Organization of American States

Inter-American Commission on Human Rights IACHR

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

OEA/Ser.L/V/II.147
CIDH/RELE/INF.10/13
March 5, 2013
Original: Spanish

NATIONAL JURISPRUDENCE ON FREEDOM OF EXPRESSION AND ACCESS TO INFORMATION

Office of the Special Rapporteur for Freedom of Expression
Inter- American Commission on Human Rights

2013
Internet: http://www.cidh.org/relatoria
Email : cidhexpresion@oas.org

OAS Cataloging-in-Publication Data

Inter-American Commission on Human Rights. Office of the Special Rapporteur for Freedom of Expression.

Jurisprudencia nacional sobre libertad de expresión y acceso a la información = National jurisprudence on freedom of expression and access to information / [Preparado por la Relatoría Especial para la Libertad de Expresión de la Comisión Interamericana de Derechos Humanos].

p. ; cm. (OEA documentos oficiales; OEA Ser.L/V/II CIDH/RELE/INF.) (OAS official records; OEA Ser.L/V/II CIDH/RELE/INF.)

ISBN 978-0-8270-5984-9

1. Access to information--Legislation and jurisprudence--America. 2. Freedom of expression--Legislation and jurisprudence--America. 3. Freedom of information--Legal aspects--America. 4. Civil rights--America. 5. Human rights--America. I. Title. II. Title: National jurisprudence on freedom of expression and access to information. III. Series. IV. Series. OAS official records ; OEA/Ser.L/V/II CIDH/RELE/INF.

OEA/Ser.L/V/II CIDH/RELE/INF.10/13

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Document elaborated and printed thanks to the financial support of the governments of Finland and Switzerland

Approved by the Inter-American Commission on Human Rights on March 5, 2013

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OFFICE OF THE SPECIAL RAPPORTEUR FOR FREEDOM OF EXPRESSION

INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

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ACHPR:	African Commission on Human and Peoples' Rights
American Convention:	American Convention on Human Rights
American Declaration:	American Declaration of the Rights and Duties of Man
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European Convention:	European Convention on Human Rights and Fundamental Freedoms
European Court:	European Court of Human Rights
IACHR:	Inter-American Commission on Human Rights
Inter-American Court:	Inter-American Court of Human Rights
OAS:	Organization of American States
OSCE:	Organization for Security and Cooperation in Europe
Office of the Special Rapporteur:	Office of the Special Rapporteur for Freedom of Expression
UN:	United Nations

NATIONAL JURISPRUDENCE ON FREEDOM OF EXPRESSION AND ACCESS TO INFORMATION

A. Introduction

1. In this report, the Office of the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights provides a synthesis of important rulings from the region's domestic high courts on the issue of freedom of expression in the Americas. This review is a continuation of the practice begun by the Office of the Special Rapporteur of documenting and disseminating, through its annual reports, the domestic court rulings that represent progress on a domestic level or that enrich regional scholarship and case law while at the same time incorporating inter-American standards on the issue into its reasoning.

2. As in other annual reports, this type of review seeks to contribute to a positive dialog between the bodies of the Inter-American system and domestic jurisdictions, with the conviction that the sharing of different experiences leads to a virtuous cycle of mutual learning.[1]

3. Effectively, the Court and the Inter-American Commission have repeatedly recognized that all domestic courts - regardless of level or hierarchy - play a crucial role in developing and implementing regional human rights standards. As the Court has found, local justice systems operate not only to guarantee the rights of individuals in specific cases, but also, through their rulings, they can broaden and strengthen the content of constitutional provisions and domestic laws connected with a particular right, thereby also strengthening the provisions of international instruments such as the American Convention. Likewise, the system's organs have emphasized that domestic judges play an important role in the process of implementing international human rights law in domestic legal systems.

4. For this reason, this Office continues to make its best efforts to document the court rulings that represent important local progress in the recognition and protection of the right to freedom of expression, and disseminate them in its annual reports, keeping that documentation updated and standardized. In some cases, these rulings must also be considered models to follow on the issue. This work also allows the Office of the Special Rapporteur to determine the degree to which the right is protected in the different countries of the region, as well as the characteristics of each level of protection. The results

[1] IACHR. Annual Report 2009. OEA/Ser.L/V/II. Doc. 51. December 30, 2009. *Annual Report of the Office of the Special Rapporteur for Freedom of Expression*. Chapter IV (The Right of Access to Information). Para. 93; Chapter V (National Incorporation of the Inter-American Standards on Freedom of Expression During 2009). Paras. 33-134. Available at: http://www.oas.org/en/iachr/expression/docs/reports/annual/Informe%20Anual%202009%202%20ENG.pdf

thus far have been notable. As this report demonstrates, there is a clear trend in important courts of the Americas toward a true guarantee and protection of the right to freedom of thought and expression of persons, meaning decisive steps toward the consolidation and preservation of pluralist and deliberative democratic systems.

