that “the plaintiff has been the victim of libel and an affront, to the extent of violating his honour, given that this is suggested by the corruption charge” (Ground 3).

3. As regards the legal reasoning of the Amparo appeal, the petitioners request the annulment of the aforementioned judicial resolutions, invoking the right of freedom of expression [Article 20(1) (a) of the Spanish Constitution] and the freedom of information [Article 20(1) (d) of the Spanish Constitution]. In their opinion, the Judgment delivered in the cassation appeal, upholding the first instance Judgment, did not adequately ponder the fundamental rights concerned from a constitutional point of view. The Amparo appeal alleges that the editorial objective of the “Cuadernos del Sureste” magazine was none other than to participate in public life in a deliberately critical manner; the statements and disputed text belonged to a specific political and social scenario that the Supreme Court overlooked. The appellants’ lawyer highlights the existence of certain facts that both First Instance Court No. 2 in Arrecife and the Provincial Appellate Court of Las Palmas deemed proven and which, in their opinion, are particularly relevant for the resolution of this Amparo appeal: a) the information published in the article entitled “The Secretary: the fifth power” is totally true; b) the plaintiff Mr. Felipe Fernández Camero was, at the time the magazine was edited and the disputed statements made, the Secretary of the City Council of Arrecife, a practising lawyer, and held as well various posts in private companies; and c) the information contained in the article had already been published by various social communication

media. In addition, they also point out that the object of a cassation appeal should be restricted to examining the specific legal infractions claimed, without refuting the assessment of evidence made by the instance court.

After summarizing the constitutional case-law on the conflict between the right of freedom of information and the right to honour (citing, amongst others, Constitutional Court Judgment [STC] 54/2004, of 15 April), they claim that the information provided in the article entitled “The Secretary: the fifth power” is true and concerns matters of public relevance, both referring to general interest issues (urban development) and the plaintiff’s status as a public personality. The Amparo appellants also indicated that, according to constitutional case-law, this status includes authorities and public officials, who need to accept the fact that any actions further to their posts and tasks will be publicly scrutinized, even if what they do or say is unrelated to their tasks, whenever their conduct is directly and evidently related to the exercise of their office.

With regard to the freedom of expression, they claim (citing STC 107/1988, of 8 June) that the veracity requirement is not necessary in these cases and that society allows the use of “hurtful terms using strong language” due to its values based on pluralism, tolerance and open-mindedness. The appellants claim that the article disputed was criticizing Mr. Fernández Camero’s professional activity on the grounds that his work as a lawyer was incompatible with his post as a public official. In turn, they allege that the term “corruption” “has not been used in a technical-legal sense, but in colloquial terms, as recognised by Dictionary published by the *Real Academia Española*, in relation to certain political-administrative practice that citizens may dispute, challenge or criticize, thereby reaching their own conclusions on the matter;” such accusation, albeit hurtful to Mr. Fernández Camero, in their opinion is protected by the right of freedom of expression, since it is related to the information that is being communicated, which is true and of public relevance.

The Amparo appellants conclude their pleadings by indicating that both the article published in no. 11 of “Cuadernos del Sureste” magazine and the statements made by Mr. Jiménez Marsá arise as part of a political-administrative criticism of a markedly social nature, which particularly reinforces the freedom of information and

expression, citing to this effect Constitutional Court Judgments (SSTC) 11/2000, 2/2001, 148/2002, 160/2003, 185/2003, 9/2007 and 108/2008, amongst others.

As a result, they consider that the Supreme Court has not adequately pondered the fundamental rights in conflict and that their clients' fundamental rights to the freedom of expression and information have been infringed.

4. The First Chamber of the Constitutional Court, in a ruling dated 19 July 2010, agreed to admission of the Amparo appeal and, further to the provisions established in Article 51 of the Organic Law on the Constitutional Court, officially requested the Supreme Court, Provincial Appellate Court of Las Palmas and First Instance Court number 2 of Arrecife in order to, within a term of ten days, respectively provide an affidavit of Cassation appeal number 1752-2005 Appellation number 597-2004, and of Ordinary Proceedings number 116-2003. Likewise, they requested that the parties of such proceedings be summoned, except for the Amparo appellants, to appear in this constitutional suit within a term of ten days.

5. By means of a ruling, likewise delivered on 19 July 2010, it was agreed to examine the petition of interim measure —suspension of the challenged decision— made by the applicants. Pursuant to the provisions established in Article 56 of the Organic Law on Constitutional Court, the Public Prosecution Office and the appellants were granted a common three-day term to make their pleadings about this petition.

By means of a writ, recorded on 27 July 2010, the appellants presented their pleadings and reiterated their petition in order to prevent the Amparo appeal being deprived of its purpose. On 15 September 2010, the Public Prosecution Office agreed to the partial suspension of the contested decision.

By an Order dated 4 October 2010, the First Chamber of the Constitutional Court agreed to suspend the judicial resolutions challenged, exclusively as regards the publication or dissemination of the Judgment convicting the Amparo appellants.

6. By a writ recorded on 20 December 2010, the Court Attorney Mr. José Carlos Ballesteros appeared as part to this constitutional suit, for and on behalf of Mr. Felipe Fernández Camero.

