

## The National Incorporation of the Freedom of Expression Standards of the Inter-American Human Rights System<sup>1</sup>

The entities of the Inter-American Human Rights System (the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights) have found the use of criminal law to sanction offensive expressions directed against public officials to be incompatible with the American Convention on Human Rights. This article briefly explains the scope of this standard - which we will call "*the special standard of protection of speech directed at public officials*" - and describes its reception in the countries of Latin America.

### I. The Special Standard of Protection

The American Convention on Human Rights does not expressly refer to the use of criminal law to penalize the exercise of freedom of expression. However, both the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights have consistently held that criminal laws that seek to punish offences against the honor or reputation of public officials are inconsistent with the Convention<sup>2</sup>.<sup>1</sup> Public officials have the right to a good name and there may indeed be measures for the protection of this right. However, for the entities of the Inter-American Human Rights System, these measures can only consist of reasonable correction measures in cases of false publications and civil actions, provided that it is demonstrated that the person who published the information acted with knowledge that it was false or with reckless disregard for the truth (actual malice). In this sense, the Inter-American jurisprudence is very similar to the one maintained in the United States Supreme Court case of *New York Times Co. v. Sullivan*.

Article 13(2) of the American Convention establishes that any restriction on freedom of expression must (i) be provided for by law, (ii) pursue a legitimate purpose, and (iii) be necessary to achieve said purpose, which implies that it must be proportional to the degree to which it affects freedom of expression. According to the Inter-American Commission and Court, criminal laws punishing defamation of public officials are unnecessary and disproportionate for at least three reasons. Firstly, criminal law is the "*most restrictive and harshest means to establish liability*"<sup>3</sup> and only in the face of an imperative democratic necessity can resorting to it be justified when limiting freedom of expression. Secondly, public officials are people who have voluntarily exposed themselves to public scrutiny and are therefore obliged to tolerate a higher level of criticism. Thirdly, criticism of public authorities is an essential element of democratic debate and "*encourages the transparency of State actions and promotes the responsibility of public officials in the performance of their duties*"<sup>4</sup>. It would be disproportionate to inhibit vigorous debate over the performance of public officials, who knew they would be subjected to this demanding scrutiny on the grounds of their administering a power that belongs to society and for which they are to be held accountable.

## II. Reception of this Standard in Latin America

The *special standard of protection of speech directed at public officials* is probably one of the standards that has most facilitated a major transformation in domestic legal systems throughout Latin America. Since 1994, when it was first formulated by the Inter-American Commission<sup>5</sup>, the standard has been promoting a gradual process of decriminalizing the crimes of *desacato* (contempt), libel and slander in the region. This process has had two important aspects: the decriminalization of *desacato* and the decriminalization of libel and slander with regard to matters of public interest.

In regards to the progressive decriminalization of the crime of *desacato*, at the beginning of the 1990s, most Latin American countries sanctioned with imprisonment and/or a fine, whoever, by any means, offended the honor or reputation of a public official. The crime of *desacato*, as this criminal offence is called, differs from libel and slander in two respects:

(i) in that the victim must be a public official, and (ii) in the severity of the sentence imposed, which is normally higher than that foreseen for the offences of libel and slander directed at private individuals.

In its 1994 Annual Report, the Inter-American Commission reported that the crime of *desacato* was incompatible with the *special standard of protection of speech directed at public officials* and, consequently, with Article 13(2) of the American Convention on Human Rights<sup>6</sup>. Since then, most countries in Latin America have enacted laws that repeal the crime of *desacato* from their respective legislations. This is the case for Argentina (1993)<sup>7</sup>, Paraguay (1997)<sup>8</sup>, El Salvador (1997)<sup>9</sup>, Costa Rica (2002)<sup>10</sup>, Peru (2003)<sup>11</sup>, Chile (2005)<sup>12</sup>, Panama (2005)<sup>13</sup> and Nicaragua (2007)<sup>14</sup>. In other countries, such as Honduras (2005)<sup>15</sup>, Guatemala (2006)<sup>16</sup> and Bolivia (2012)<sup>17</sup>, the crime of *desacato* has been declared unconstitutional because it is incompatible with the American Convention. To date however, the crime of *desacato* continues to exist in a few countries that have very low levels of democratic development, such as Haiti<sup>18</sup>, Cuba<sup>19</sup> and Venezuela<sup>20</sup>, where it is punishable by up to three years imprisonment and is used to control dissent.