5. This document is divided into two parts. The first part briefly explores the most relevant aspects of the inter-American legal framework on freedom of expression that have served as the basis for the selection of the judgments presented herein. For the purposes of this review, the determination that domestic progress has been made or a best practice has been established will be based on how well a judicial ruling measures up to the principles, scope and limits of the right to freedom of expression according to the interpretation of the authorized organs of the inter-American system and the highest standards set by the region's courts and tribunals.

6. The second part collects rulings from different countries throughout the region, organizing them thematically and summarizing them so as to make it easy to understand the way in which each ruling constitutes local progress or the way in which it implements regional standards.

7. Finally, as in other annual reports, the Office of the Special Rapporteur recognizes that an exhaustive review of the rulings made with regard to this right goes beyond the scope of this report. The Office of the Special Rapporteur will refer only to the emblematic court rulings on which it has received information.

B. Inter-American legal framework regarding freedom of expression

8. For the purposes of this report, domestic progress or the identification of best practices starts with the standards used to adopt the corresponding ruling and its impact on the greater exercise of freedom of thought and expression. In principle, these are rulings that at the very least reduce arbitrary or disproportionate limits on freedom of expression and contribute to strengthening guarantees of the existence of public and plural debate under democratic conditions, pursuant to the inter-American legal framework on the issue.

9. As this Office of the Special Rapporteur has expressed on prior occasions, the inter-American system for the protection of human rights is probably one of the systems that establishes the most guarantees for the exercise of freedom of thought and expression. Effectively, in its Article 13, the American Convention on Human Rights places a very high value on freedom of expression and establishes its own limited system of restrictions.[2] The same reinforced level of guarantee can be found in the American

[2] The article holds that: "1.Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice. // 2. The exercise of the right provided for in the foregoing paragraph shall not be subject to prior censorship but shall be subject to subsequent imposition of liability, which shall be expressly established by law to the extent necessary to ensure: (a) respect for the rights or reputations of others; or (b) the protection of national security, public order, or public

Declaration of the Rights and Duties of Man - Article IV[3] - and the Inter-American Democratic Charter - Article 4.[4] This stricter level of guarantee is based on the broad concept of the autonomy and dignity of persons, which is based on the recognition of freedom of expression not only as a right derived from the idea of human autonomy, but also as a right with instrumental value for the exercise of other fundamental rights and with an essential role in democratic systems.

10. On this latter aspect, the IACHR and the Inter-American Court have highlighted in their case law that there is a structural relationship between democracy and the right to freedom of thought and expression. This relationship is so important that the organs of the system have emphasized that the objective itself of Article 13 of the American Convention is to strengthen the functioning of pluralist and deliberative democratic systems by protecting and fomenting the free circulation of information, ideas, and expression of all kinds.

11. This relationship between the right to freedom of expression and democracy - defined as "strict" and "indissoluble" - is partly explained by the dual dimensions of this right. Effectively, and as the Inter-American Court and the IACHR have indicated, freedom of expression has an individual component consisting of each person's right to express his or her own thoughts, ideas and information, as well as a collective or social aspect, consisting of every person's right to seek and receive any information (*information and ideas of all kinds*), to know outside thoughts, ideas, and information, and to be well informed.[5]

12. Taking this dual dimension into account, inter-American case law has found that freedom of expression is a *means for the exchange* of information and ideas among people and for mass communication among human beings. It has specified that for the common citizen, the knowledge of others' opinions or the information available to other people is just as important as the right to disseminate one's own beliefs or

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health or morals. // 3. The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions. // 4. Notwithstanding the provisions of paragraph 2 above, public entertainments may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence. // 5. Any propaganda for war and any advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law."

[3] "Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever." American Declaration of the Rights and Duties of Man. Article IV.

[4] "Transparency in government activities, probity, responsible public administration on the part of governments, respect for social rights, and freedom of expression and of the press are essential components of the exercise of democracy. // The constitutional subordination of all state institutions to the legally constituted civilian authority and respect for the rule of law on the part of all institutions and sectors of society are equally essential to democracy." Inter-American Democratic Charter, Article 4.

[5] IACHR, Office of the Special Rapporteur for Freedom of Expression, *A Hemispheric Agenda for the Defense of Freedom of Expression.* OEA/Ser.L/v/II/CIDH/RELE/INF.4/09. February 25, 2009, para. 15. Available at: http://www.oas.org/en/iachr/expression/doconpublicationonHemispheric%20%20Agenda%20Eng%20FINAL%20portada.pdf

information. The case law has also emphasized that a particular act of expression has both dimensions simultaneously. For this reason, a limitation of the right to freedom of expression at the same time affects the right of the person wishing to disseminate an idea or information and the right of members of society to learn about that idea or information. Additionally, the right to information and to receive the greatest number of opinions and variety of information requires a special effort for achieving access to the public debate under equal conditions and without discrimination of any kind. This presupposes special conditions for inclusion that allow for the effective exercise of this right for all sectors of society.[6]

13. A large portion of the development of the subject in scholarship and in the case law of the system's bodies highlights the importance assigned to the dual dimension of the right to freedom of expression and its role in democracy. Specifically, based on this relationship between democracy and freedom of expression, the Court and the Inter-American Commission have in recent years defined a general framework regarding the principles and standards linked to the interpretation and application of Article 13 of the Convention - and IV of the American Declaration - that places emphasis on the special protection of speech regarding the public interest or State officials and the conditions under which legitimate limitations to this right may be established in such cases.