7. By means of a procedural ruling, dated 7 February 2011, the Court Attorney Mr. José Carlos Caballero Ballesteros was deemed as party to the suit, acting for and on behalf of Mr. Felipe Fernández Camero, and it was agreed to forward the measures taken to the parties to the suit and the Public Prosecution Office in order to submit their pleadings within a common 20-day term.

8. On 8 March 2011, the attorney of the Amparo appellants filed his writ of allegations requesting that protection be granted. He fully ratified the constitutional protection claim filed at the time, pointing out the following: a) the Amparo appeal was filed within 30 days following notification of the Judgment delivered by the Civil Chamber of the Supreme Court through First Instance Court number 2 of Arrecife, in the absence of a hearing before the Civil Chamber; b) the records related to the proceedings being examined by the Provincial Appellate Court of Las Palmas include a copy of the Judgment delivered by the Central Contentious-Administrative Court number 5 upholding the administrative sanction imposed by the Secretary of State for Territorial Planning on Mr. Fernández Camero as the author of a very serious breach of incompatibility rules; c) during the processing of the cassation appeal the Public Prosecution Office issued a report on 11 September 2008, requesting its rejection, on the grounds, as stated by the Appellate Court, that “the facts described refer to truthful information of great public relevance, such as the professional or business activities of a public official, who holds a highly prominent post as General Secretary of a City Council,” and during the cassation procedure it is not possible to discuss the assessment of evidence made by the Appellate Court; d) the procedural nullity incident is irrelevant because “the specific grounds of challenge were already explained by my client in the remedy of appeal lodged against the Judgment of the First Instance Court and, therefore, were sufficiently known and valued by the Civil Chamber of the Supreme Court; as a result, the procedural nullity incident, in this specific case, lacked any individual, independent and limited object of cognition.”

Finally, it points out that Mr. Fernández Camero is currently charged under various criminal lawsuits that are investigating allegedly corrupt urban development schemes, providing a copy of the relevant news published in the media.

9. By means of a writ recorded on 10 March 2011, the representative of Mr. Felipe Fernández Camero submitted his pleadings and requested that the Amparo appeal, on the grounds of several causes determining its inadmissibility. Subsidiarily, he requested that the appeal be rejected, on the grounds that the freedoms of expression and information alleged by the appellants had not been infringed.

First of all, he points out that in the Amparo appeal unduly refers to facts and provides documents that are much later in time to the events causing the conflict to which this appeal is and should be limited, i.e., the publication, in January 2003 of the disputed article and the subsequent statements made by Mr. Jiménez Marsá. Following this prior notice, he indicates that the appeal should have been dismissed because the petitioners had not accredited when they were notified of the Judgment delivered by the Civil Chamber of the Supreme Court, as of which the 30-day term is calculated. In this case, states Mr. Camero's representative, the plaintiffs provided a resolution issued by the instance court, declaring unawareness of the date when the Judgment was notified; consequently, as established by the constitutional case-law (he cites Constitutional Court Order [ATC] 642/1988, May 23), the Amparo appeal should have been dismissed.

Next, he adds, the petitioners lacked the necessary standing to file this appeal pursuant to the provisions established in Article 46(1) (b) of the Organic Law of the Constitutional Court. This party claims that the applicants for constitutional protection, by not appearing in the cassation appeal, had not adequately exercised their right of procedural processing, given that if they had been in such appeal, they would have been able to uphold the fundamental rights before the Supreme Court, for which they are now seeking constitutional protection.

As the third reason for inadmissibility, he points out that prior judicial channels have not been exhausted [Article 44(1) (a) of the Organic Law of the Constitutional Court] because, in his opinion, and pursuant to the provisions established in Article 241

of the Organic Law on the Judiciary, it was possible to file a procedural nullity incident claiming a breach of fundamental rights by the Supreme Court Judgment. To back up this petition, he refers to the doctrine established in ATC 200/2010, December 21, also delivered further to a conflict between the freedom of expression and the right to honour, which dismissed an Amparo appeal on the grounds that, as a procedural nullity incident had not been filed against the Judgment delivered in cassation, judicial channels to Amparo appeal had not been exhausted [Article 50(1)(a) in relation to Article 44(1) (a) of the Organic Law on the Constitutional Court].

Albeit as still part of admissibility requirements, Mr. Felipe Fernández Camero's representative claimed that special constitutional relevance had not been duly justified, nor did it exist in this case. After citing and transcribing applicable provisions, as well as Grounds 2 of Judgment of the Constitutional Court [STC] 155/2009, of 25 June, and Grounds 1 and 2 of ATC 188/2008, of 21 July (citing Constitutional Court Orders (AATC) 289/2008 and 290/2008, September 22), he asserts that, in this case, there is no special constitutional relevance as regards the Amparo appeal given that the petitioners describe "matters that are adequately defined by constitutional case-law which, in turn, has been upheld by the Supreme Court Judgment, which is why the three requirements foreseen in Article 50(1) (b) of the Organic Law on the Constitutional Court are not fulfil."

Finally, the last procedural obstacle claimed by Mr. Fernández Camero's representative is the lack of accreditation of the representatives of the Amparo appeal on behalf of "Asociación Colectivo Cuadernos del Sureste", consequently infringing Article 49(2) (a) of the Organic Law on the Constitutional Court, and the failure to provide a resolution from the competent Association body adopting the decision to bring an appeal for constitutional protection, further to its By-laws.