As mentioned, the second aspect consists of the progressive decriminalization of the crimes of libel and slander, whenever the victim is a public official or if it is about prosecuting an expression of “public interest”. The Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights, has warned that the crimes of libel and slander pose a serious threat to freedom of expression, just as the crime of *desacato* does, as they can be used to suppress criticism made against public officials<sup>21</sup>. Thus, the Declaration of Principles on Freedom of Expression of the Inter-American Commission on Human Rights (2000), orders not only to repeal the crime of *desacato* (Principle 11), but also to decriminalize crimes of libel and slander when the person offended is a public official (Principle 10).

The decriminalization of the crimes of libel and slander in the Americas has had three distinct modalities. The first modality consists in the absolute repeal of defamation

offences. Examples of this modality are Mexico (2007)<sup>22</sup>, Grenada (2012)<sup>23</sup> and Jamaica (2013)<sup>24</sup>, which only provide for civil sanctions in cases of defamation. The second modality consists in the partial repeal of the crimes of libel and slander, with regard to the hypothesis that the victim is a public official or the expression is judged to be of “public interest”. Examples of this modality are Panama (2007)<sup>25</sup>, Nicaragua (2007)<sup>26</sup>, Argentina (2009)<sup>27</sup> and El Salvador (2011)<sup>28</sup>. The third modality consists in the judicial interpretation of the crimes of libel and slander in accordance with international standards, so that these crimes are inapplicable when attempting to prosecute those who have criticized public authorities. Examples of this are Colombia<sup>29</sup>, Mexico<sup>30</sup> and Panama<sup>31</sup>, where the highest courts have held that criminally sanctioning defamation directed at public servants constitutes a disproportionate restriction of freedom of expression, incompatible with a democratic society.

Finally, in many cases the highest courts have not only been reluctant to apply criminal law to prosecute those who have criticized public authorities, but - following Inter-American standards - have applied the standard of actual malice when assessing whether there is any type of civil liability in these cases.

The *standard of protection of speech directed at public officials* is probably one of the most important standards in the Inter-American Human Rights System, due not only to its importance in the running of a democratic system, but also due to the significant transformations it has promoted in most of the countries of the region. Since its formulation in 1994, the standard has led to a progressive decriminalization of public interest speech and, specifically, the crimes of *desacato*, libel and slander. The standard is a paradigmatic example of the potential of international human rights law to drive transitions to genuine democracy.

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<sup>2</sup> Inter-Am. Court H.R., *Herrera Ulloa v. Costa Rica*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 2nd July 2004, IACHR Series C, No. 107, paras. 128-129; *Ricardo Canese v. Paraguay*, Merits, Reparations and Costs, Judgment of 31st August 2004, IACHR Series C, No. 111, paras. 97-107; *Palamara Iribarne v. Chile*, Merits, Reparations and Costs, Judgment of 22nd November 2005, IACHR Series C, No. 135, paras. 82-88; *Kimel v. Argentina*, Merits, Reparation and Costs, Judgment of 2nd May 2008, IACHR Series C, No. 177, paras. 76-87; *Tristán Donoso v. Panama*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 27th January 2009, IACHR Series C, No. 193, paras. 119-123; *Usón Ramírez v. Venezuela*, Preliminary Objections, Merits, Reparations and Costs, Judgment of 20th November 2009, IACHR Series C, No. 207, paras. 73-84.

<sup>3</sup> *Kimel v. Argentina* (note 1), para. 76.

<sup>4</sup> *Kimel v. Argentina*, para. 87.

<sup>5</sup> Inter-Am. Comm. H.R., *Annual Report 1994*, OEA/Ser.L/V/II.88, Chapter 4.