14. This general framework promotes the recognition of at least the following principles: 1) all forms of expression, regardless of content and level of acceptance by society at large or the State, are presumed generally to be covered; 2) expression having to do with matters of public interest and individuals who are holding or seeking to hold government positions, and expression that includes elements constitutive of the personal identity or dignity of the person who makes the expression enjoy greater protection under the American Convention, and the State must therefore refrain to a greater degree from imposing limitations on these forms of expression; 3) to be admissible, the limitations must be established through subsequent liability for exercising the right, with prior restraint (censorship) and restrictions that have discriminatory effects and that are imposed through indirect mechanisms, such as the ones proscribed in Article 13(3) of the American Convention, being prohibited; 4) the examination of the legitimacy of the limitations imposed requires that the restrictions be established clearly and precisely by law, that they be aimed at achieving legitimate objectives recognized by the Convention, and that they be necessary in a democratic society (three-part test); and 5) the standard requires that due to the type of speech to which they apply or the medium they employ, some types of limitations must be exceptional and subjected to an examination that is stricter and more demanding in order to be valid under the American Convention (*strict necessity test*).

15. The judgments reviewed herein show the way in which different domestic courts have incorporated regional standards into their domestic legal systems. Likewise, some of the rulings mentioned in this report have been pioneer in making

[6] IACHR, Office of the Special Rapporteur for Freedom of Expression, *A Hemispheric Agenda for the Defense of Freedom of Expression.* OEA/Ser.L/v/II/CIDH/RELE/INF.4/09. February 25, 2009, para. 15. Available at: http://www.oas.org/en/iachr/expression/doconpublicationonHemispheric%20%20Agenda%20Eng%20FINAL%20portada.pdf

fundamental progress on the issue of freedom of expression and have become required points of reference not only for the courts and tribunals of other States but also for the bodies of the regional system itself. Effectively, it has been possible thanks to some of the rulings noted hereinafter to promote freedom of thought and expression and strengthen inter-American scholarship and case law.

C. National Jurisprudence on the subject of freedom of expression

16. Hereinafter, we will present some of the most significant decisions that in the opinion of the Office of the Special Rapporteur constitute important domestic progress or best practices on the subject of freedom of expression. They are organized according to the main standard or rule of the right that they develop. The initial sections contain extracts from some of the rulings that address generally the scope and characteristics of the right to freedom of expression. These are included here for their relevance in the later analysis of the legitimacy of limitations to the right, a central aspect of the rulings reviewed.

1. Case law on the importance, scope and function of freedom of expression in democratic systems

17. In decisions that have clearly been in harmony with the organs of the inter-American human rights system, the highest courts in the region have generally recognized the importance and special character of the right to freedom of thought and expression in the context of their constitutional legal systems. The priority given to this right has been attributed to the instrumental role it plays in democratic systems and to it being an indispensable tool for the exercise of other rights. As this aspect has been broadly developed by a variety of courts, in this section the Office of the Special Rapporteur will highlight some of the relevant court rulings that have been emblematic on this issue.

18. In a judgment dated February 1, 2006,[7] the Court of Constitutionality of Guatemala indicated in a ruling on the constitutionality of the articles of the Penal Code that establish the crime of *desacato*[8] that freedom of expression is "a fundamental right inherent to persons […] and one of the liberties that are a positive sign of true constitutional rule of law […]." In this sense, it explained that "the free expression of thought is one of the rights that make respect for the dignity of a person possible by allowing a person to freely translate his or her ideas and thoughts into expression that can give rise to value judgments and subsequent decision-making, not only of individuals but also of groups, within a democratic society." In the opinion of this high court, this is "how one explains that in modern constitutional history, the exercise of this right has deserved constitutional protection."

[7] Republic of Guatemala. Court of Constitutionality. Partial Judgment of General Unconstitutionality, Case File 1122-2005, February 1, 2006. Available at: http://www.cc.gob.gt/siged2009/mdlWeb/frmConsultaWebVerDocumento.aspx?St_DocumentoId=807270.html

[8] The judgment examined the constitutionality of articles 411, 412 and 413 of the Penal Code of Guatemala regulating the crimes of *desacato* against presidents of State bodies (art. 411), *desacato* against authority (art. 412) and evidence for leveling accusations of these crimes (art. 413).

19. In this important ruling, the Court of Constitutionality of Guatemala turns to what was established by the Inter-American Court of Human Rights in Advisory Opinion OC/5 and the Declaration of Principles on Freedom of Expression where they determine that "the right to and respect for freedom of expression is established as an instrument that allows for the free exchange of ideas and functions to strengthen democratic processes, while at the same time guaranteeing the citizenry a basic tool for participation." This criteria was reiterated by the Court of Constitutionality of Guatemala in a ruling dated September 14, 2010.[9] Citing comparative law, the Court recalled that the deep commitment to the freedom of expression of all persons and the need to protect robust, open and uninhibited debate on subjects of public interest require the State to tolerate attacks even when they seem or in fact are harsh, caustic or unpleasant.