Based now on the merits of the case, he affirms that both the article entitled "The Secretary: the fifth power" and the journalistic statements made by Mr. Jiménez Marsá, evidence that he was referred to as "corrupt" and that this was the purpose of the article; this adjective is not covered by the freedom of expression and information as it amounts to an insult. As opposed to what the applicant for constitutional protection was claiming, the representative of this party considered that the expressions in question

were used to disqualify, with malicious intent, given that not even the authentic facts may be linked to “corrupt” as an adjective. The court attorney, accepting the considerations made in the Judgment delivered by the Civil Chamber of the Supreme Court, claims that the adjective “corrupt” infringes to Mr. Fernández Camero’s right to honour, given that, in his opinion, it is not a colloquial expression or a mere criticism of his professional work, but a personal and professional disqualification that cannot be protected under the right of freedom of expression and information.

Mr. Fernández Camero’s representative concludes his pleadings by stating that, in light of the evidence conducted in the first instance trial, it has been accredited that the applicants for constitutional protection charged the Secretary of the City Council of Arrecife with a false fact —corruption— and that this appreciation has been upheld by the Supreme Court. The Constitutional Court cannot now review the evaluation of evidence or any declaration of proven facts and law applied by Judges and Tribunals.

10. The Public Prosecutor Office completed the pleadings stage with a writ, recorded on 14 March 2011, where, after summarizing the facts and legal grounds contained in each judicial resolution being challenged, it requested that Judgment be delivered allowing the Amparo appeal.

According to the Public Prosecutor Office, the fundamental rights in conflict have not been duly weighed by the decisions issued in the first instance and cassation. In its opinion, the expressions contained in the article and the statements made by Mr. Jiménez Marsá at the introductory event of the magazine number where it was published, in the context in which they were issued, had no insulting or degrading purpose, as they were made in relation to an issue of undisputed social relevance — urban development in Lanzarote— with respect to the activity of a person who, in a two-fold status as Secretary of the City Council of Arrecife and lawyer, had huge social exposure. Consequently, the Public Prosecutor considers that the judicial resolutions challenged had infringed the appellants’ right of freedom of expression and, therefore, requested that constitutional protection be granted.

11. By means of a ruling dated 7 June 2011, the Plenary of the Court, pursuant to Article 10(n) of the Organic Law on the Constitutional Court and at First Chamber's request, decided to take over the examination of this Amparo appeal.

12. Mr. Fernández Camero's attorney, in a writ registered by the Court on 30 September 2011, requested that the Court hand over a copy of the allegations presented in the common pleadings stage foreseen in Article 52(1) of the Organic Law on the Constitutional Court and of the document confirming the representative status of the party acting as attorney of "Asociación Colectivo Cuadernos del Sureste".

By means of a ruling delivered by the Plenary of the Court on 7 October 2011, it was agreed to provide Mr. Fernández Camero's Attorney with a copy of the writs submitted in the common pleadings stage foreseen in Article 52(1) of the Organic Law on the Constitutional Court, by the appellants and the Public Prosecutor Office, as well as a copy of the power of attorney certificate dated 8 September 2003, held in the records of court proceedings, sent by First Instance Court No. 2 of Arrecife.

13. By means of a ruling dated 17 December 2013, 19 December 2013 was scheduled as the date on which to discuss and vote upon this Judgment.

II. Grounds

1. The object of this Amparo appeal is to challenge the Judgment delivered by the Civil Chamber of the Supreme Court which, deeming the cassation appeal against the Judgment issued by the Provincial Appellate Court of Las Palmas de Gran Canaria, overruled this Judgment and declared the Judgment of First Instance Court No. 2 in Arrecife as legally correct; this latter judgment found the now applicants guilty of a violation of Mr. Felipe Fernández Camero's honour.

The appellants claim that the challenged Judgment has violated their freedom of expression and information, on the grounds that no insulting or degrading expressions were used; furthermore, the veracity of the information disseminated has been confirmed, as well as the public relevance of the matter and public nature of the person

concerned. Mr. Fernández Camero's attorney is requesting the non-admission of the Amparo appeal for the reasons already explained in the Background Facts and, alternatively, the rejection, on the grounds that the adjective "corrupt" has illegally affected his right to honour. According to his attorney, the adjective constitutes an insult and, consequently, cannot be protected by the freedom of expression or by the freedom of information. In turn, the Public Prosecution Office requests that the claim be upheld on the grounds that an inadequate weighting has been made of the fundamental rights referred to, by failing to take into account the context in which such disputed expressions and statements have been made.