<sup>6</sup> Inter-Am. Comm. H.R., *Annual Report 1994*, OEA/Ser.L/V/II.88, Chapter 4.

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- <sup>7</sup> Law No. 24,198 of 31 May, 1993 (amendment to the Criminal Code), *Boletín Oficial* No. 27,652, Section 2.
- <sup>8</sup> Law No. 1,160 of 26 November, 1997 (enacted in the Criminal Code), Section 348.
- <sup>9</sup> Legislative decree No. 1,030 of 26 April, 1997 (enacted in the Criminal Code), *Diario Oficial* No. 105, Vol. 355, Section 408.
- <sup>10</sup> Law No. 8,224 of 4 March, 2002 (abolishing the crime of *desacato*), *La Gaceta* No. 65, Section 1.
- <sup>11</sup> Law No. 27,975 of 29 May, 2003 (abolishing the crime of *desacato*), *El Peruano*, Page No. 244,987, Section 1.
- <sup>12</sup> Law No. 20,048 of 22 August, 2005 (amendment to the Criminal Code), *Diario Oficial* No. 38,250, Section 1.
- <sup>13</sup> Law No. 22 of 29 June, 2005 (abolishing the crime of *desacato*), *Gaceta Oficial* 25,336, Section 1.
- <sup>14</sup> Law No. 641 of 16 November, 2007 (enacted in the Criminal Code), *La Gaceta* Pages 83-87, Section 567.
- <sup>15</sup> Supreme Court of Justice, Constitutional Chamber, Judgment of 19 May, 2005.
- <sup>16</sup> Constitutional Court, Judgment No. 1122-2005 of 1 February, 2006.
- <sup>17</sup> Constitutional Court of the Plurinational State of Bolivia, Decision No. 1250/2012 of 20 September, 2012.
- <sup>18</sup> Criminal Code 1985, Sections 183-192.
- <sup>19</sup> Law No. 62 of 29 December, 1987 (enacted in the Criminal Code), *Gaceta Oficial* No. 3, Section 144.
- <sup>20</sup> Criminal Code of 20 October, 2000, *Gaceta Oficial Extraordinaria* No. 5.494, Sections 148-152 and 23- 227. Declared to be constitutional by the Supreme Court of Justice on its judgment of 15 July, 2003.
- <sup>21</sup> Special Rapporteurship for Freedom of Expression (OAS), *Annual Report 2002*, p. 149; *Annual Report 2004*, p. 160.
- <sup>22</sup> Decree of 13 April, 2007 (abolishing some sections of the Criminal Code), *Diario Oficial de la Federación* of 13 April, 2007, Section 1.
- <sup>23</sup> Criminal Code (Amendment) Act 2012.
- <sup>24</sup> Defamation Act 2013 (an act to repeal the Defamation Act and the Libel and Slander Act), Section 7.
- <sup>25</sup> Law No. 26 of 21 May, 2008 (amendment to the Criminal Code), *Gaceta Oficial* 26,045, Sections 193 and 195.
- <sup>26</sup> Law No. 641 of 16 November, 2007 (enacted in the Criminal Code), *La Gaceta* Pages 83-87, Section 204.
- <sup>27</sup> Law No. 26,551 of 18 November, 2009 (amendment to the Criminal Code), *Boletín Oficial* No. 31,790, Sections 1 and 2.
- <sup>28</sup> Decree 836 of 7 December, 2011 (amendment to the Criminal Code), *Diario Oficial* No. 299, Vol. 393, Section 6. Cf. Argentina, Supreme Court of Justice. Judgment of 24 June, 2008. P.2297.XL. *Patitó, José Ángel et al. v. Diario La Nación et al.*
- <sup>29</sup> Supreme Court of Justice, Criminal Appellate Division, Judgment of 10 July, 2013.
- <sup>30</sup> Supreme Court of Justice of the Nation (Mexico). Direct Protection (Amparo) in Revision 2044-2008, of 17 June, 2009
- <sup>31</sup> Supreme Court of Justice (Panama), Protection (Amparo) of Constitutional Guarantees Action, File 1292- 10. 4 July, 2012