20. The Constitutional Chamber of the Supreme Court of Justice of Costa Rica ruled similarly in a judgment dated March 29, 2011[10]. Therein, it ruled on an *amparo* remedy brought against an agreement reached by the University Council of the Universidad de Costa Rica preventing a foreign guest from giving a conference there because in the past he had made statements that were discriminatory against a variety of minorities. In its ruling, the Chamber expressed that:

> "It should also be taken into account that freedom of expression is an indispensable requirement for democracy - although certainly not the only one - as it allows for the creation of public opinion, essential for giving content to a number of principles of the constitutional rule of law, such as for example the right to information, the right to petition and rights having to do with political participation. The opportunity for all people to participate in public debate constitutes a necessary condition for the construction of a social dynamic of exchange of knowledge, ideas and information that allows for the reaching of consensus and taking of decisions among components of diverse social groups; but it also constitutes a channel for the expression of dissenting opinions, which in a democracy are just as necessary as concurring opinions. For its part, the exchange of opinions and information that arises from public debate contributes to forming personal opinions, while both combined form public opinion, which ends up being expressed through the channels of representative democracy."

21. This relationship between democracy and freedom of expression has also been recognized by the Supreme Court of Justice of the Nation of Mexico in a number of rulings. That court has found that freedom of expression is a right that is "functionally

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[9] Republic of Guatemala. Court of Constitutionality. Judgment on Appeal of *Amparo* Judgment, Case File 4628-2009, September 14, 2010. Available at: http://www.cc.gob.gt/siged2009/mdlWeb/frmConsultaWebVerDocumento.aspx?St_DocumentoId=815146.html. This ruling of the Court of Constitutionality of Guatemala overturned a ruling convicting a candidate for representative elections with the Professional Association of Veterinary Doctors and Zoologists before the Superior University Council of Guatemala of lacking "professional ethics" and "respect for one of its members, both in speech and in writing," after he criticized the quality of the education provided at one of the universities in that country during his campaign. Basing its ruling on the importance and function of the right to freedom of expression in democratic proceedings, the Court of Constitutionality of Guatemala ordered that a new ruling be issued based on the court's case law on the subject.

[10] Republic of Costa Rica. Constitutional Chamber of the Supreme Court of Justice. *Amparo* Remedy Res. No. 2011004160, March 29, 2011. Available at: http://sitios.poder-judicial.go.cr/salaconstitucional/Constitucion%20Politica/Judgmenton2011/11-004160.html

essential in the structure of the constitutional rule of law"[11] and that in its "public, collective and institutional aspects" it becomes the "centerpiece for the proper functioning of representative democracy."[12]

22. For its part, the Supreme Court of Justice of the Argentine Nation issued a ruling on June 24, 2008, in the case of *Patitó, José Ángel et al. v. Newspaper La Nación et al.*[13] that emphasized that "with regard to freedom of expression, this Court has repeatedly ruled that it holds an eminent place in a republican regime. In this sense, the Court has held for some time that […] among the liberties that the National Constitution enshrines, freedom of the press is one of the most important, to the point that without its due protection, the democracy that exists would be an impaired one and democracy in name only [...]."

23. Analogously, the Constitutional Tribunal of Bolivia ruled in a judgment dated September 20, 2012,[14] that Article 162 of the Penal Code was unconstitutional. That article established harsher prison sentences for those convicted of defamation [*calumnia, injuria o difamación*] against a public official (*desacato*). The court explained that freedom of expression is an essential human right that holds a "preferential position" in the constitutional system due to the role it plays in a democratic system. Taking up once again one of its previous rulings, it indicated that freedom of expression "constitutes one of the most important rights of an individual and one of the fundamental pillars of all democratic States," and that "the State duty to respect and guarantee fundamental principles in a democratic society includes the obligation to promote open and plural public debate."

24. In a judgment dated April 30, 2009,[15] the Supreme Federal Tribunal of Brazil declared that the Press Act, which was passed during the military regime, established harsh punishment for journalists for the crime of defamation [*difamación y injurias*], allowed for prior restraint and established other measures that restricted the exercise of freedom of expression, and was therefore not compatible with the Federal Constitution. To this effect, the Tribunal carried out an extensive examination of the scope and importance of freedom of expression in a democratic system, referencing among other sources the inter-American system's standards on the subject.