2. Before analysing the infringement reported in this Amparo appeal, we must reply to the pleadings submitted by Mr. Fernández Camero's attorney regarding the existence of various causes of inadmissibility.

a) First of all, as regards the alleged non-accreditation of the notification date of Supreme Court Judgment dated 24 September 2009, and its effects on the timeframe to lodge the Amparo appeal, the court records include a certificate issued by the Secretary of Chamber One of the Supreme Court about notification of the Judgment, on 5 October 2009, to the only party appeared in the suit. Furthermore, the court records also include a resolution issued by the person in charge of Court No. 2 in Arrecife, dated 24 February 2010, affirming that the Court "is unaware of the date when the Supreme Court Judgment was notified; arrival of the court records was notified to the parties in a resolution delivered on 12 November," which was notified to the applicants on 17 November 2009. Consequently, it seems that as the court records did not reflect the Supreme Court's notification to the now appellants of the judgment delivered in the motion to vacate, the relevant date to determine whether the Amparo appeal was lodged within the legally established timeframe is the date of notification to the parties, by Court No. 2 in Arrecife, of arrival of the court records which, as mentioned above, took place on 17 November 2009. As the Amparo appeal was received by the General Registry of the Court on 30 December 2009, we may conclude that it was presented on time.

b) Secondly, it is claimed that the failure of the appellants to appear as party to cassation appeal, despite being duly summoned to do so, means that they lack standing to lodge Amparo appeal. On this point, we should recall that the criteria used to determine whether or not there is sufficient standing to address this Court may be found in Articles 162 (1) (b) of the Spanish Constitution and Article 46 (1) (b) of the Organic Law on the Constitutional Court, whereby any natural or legal person upholding a legitimate interest, who have been party to the relevant judicial process, is respectively acknowledged standing. We have carried out an integrating interpretation of these provisions, presuming that the formula foreseen in Article 46 (1) (b) Organic Law on the Constitutional Court complements that of Article 162 (1) (b) of the Spanish Constitution, without amounting to a limitation or restriction thereof (Constitutional Court Judgments [in Spanish, *Sentencia del Tribunal Constitucional*, SSTC hereinafter] 106/1984, of 16 November, Ground [in Spanish, *fundamento jurídico*, FJ hereinafter] 1; 235/1997, of 19 December, FJ 2; and 158/2002, of 16 September, FJ 2). We have also interpreted the idea of a legitimate interest in very broad and flexible terms, for the purposes of recognising standing to bring an Amparo appeal (SSTC 221/2002, of 25 November, FJ 2; 176/2005, of 4 July, FJ 2; and 208/2009, of 26 November, FJ 2). If this doctrine is applied to the case at hand, the alleged standing does not exist, as there is no doubt that “Asociación Colectivo Cuadernos del Sureste” and Mr. Jiménez Marsá have a legitimate interest to challenge the Judgment delivered by the Civil Chamber of the Supreme Court in cassation, particularly as they eventually challenged the first instance judgment (which now, following acceptance of the cassation, is deploying all its effects). As we upheld in said STC 208/2009, of 26 November, FJ 2, citing STC 43/1990, of 15 March, FJ 3, in a similar case to the one examined in this appeal, this interest does not disappear by the mere fact of failing to appear as party to cassation.

c) In relation to defective appointments, representation and procedural standing of the appellants, Mr. Fernandez’s representative has declared that, first of all, both Mr. Jiménez Marsá and “Asociación Colectivo Cuadernos del Sureste” have duly appeared as parties to the suit represented by an Attorney, as accredited with the provision of the relevant deeds recording a power of attorney to act before court, granted by the appellants to the Attorney and Lawyer, authorised by a Notary Public, thereby fulfilling the provisions of Article 49 (2) (a) of the Organic Law on the Constitutional Court. As regards the will to bring this Amparo appeal, the power of attorney to act before the

Constitutional Court should be deemed sufficient, as well as the agreement adopted at an extraordinary meeting held by “Asociación Cuadernos del Sureste” in order to appear before First Instance Court No. 2 in Arrecife in the interim measures process filed by Mr. Fernández Camero, which already provides material evidence of the will to uphold the freedoms of expression and information.

d) Fourth, as mentioned above, the defendant in this Amparo appeal is upholding, as a procedural defect, non-exhaustion of prior judicial channels, specifically due to failing to file a procedural nullity incident against the Judgment adopted by the Civil Chamber of the Supreme Court, basing this requirement on the doctrine laid down by Constitutional Court Order (in Spanish, *Auto del Tribunal Constitucional*, hereinafter ATC) 200/2010, of 21 December.

This pleading should be rejected for two reasons: above all and as recently pointed out (STC 176/2013, of 21 October, FJ 3), the case-law cannot apply to a claim for constitutional protection that was received by the General Registry of the Court prior to the date on which the Order was issued, as is the case here; the claim, as mentioned at the beginning, was formalised on 30 December 2009, which was why it was materially impossible for the appellants to have been able to act further to the same.

Furthermore but not least, the doctrine of reference relates to a different situation than the one arising in this case. In fact, ATC 200/2010 responds to a very specific situation that does not intend to have an extensive scope: whenever a “violation” [which determines the objective scope of a nullity incident, as expressly required by Article 241(1) of the Organic Law on the Judiciary] of a fundamental right, for which constitutional protection is being requested by the appellant (not another right or another person), takes place by virtue of the last resolution ending judicial channels, and not before. This situation may determine the need to file an incident, not only with respect to an infringement of the procedural rights foreseen in Article 24 of the Spanish Constitution, but also —as a novelty— of substantive fundamental rights, following the reform of Article 241 of the Organic Law on the Judiciary by the First Final Provision of Organic Law 6/2007, of 24 May, which extended its scope to all the rights foreseen in Article 53(2) of the Spanish Constitution.