25. The Tribunal found that freedom of the press is an expression of the freedoms of thought, information and expression with an intrinsic relationship to

[11] United States of Mexico. Supreme Court of Justice. Direct *Amparo* Appeal 2044-2008, June 17, 2009. Available at: http://www2.scjn.gob.mx/juridica/engroseoncerradoonpublico/08020440.010.doc

[12] United States of Mexico. Supreme Court of Justice. Direct *Amparo* Appeal 2044-2008, June 17, 2009. Available at: http://www2.scjn.gob.mx/juridica/engroseoncerradoonpublico/08020440.010.doc

[13] Republic of Argentina. Supreme Court of Justice. Judgment of June 24, 2008, P.2297.XL, *Patitó, José Ángel et al. v. Diario La Nación et al.* Available at: http://www.cpj.org/newon2008/americaonArgentina.Court.24-06-08.pdf

[14] Plurinational State of Bolivia. Constitutional Tribunal. Specific Action of Unconstitutionality, Case File 00130-2012-01-AIC, Judgment 1250/2012, September 20, 2012. Available at: http://www.tribunalconstitucional.gob.bo/moduleonver_resolucion/indexnew.php?id=125150

[15] Federative Republic of Brazil. Supreme Federal Tribunal. Complaint of breach of fundamental precept 130 Federal District. April 30, 2009. Available at: http://www.stf.jus.br/portal/inteiroTeor/obterInteiroTeor.asp?id=605411&idDocumento=&codigoClasse=776&numero=13

democracy, and that therefore it must enjoy extra protection to ensure it can be exercised fully. In this regard, the Supreme Tribunal highlighted that the press is a natural opportunity for the formation of public opinion and an alternative to the official version of the facts. In that sense, critical thought in journalism is an integral part of full and trustworthy information. This standard was reiterated by the Tribunal in a judgment dated September 2, 2010.[16]

26. The Constitutional Court of Colombia has repeatedly established in multiple rulings the priority status of the right to freedom of expression in the constitutional framework of that country.[17] So for example, in recent ruling C-422/11 of May 25, 2011[18], the Court ruled that judges who hear cases on defamation [*injurias y calumnias*] must interpret those criminal offenses restrictively in ways that favors "the expanding scope of freedom of expression." In this ruling, the Court reiterated the thesis that it has held since its beginning - and that is based on "the special importance of this right in the Colombian legal system - […] that the right occupies a place of privilege within the catalog of fundamental rights."

27. Prior to this, in ruling T-391/07 of May 22, 2007[19], regarding a writ of protection brought by Radio Cadena Nacional (RCN) against the Council of State, the Constitutional Court of Colombia indicated that "the principal justification for making freedom of expression central to contemporary constitutional systems is that, through its protection, representative democracy, citizen participation and self governance are facilitated in each nation. This argument highlights that communication and the free flow of information, opinions and ideas in a society are essential elements for democratic and representative governance, for which reason freedom of expression, on allowing open and vigorous debate on public matters, serves a central political function."

28. Of particular interest are the considerations developed by the Constitutional Court of Colombia in this ruling with regard to the way this right specifically functions in its political dimension. For this Court:

> "In its political dimension, freedom of expression serves a number of specific functions: (i) the broad and open political debate protected by this freedom informs and improves on

[16] Federative Republic of Brazil. Supreme Federal Tribunal. Sentence of September 2, 2010. Precautionary measure in Direct Action of Unconstitutionality ADI-4451. Available at: http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=2613221 In this ruling, the Supreme Federal Tribunal recognized that the press has a "relationship that is rooted in interdependence or feedback." In this sense, it explained that the Brazilian constitution grants the press the right to monitor and disclose matters related to the life of the State and society, which is why renouncing press freedom would be equivalent to renouncing general information about matters related to authorities, whether they be political, economic, military or religious.

[17] Republic of Colombia. Constitutional Court. Judgment C-010/00, of January 19, 2000. Available at: http://www.corteconstitucional.gov.co/relatoria/2000/C-010-00.htm; Constitutional Court. Judgment T-391/07, of May 22, 2007. Available at: http://www.corteconstitucional.gov.co/relatoria/2007/T-391-07.htm; Constitutional Court. Judgment C-442-11, of May 25, 2011. Available at: http://www.corteconstitucional.gov.co/relatoria/2011/C-442-11.htm

[18] Republic of Colombia. Constitutional Court. Judgment C-442-11 of May 25, 2011. Available at: http://www.corteconstitucional.gov.co/relatoria/2011/C-442-11.htm

[19] Republic of Colombia. Constitutional Court. Judgment T-391/07, of May 22, 2007. Available at: http://www.corteconstitucional.gov.co/relatoria/2007/T-391-07.htm

> the quality of public policy in that it permits "the inclusion of all sectors of society in the communication, decision making and development processes," inclusion that "is fundamental for their needs, opinions, and interests to be taken into account in the design of policies and decision making," thus allowing equitable exercise of the right to participation; (ii) freedom of expression keeps the channels for political change open, using critical analysis to prevent those that govern from becoming indefinitely rooted in an illegitimate position; (iii) solid protection of the free communication of information and ideas prevents governmental abuses of power by supplying a counterweight through the opening of a channel for the exercise of the power of citizen participation and oversight of the public - in other words, it provides an opportunity for the discussion of matters in the general interest, an opportunity that in turn reduces the risk of government oppression; (iv) it promotes sociopolitical stability on providing an escape valve for social dissent and thereby establishing a framework for managing and processing conflicts that does not threaten to erode societal integrity; (v) it protects active political minorities at a given time, preventing them from being silenced by majority or prevailing forces; and (vi) on a more basic level, it is a necessary condition for ensuring the free expression of the opinions of voters when they cast their ballots for a political representative. It has also been noted that freedom of expression (vii) contributes to the formation of public opinion on political matters and the consolidation of a duly informed electorate, given that it gives substance to citizens' right to understand political matters, thereby allowing them to participate effectively in the operation of democracy, thereby (viii) bringing to life the principle of representative self-government by citizens themselves, and (vii) the responsibility of those governing the electorate, as well as (ix) the principle of political equality. Finally, it has been emphasized that (x) freedom of expression strengthens the individual autonomy of the political subject in a democratic regime, and that (xi) on allowing the construction of opinion, it facilitates societal control over the operation not only of the political system, but also of society itself, including the legal system and its need to develop or change."[20]