In the case being examined here, the freedom of expression invoked by the applicants was allegedly infringed first of all by the First Instance Judgment, which upheld the claim brought against it, considering the plaintiff's right of honour prevalent, despite not granting the full compensation amount requested. Following a decision to the contrary by the Provincial Appellate Court in the remedy of appeal then brought by the now Amparo appellants, restoring this same material right that was allegedly infringed, the Civil Chamber of the Supreme Court quashed the second instance judgment and, by overruling it and examining the merits of the case, agreed to uphold the claim "in the same way as the first instance judgment" (Ground 3), ratifying it and accepting "all its pronouncements" (Ruling). Consequently, it is not possible to claim that this is a brand-new infringement attributable to the Judgment closing judicial channels prior to constitutional protection, nor that such infringement "could not be challenged before the resolution was delivered, ending the process", in the terms of Article 241(1) *in fine* of the Organic Law on the Judiciary, in order to require the filing of an incident. As a result, the doctrine laid down by ATC 200/2010, to prevent an examination of the merits of the appeal, is totally irrelevant here.

Irrespective of the foregoing, which is sufficient to overcome this procedural obstacle, the conclusion that ATC 200/2010 reached in order to require the filing of a procedural nullity incident in these cases as a condition to deem fulfilled the requirement to exhaust prior judicial channels, needs to be reviewed. The purpose of the requirement foreseen in Article 44(1)(a) of the Organic Law on the Constitutional Court, as unanimously and constantly upheld by the Court, "is to preserve the subsidiary nature of relief appeal, avoiding access to this constitutional jurisdiction taking place *per saltum*, i.e. without giving the courts the opportunity to pronounce themselves and, if applicable, to remedy the infringement claimed as the grounds for relief appeal (in general, see recent decisions SSTC 42/2010, of 26 July, 91/2010, of 15 November, and STC 12/2011, of 28 February). Consequently, in cases such as the one at hand, it suffices to check that the courts have had the chance to pronounce themselves about the fundamental rights —later upheld in constitutional protection proceedings— to deem this requirement as fulfilled. Otherwise, access to constitutional protection would be limited due to a formalistic approach, where the subsidiary logic behind it is not distinguished from its configuration. As stated in STC 11/2011, of 28 February, FJ 4, "the procedural requirement of exhaustion of judicial remedies cannot be configured as

the need to file as many appeals as imaginable, including those hardly feasible. This exhaustion is deemed as fulfilled if remedies are used that maybe reasonably considered pertinent, without requiring a complex legal analysis.” Likewise, this Court has repeatedly laid down that when determining which remedies are pertinent in each specific case the ordinary jurisdictional bodies are entrusted with this matter of ordinary law; consequently, the supervision by the constitutional jurisdiction of exhaustion of judicial remedies, as a prior requirement to lodge an Amparo appeal, does not entitle the Court to replace the ordinary jurisdictional bodies in their procedural interpretation task. This is why we have also affirmed that, when evaluating compliance with the required exhaustion of judicial remedies, “it is not a matter of establishing with total accuracy whether or not an appeal is admissible, but deciding whether it is reasonable to file the same” (STC 11/2011, of 28 February, FJ 3).

Further to the foregoing, given that in this case the subsidiary nature of constitutional protection has been guaranteed by far- the matter was examined by three judicial instances, each one of which had the chance to examine the alleged infringements of fundamental rights before delivering a decision- the conclusion must be reached that the appellant was not obliged to also file a procedural nullity incident, foreseen in Article 241(1) of the Organic Law on the Judiciary, against the challenged judgment delivered in cassation. In other words, the filing of a nullity incident cannot be considered as reasonably necessary in cases like this. The cause of non-admission should consequently be rejected. Otherwise, the filing of the nullity incident would have led to a total re-consideration of acceptance of the appeal filed by the former, i.e. its rejection, consequently causing a radical change in the ruling and legal grounds used to acknowledge the *ad casum* prevalence of the right to broadcast information. In these conditions, the plaintiff cannot be criticized for not having brought a procedural nullity incident before the Supreme Court, intending that the latter reconsider the merits of its decision on similar grounds to those already used in judicial proceedings. The foregoing has been upheld on other occasions where, although the nullity incident was potentially admissible in formal terms, it was materially unfeasible because it meant requesting that the judicial body go back on something it had already resolved in prior decisions (STC 182/2011, of 21 November, FJ 2).