29. As will be explained later on, according to this Tribunal, "the multiplicity of reasons that justifies granting generic freedom of expression a privileged position in the Colombian constitutional system has an immediate practical consequence: there is a constitutional presumption in favor of freedom of expression.[21]

2. Case law on the scope and entitlement of freedom of expression

30. In the terms of Article 13 of the American Convention, freedom of expression is a right held by every individual, without discrimination of any kind. According to Principle 2 of the Declaration of Principles, "all people should be afforded equal opportunities to receive, seek and impart information by any means of communication without any discrimination for reasons of race, color, sex, language, religion, political or other opinions, national or social origin, economic status, birth or any other social condition."

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[20] Republic of Colombia. Constitutional Court. Judgment T-391/07, of May 22, 2007. Available at: http://www.corteconstitucional.gov.co/relatoria/2007/T-391-07.htm

[21] Republic of Colombia. Constitutional Court. Judgment T-391/07, of May 22, 2007. Available at: http://www.corteconstitucional.gov.co/relatoria/2007/T-391-07.htm

31. As the Inter-American Court has indicated, the conditions for bearing the right to freedom of expression cannot be restricted to a particular profession or group of individuals, nor to the scope of freedom of the press: the "American Convention guarantees this right to every individual, irrespective of any other consideration; so, such guarantee should not be limited to a given profession or group of individuals. Freedom of expression is an essential element of the freedom of the press, although they are not synonymous and exercise of the first does not condition exercise of the second."[22]

32. Likewise, the Commission and the Inter-American Court have emphasized the Democratic scope of freedom of expression, which implies both the ability of every individual to put forward expression and ideas, as well as the ability to seek, receive and disseminate information of all kinds, orally, in print, in the mass media, or through any other medium of an individual's choosing. In this sense, the organs of the system have recognized that Article 13 of the American Convention includes:[23] 1) the right to speak - that is, to express orally thoughts, ideas, information or opinions;[24] 2) the right to speak necessarily implies individuals' right to use the language of their choosing to express themselves;[25] 3) the right to write - that is, to express thoughts, ideas, information or opinions in writing or in print; 4) the right to disseminate spoken or written expression of thoughts, information, ideas or opinions through the medium chosen for communicating to the largest number of receptors possible;[26] 5) the right to artistic or symbolic expression, to the distribution of artistic expression, and to access to art in all its forms;[27] 6) the right to seek, receive and access expressions, ideas, opinions and information of all kinds; 7) the right to have access to information about oneself contained in public or private databases or registries, with the correlative right to update, correct or amend it; and 8) the right to

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[22] I/A Court H.R. *Case of Tristán Donoso v. Panama. Preliminary Objections, Merits, Reparations and Costs.* Judgment of January 27, 2009. Series C No. 193. para. 114.

[23] See IACHR, Office of the Special Rapporteur for Freedom of Expression. *Inter-American Legal Framework of the Right to Freedom of Expression*. OEA/Ser.L/V/II CIDH/RELE/INF. 2/09. December 30, 2009. Paras. 21-29. Available at: http://www.oas.org/en/iachr/expression/doconpublicationonINTER-AMERICAN%20LEGAL%20FRAMEWORK%20OF%20THE%20RIGHT%20TO%20FREEDOM%20OF%20EXPRESSION%20FINAL%20PORTADA.pdf

[24] I/A Court H.R. *Case of López Álvarez v. Honduras.* Judgment of February 1, 2006. Series C No. 141, para. 164; *Case of Herrera Ulloa v. Costa Rica*. Judgment dated July 2, 2004. Series C No. 107, para. 109; *Case of Ricardo Canese v. Paraguay*. Judgment of August 31, 2004. Series C No. 111, para. 78; *Case of Ivcher Bronstein v. Peru.* Judgment of February 6, 2001. Series C No. 74, para. 147; *Case of "The Last Temptation of Christ" (Olmedo Bustos et al.)* v. *Chile*. Judgment dated February 5, 2001. Series C No. 73, para. 65; *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, para. 31.

[25] I/A Court H.R. *Case of López Álvarez* v. *Honduras.* Judgment of February 1, 2006. Series C No. 141, para. 164.