Furthermore, the oft-cited STC 182/2011 also highlights, in an eloquent manner, the difficult position the appellant may face “in a crossroads that this difficult to resolve, given that if not all the remedies available in ordinary judicial procedures are used, an Amparo appeal could be dismissed for failing to exhaust judicial remedies; on the other hand, if the appellant decides to fill all possible or imaginable remedies, he runs the risk of acting in a procedurally untimely manner by filing a remedy that was not strictly applicable (in general, see recent STC 192/2005, of 18 July)’ (STC 255/2007, FJ 2).” Consequently, an applicant cannot be criticized for directly addressing this Court without previously filing a procedural nullity incident, given that the adequacy of this procedural remedy is doubtful at the least. As anticipated, recently in STC 176/2013, of 21 October, FJ 3, it was stated that “In the judicial process giving rise to the Amparo appeal, the main object of the dispute throughout its three instances consisted of whether there was a breach of the plaintiff’s rights to self-image and privacy or, on the contrary, whether the defendant’s conduct was protected by its right of information; the instance and appeal judgments, on the one hand, and the motion to vacate, did not provide a uniform response. Had a procedural nullity incident been filed, the appellants would have claimed a breach, by the judgment delivered in cassation, of these same fundamental rights which both the instance judgment and the one delivered on appeal recognised as effectively infringed by the defendants in the civil process. This would have meant that the object of said incident would have been to fully reconsider the acceptance of the appeal filed by the former, i.e. its dismissal, consequently entailing a radical change in the ruling and legal grounds used to acknowledge an *ad casum* prevalence of the right to broadcast information. In these conditions, the plaintiff cannot be criticized for not submitting a procedural nullity incident before the Supreme Court, requesting that the latter reconsider the merits of its resolution on similar grounds to those already used in judicial procedures.” In this case, a violation of the right took place in the last judgment, but the reasoning given until now may be extended to other cases; consequently, if the object of the suit consists of examining a direct infringement of a right, such as the right of honour or privacy, a recognised infringement, or non-recognition, to the detriment of the right of freedom of expression or of the press, resulting from overruling prior instance decisions, does not require that a nullity incident be necessarily filed, given that it is deprived of the purpose for which it was foreseen, and would involve a request to reconsider the merits of a resolution on similar

grounds to those already used in judicial channels. The foregoing amounts to a clear overrule in the case-law with respect to that laid down in ATC 200/2010.

e) Mr. Fernández Camero's lawyer also requests the non-admission of the Amparo appeal because the petitioners have not duly justified its special constitutional relevance. In his opinion, this special relevance would not exist according to the criteria established in Article 50(1)(b) Organic Law on the Constitutional Court. This allegation must also be dismissed. In their writ of claim, the applicants use a specific section to describe the "Special Constitutional Relevance of this Appeal" explaining the reasons why they consider that this is important for an interpretation of the Spanish Constitution and to determine the content of its fundamental rights. First of all, they point out that there are contradictory judicial resolutions on conflicting fundamental rights, which interpret constitutional case-law in a different manner; this is why, citing STC 155/2009, they consider it necessary for the Constitutional Court to issue its pronouncement. They also claim that the constitutional relevance of the appeal arises from the fact that in cases such as this—where a markedly political criticism is made of a political and social scenario—, an infringement of the freedoms of expression and information entails material detriment "to the principle of plurality underlying any Democratic State action." Finally, they point out that the challenged Judgment has weighted the conflicting fundamental rights "in total disregard of constitutional case-law." As a result, they claim that a decision on the merits of the case by the Court is clearly important for interpretation of the Constitution and to determine the content and scope of the fundamental rights involved.

In light of the foregoing, the appellants, who have declared and upheld "the objective projection of the protection requested" (STC 69/2011, of 16 May, FJ 3, ATC 42/2012, of 7 March, FJ 3), have fulfilled the burden of justifying the special constitutional relevance required by Article 49(1) of the Organic Law on the Constitutional Court. It should be noted, on the other hand, that as upheld in STC 155/2009, of 25 June, FJ 2, although it is the appellant who, according to the provisions established in Article 49(1) *in fine* of the Organic Law on the Constitutional Court, must necessarily satisfy the burden of justifying in its claim the special constitutional relevance of the appeal (AATC 188/2098, of 21 July, 289/2008 and 290/2008, of 22 September), "the Constitutional Court is the one entrusted with the task of ascertaining

in each case whether or not this “special constitutional relevance” exists. To do this, according to Article 50(1) (b) of the Organic Law on the Constitutional Court, it will consider “its importance for interpretation of the Constitution, for its application or general effectiveness and in order to determine the content and scope of fundamental rights.”

In this case, the Court considers that the requirement of special constitutional relevance [Art. 50(1) (b) of the Organic Law on the Constitutional Court] has been met, given that the issues raised in this Amparo appeal enable a definition and clarification of certain aspects of constitutional case-law related to the requirement to exhaust judicial remedies, which is an inseparable requirement of the subsidiary nature of Amparo appeal. Specifically, the case under examination enables the Court to reflect upon the matter of the need to previously file a procedural nullity incident, in those cases where an infringement of fundamental rights is directly caused by a conflict between individuals and the violation is alleged in relation to a judicial decision that resolves the issue and that is not subject to appeal. The Court, in Full Bench, has not previously pronounced itself on this specific issue, which has however been submitted to the Chamber and to which ATC 200/2010 expressly referred. The circumstances of this appeal are adequate for us to proceed to review, clarify and modify this prior doctrine, as necessary, further to Article 13 of the Organic Law on the Constitutional Court.

f) Finally, as claimed by Mr. Fernández Camero’s lawyer, the facts occurring after the ones being discussed herein, as well as the documents subsequently provided by the applicants, should not be taken into account for the resolution of this appeal; the Court should merely examine the facts declared as proven in prior judicial decisions, underlying the conflict between Mr. Fernández’s right of honour and the freedom of expression and/or to communicate truthful information.