[26] I/A Court H.R. *Case of Palamara Iribarne v. Chile*. Judgment of November 22, 2005. Series C No. 135, para. 73; *Case of Herrera Ulloa v. Costa Rica*. Judgment of July 2, 2004. Series C No. 107, para. 109; *Case of Ricardo Canese v*. *Paraguay*. Judgment of August 31, 2004. Series C No. 111, para. 78; *Case of Ivcher Bronstein v. Peru.* Judgment of February 6, 2001. Series C No. 74, para. 147; *Case of "The Last Temptation of Christ" (Olmedo Bustos et al.)* v. *Chile*. Judgment dated February 5, 2001. Series C No. 73, para. 65; *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5, para. 31.

[27] IACHR. Pleadings before the Inter-American Court in the *Case of "The Last Temptation of Christ " (Olmedo Bustos et al.)* v. *Chile*. Transcripts available at: I/A Court H.R. Case of "*The Last Temptation of Christ" (Olmedo Bustos et al.) v*. *Chile.* Judgment dated February 5, 2001. Series C No. 73, para. 61(b).

possess information in writing or any other form, to transport that information, and to distribute it.[28]

33. All of the rulings collected in this report begin with the assumption that the right to freedom of expression universal, something that is generally recognized in the constitutions of the countries of the region. Thus for example, the Constitutional Court of Colombia in the aforementioned judgment T-391/07 of May 22, 2007,[29] found that all individuals are entitled to the right to freedom of expression, without any discrimination regarding the characteristics of the individual, the content of the speech, or the way in which the speech is received or distributed.

34. On this last point, it expressed that the media, as vehicles for the full exercise of the right to freedom of expression, must be recognized as bearers of this right. In this regard, it would be appropriate to mention that the Constitutional Court has recognized that the right to open a media outlet is a fundamental right that must be recognized universally and without discrimination, and with restrictions that are strictly necessary with regard to certain types of media that wish to use the electromagnetic spectrum.[30]

35. The scope of the right to freedom of expression in the rulings reviewed in this report is likewise broad. Although the majority of the rulings examined refer to expression through the mass and print media, the courts recognize that the right to freedom of expression likewise protects multiple other forms of expression, artistic expression among them. This has been established by, for example, the Supreme Federal Tribunal of Brazil, in a judgment issued on August 1, 2011, in which it examined the constitutionality of the requirement that the country's musicians be part of a professional organization[31].

3. Case law on the presumption of *ab initio* coverage for all kinds of expression, including offensive, shocking or disturbing speech

36. The organs of the inter-American system have explained that in principle, all forms of speech are protected by the right to freedom of expression regardless of their content or the degree to which they are accepted by society or the State. This Office of the Special Rapporteur has emphasized that this general assumption that all expression is covered is explained through the State's obligation to remain neutral toward content and

[28] IACHR. Report No. 3/98. Case No. 11.221. *Tarcisio Medina Charry.* Colombia. April 7, 1998, para. 77.

[29] Republic of Colombia. Constitutional Court. Judgment T-391/07, of May 22, 2007. Available at: http://www.corteconstitucional.gov.co/relatoria/2007/T-391-07.htm

[30] *Cf., e.g.*, Republic of Colombia. Constitutional Court. Unification Judgment SU-182 of 1998. Available at: http://www.corteconstitucional.gov.co/relatoria/1998/SU182-98.htm

[31] Federative Republic of Brazil. Supreme Federal Tribunal. Extraordinary remedy 414.426 Santa Catarina. Judgment of August 1, 2011. Available at: http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=628395. In the same sense, judgment T-081 of the Constitutional Court of Colombia, among other considerations, mentioned previously that freedom of expression protects multiple forms of expression, among them artistic expression. In its ruling, the Court found that granting a public servant the authority to classify a work of art as indecent violated the right to freedom of expression. Cf. Republic of Colombia. Constitutional Court. Judgment T-081 of February 26, 1993. Available at: http://www.corteconstitucional.gov.co/relatoria/1993/T-081-93.htm

by the resulting need to guarantee that, in principle, no individuals, groups, ideas or means of expression are excluded *a priori* from the public debate.[32]

37. According to this order of ideas, the Inter-American Court has reiterated that freedom of expression must be guaranteed not only with regard to the distribution of ideas and information favorably received or considered inoffensive or indifferent, but also with regard to those that offend and shock.[33] These are the demands of pluralism, tolerance and the spirit of disclosure without which a truly democratic society could not exist.

38. In the last decade, domestic courts have taken significant steps toward protecting this kind of expression, preserving the significant value that it has for democratic societies. For example, according to a judgment dated September 2, 2010, for the Supreme Federal Tribunal of Brazil, freedom of expression guarantees the right of a journalist - the same as any other person - to express his or her ideas "including with a tough, blunt, sarcastic, ironic or irreverent tone, especially against State authorities and bodies."[34] The Supreme Court of Justice of Argentina also used this criteria in a recent judgment dated October 30, 2012, handed down in the case of *Quantín, Norberto Julio v. Benedetti, Jorge Enrique et al. on derechos personalísimos*[35]. In that ruling, the Argentine Supreme Court took up the case law of the European Court of Human Rights and the Inter-American Court on the subject and recalled that "journalistic freedom includes the opportunity to use a certain degree of exaggeration, to the point of provocation." On ruling in this specific case, it found that "toleration of these excesses are better for democracy than the other alternative," which would be turning judges into the arbiters of societal debate. For this high court, "in addition to the fact that this role would be inappropriate for the courts, it would dangerously restrict the freedom of public debate."