3. Examining the merits of the case, i.e., whether the Supreme Court (and, previously, First Instance Court No. 2 in Arrecife), adequately weighted the fundamental rights involved, it is relevant to recall that, in these cases where substantive rights conflict, the nature of our examination or weighting does not involve the reasonableness or sufficient justification of the valuations made by Judges and Courts.

Rather, “we should immediately apply to the proven facts the requirements stemming from the Spanish Constitution in order to determine whether, when examining the same, these have or have not been upheld” (in general, STC 110/2000, of 5 May, FJ 3), even if to do this it is necessary “to use other criteria than those applied by judicial bodies, given that their reasons do not bind this Court or limit its jurisdiction to a mere review of the grounds of resolutions already pronounced” (STC 50/2010, of 4 October, FJ 3).

4. First of all we must establish whether the issue involves the freedom of expression or the freedom of information; although the applicants jointly claim both, “the parameters that will lead our analysis will differ depending on whether we are referring to one right or the other” (STC 50/2010, of 4 October, FJ 4). In fact, we have insisted on many occasions on the need to distinguish between “rights that guarantee the freedom of expression, covering thoughts, ideas and opinion, including appreciations and value judgments, from the right to broadcast information, which refers to the dissemination of facts that are worthy of becoming news items” (STC 50/2010, of 4 October, FJ 4; and also 41/2011 of 11 April, FJ 2). This distinction is not trivial because veracity, understood as a careful investigation of the facts, conditions the legitimacy of the right of information; however, this requirement is not necessary when freedom of expression is concerned, given that opinions and value judgments are not subject to a demonstration of accuracy, as in the case of facts (SSTC 9/2007, of 15 January, FJ 4; 50/2010 of 4 October, and 41/2011, of 11 April). The foregoing applies even if in many occasions it is not easy to separate the expression of thoughts, ideas and opinions from a mere account of events (amongst others, SSTC 110/2000, of 5 May, FJ 6; 29/2009, of 26 January, FJ 2, and 50/2010, of 4 October, FJ 4).

In the present case, describing Mr. Fernández Camero as corrupt which is, ultimately, what is deduced from the article published in no. 11 of the magazine edited by “Asociación Colectivo Cuadernos del Sureste”, included in a file entitled “Corruption” and, more directly, inferred from the subsequent statements made by Mr. Jiménez Marsá during the press conference arranged at the magazine’s presentation event, all constitute a value judgment, which is why the right involved is the freedom of expression. This conclusion is not affected by the fact that said adjective is based on certain events described in the disputed article, given that, beyond its veracity (see

below), such facts appear as the mere grounds of the specific value judgment issued. As pointed out in STC 41/2011, of 11 April, FJ 2, in situations such as the one here, where the commission of illegalities is claimed, a description of the facts and the issue of valuations are unequivocally linked. Consequently, we have affirmed in situations where a third party was being accused of committing criminal facts that “the person issuing this accusation is exercising his freedom of opinion” (STC 41/2011 of 14 April, FJ 2, citing SSTC 136/1994, of 9 May, and 11/2000, of 17 January).

5. Having confirmed that the freedom of expression applies, we will now point out that, as stated in STC 77/2009, of 23 March, FJ 4, amongst many other judgments, “the free exercise of the freedom of expression, in the same way as the freedom of information, guarantees a relevant constitutional interest, consisting of ‘the creation and existence of free public opinion, which is a prior and necessary condition to exercise other rights inherent to the operation of a democratic system, which is constitutionally limited by a personal right of honour; this does not preclude the possibility of criticising another person’s conduct, even if it is severe and unpleasant, or may concern or disturb the addressee, as this is a consequence of pluralism, tolerance and open-mindedness, without which a democratic society cannot exist’ (STC 9/2007 of 15 January, FJ 4).” Likewise, we have upheld that the right of honour, which guarantees “a person’s good reputation, protecting her against expressions or messages that are degrading in the public opinion, by discrediting or insulting him/her, or considered in a public scenario as an affront” (in general, SSTC 180/1999, of 11 October, FJ 4, and 9/2007 of 15 January, FJ 3), also grants protection against criticism or information on a person’s professional or labour conduct that may constitute “an authentic attack to her personal honour, of particular importance, given that ‘professional activity tends to be one of the most usual ways in which an individual manifests her external personality and relationship with the rest of society, in such a way that a slanderous or unnecessary comment as to her conduct may have a particular and intense effect on this relationship and on what others may think of a person, affecting both the material results of her activity and the personal image held thereof’ (STC 180/1999, FJ 5). In this regard, we have specified that the protection granted by Article 18(1) of the Spanish Constitution only covers “criticism which, despite being formally addressed to an individual’s professional activity, actually constitute a personal affront, by directly affecting his/her

individual consideration and dignity; of particular relevance is any disgrace that questions or degrades her probity or ethics when performing such activity; obviously, this will depend on the circumstances of the case, on who, how, when and in what way has the professional worth of the harmed party been questioned' (STC 180/1999, FJ 5)" (STC 9/2007, of 15 January, FJ 3).

There is also reiterated constitutional case-law that points out that weighting the freedom of expression and the right of honour, determining their limits, means that several circumstances should be taken into account, such as "the public relevance of the matter, the type of intervention and, above all, whether in effect this affects formation of the public opinion; this limit will be weaker or lose weight if the holders of the right of honour are holding public office or are involved in matters of public relevance, in which cases the limits of permissible criticism are broader, given that these persons are exposed to stricter control of their activities and declarations, as opposed to ordinary individuals with no public exposure whatsoever [...]. It has also been stated that, even in the case of broader limits on permissible criticisms, the Constitution does not recognise an alleged right to insult someone else, which means that the constitutional protection granted by Article 20(1) (a) of the Spanish Constitution does not include degrading expressions, i.e. those which, in the specific circumstances of the case, irrespective of their veracity, are offensive or outrageous and are irrelevant to express opinions or information in question (in general, STC 9/2007, of 15 January, Ground 4)" (STC 77/2009, of 23 March, FJ 4).

6. Based on the constitutional case-law summarised above we will now analyse the content of the article entitled "The Secretary: the fifth power", as well as the statements subsequently made by Mr. Jiménez Marsá during a press conference, in order to determine whether the value judgments about Mr. Fernández Camero are protected by the freedom of expression.

As confirmed in the Background Facts, the article entitled "The Secretary: the fifth power", draw up by the Editorial Board of "Revista Cuadernos del Sureste" under the *nom de plume* Carlota Gutiérrez, was published in a number of the collection that referred to the disproportionate development of tourism on the Island of Lanzarote and

its environmental consequences. In this article —included, along with others, in a file entitled “Corruption”— various private activities of Mr. Fernández Camero are analysed and deemed incompatible with the public office held as Secretary of the City Council of Arrecife. Amongst other matters, it is stated that it is healthy for discussion purposes “that this man begins to be named, not judged, as another player in the Island’s future, despite he is clearly and voluntarily aligned with its regression.” Consequently, Mr. Jiménez Marsá, as spokesperson of the Association, in a press conference held during the introductory act of this magazine number and during a subsequent interview with “La Voz de Lanzarote” newspaper, reiterated the ideas and opinions expressed in the article and directly linked Mr. Fernández Camero to “obscure” and “corrupt” schemes.

The object of the published article dealt with a matter of public relevance, as it covered a general interest issue: the development model followed by the Island of Lanzarote and, particularly, by some of its municipalities. In this context, the Secretary of the City Council of Arrecife was criticized on the grounds that occasionally his professional work as a lawyer was incompatible with the public office he held as a civil servant. Use of the term “corruption”, or a suggestion that Mr. Fernández could have any type of relationship with activities of this nature, in this context, was not aimed at insulting or humiliating him, but to criticize the difficulty in reaching a balance between public and private interests in urban planning matters.

As we have upheld on previous occasions, what is relevant in order to determine whether an expression is merely offensive or opprobrious is whether or not it is linked to the value judgment that is issued or to the information that is broadcasted. For example, in the case decided by STC 29/2009, of 26 January, FJ 5, we considered that the adjective “xenophobe” could not be interpreted as degrading or humiliating, as it was based on a true fact (a police report on these grounds), and was not a formally degrading and therefore gratuitous or unnecessary expression, for the information that was being provided in that case. Recently, in criminal cases, we have considered that the freedom of expression includes harsh criticism of a town councillor, to the point of accusing him of “granting irregular urban planning licences,” “granting a municipal credit collector post to a personal friend,” “obstructing justice when prosecuting these infractions” (STC 89/2010, of 15 November, FJ 3).

We inevitably reach this same conclusion in the present case, where use of the term “corruption” is not unnecessary for the information being communicated. In addition, the information was of public relevance as it referred to a general interest matter —urban planning on the Island of Lanzarote— and the activity of a civil servant —the Secretary of the City Council of Arrecife—; all of these circumstances, as indicated, mean that the freedom of expression enjoys “the maximum level of justification in relation to the right of honour, which is thereby accordingly weakened, as an external limit of the freedoms of expression and information, insofar as their holders are public persons, hold public office or are involved in matters of public relevance, and are therefore obliged to bear a certain risk, of their subjective personality rights being affected by opinions or information in the general interest, as this is a necessary condition of political pluralism, tolerance and open-mindedness, without which a democratic society cannot exist” (STC 110/2000, of 5 May, FJ 8 *in fine*, citing STC 107/1988, of 8 June, FJ 2).

7. In short, the Amparo appeal has to be granted, given that both the value judgments issued in the article entitled “The Secretary: the fifth power”, and Mr. Jiménez Marsá’s subsequent statements on the matter were made further to a legitimate exercise of the fundamental right of freedom of expression.

RULING

In view of the above, the Constitutional Court, BY THE AUTHORITY CONFERRED UPON IT BY THE CONSTITUTION OF THE SPANISH NATION,

Has resolved

To grant the Amparo appeal requested by Asociación Colectivo Cuadernos del Sureste and by Mr. Jorge Antonio Jiménez Marsá, and consequently

1. To declare as infringed the plaintiffs' freedom of expression [Article 20 (1) (a) of the Spanish Constitution].

2. To fully restore the plaintiffs' rights and, to this effect, to declare the nullity of the Judgment delivered by the Civil Chamber of the Spanish Supreme Court, dated 24 September 2009.

This Judgment shall be published in the "Official State Gazette" (*Boletín Oficial del Estado*).

Issued in Madrid, on December 19th 2013.