39. The Permanent Criminal Chamber of the Supreme Court of Justice of Peru ruled similarly in a judgment dated June 18, 2010.[36] The court was ruling on a lawsuit seeking the nullification of a prison sentence for the crime of defamation handed down to the director of a weekly newspaper with local circulation. In the ruling, the Chamber

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[32] IACHR. Annual Report 2009. OEA/Ser.L/V/II. Doc. 51. December 30, 2009. *Annual Report of the Office of the Special Rapporteur for Freedom of Expression*. Chapter IV (The Right of Access to Information), para. 31. Available at: http://www.oas.org/en/iachr/expression/docs/reports/annual/Informe%20Anual%202009%202%20ENG.pdf

[33] I/A Court H.R. *Case of Herrera Ulloa v. Costa Rica*. Judgment of July 2, 2004. Series C No. 107, para. 113; Case of "*The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile.* Judgment dated February 5, 2001. Series C No. 73, para. 69; *Case of Ríos et al. v. Venezuela.* Preliminary Exceptions, Merits, Reparations and Costs. Judgment of January 28, 2009. Series C No. 194, para.105; *Case of Perozo et al. v. Venezuela.* Preliminary Exceptions, Merits, Reparations and Costs. Judgment of January 28, 2009. Series C No. 195, para 116.

[34] Federative Republic of Brazil. Supreme Federal Tribunal. Judgment of September 2, 2010. Precautionary Measure in Direct Action of Unconstitutionality ADI-4451. Available at: http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=2613221

[35] Republic of Argentina. Supreme Court of Justice. Judgment of October 30, 2012, *Quantín, Norberto Julio v. Benedetti, Jorge Enrique et al. on derechos personalísimos*. Available at: http://www.csjn.gov.ar/confal/ConsultaCompletaFallos.do?method=verDocumentos&id=693527

[36] Republic of Peru. Permanent Criminal Chamber of the Supreme Court of Justice. Judgment of June 18, 2010. RN No. 1372/2010. Available at: http://www.pj.gob.pe/wponwcm/connect/fdec1e004bf42509a767b73aa702a2d1/SPP+R.N.+N%C2%BA+1372-2010+-+Amazonas.pdf?MOD=AJPERES&CACHEID=fdec1e004bf42509a767b73aa702a2d1

recognized that "harsh and caustic criticism or attacks that are sharp and unpleasant [are] necessarily tolerable in order to secure freedom of opinion and guarantee public debate on matters of local interest in the administration of State institutions." According to the Chamber, in cases in which public and societal interest is in play, "the context in which the expressions being questioned were issued must be taken into account." In this sense, it emphasized that "the tone and content of the statements that are tolerable as part of the exercise of freedom of expression are related to the degree to which the news item awakes general or societal interest."

40. The rulings of the Constitutional Court of Colombia have had a similar tone. In judgment C-010/00,[37] this high court explained that "as international case law on human rights has highlighted, freedom of expression seeks to protect not only the dissemination of information or opinions that the State and the majority of the population consider inoffensive or indifferent, but also ideas or information that are not viewed favorably by a majority in society and that may be judged disturbing or dangerous. Pluralism, tolerance and the spirit of disclosure, without which a truly democratic society does not exist, require that these dissident opinions and information also be protected". In this line of reasoning, it expressed that the constitutional assumption of coverage of freedom of expression in principle covers *all* forms of human expression, and that constitutional freedom protects both the content and the tone of expression.[38]

41. Another case relevant for the application of the fundamentals of this principle can be found in the April 23, 2009, ruling *Patricia Mujica Silva v. Liceo Experimental Artístico y de Aplicación de Antofagasta República Juan Rojas Navarro,*[39] whereby the Supreme Court of Justice of Chile found that the decision made by public school authorities to expel one of its students "for holding ideas that they saw as contrary to the values that the entity professed" was arbitrary and violated the constitutional guarantee of freedom of expression. In its analysis of the specific case, the high court found that the decision was based solely on disagreement with positions held by the student. In this regard, it ruled that "although it is evident that the student proposed that fellow students take political action and strongly criticized the legal regime of the education system and his school […] the action being appealed violates freedom of expression […] because it punishes legitimate communication of ideas."

42. Finally, on explaining the reasoning for which the University of Costa Rica must foster a broad opening to the expression of all types of speech, the Constitutional Chamber of the Supreme Court of Justice of that country held in a decision dated March

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[37] Republic of Colombia. Constitutional Court. Judgment C-010/00, of January 19, 2000. Available at: http://www.corteconstitucional.gov.co/relatoria/2000/C-010-00.htm. *See also,* Constitutional Court. Judgment C-417/09, of June 26, 2009. Available at: http://www.corteconstitucional.gov.co/relatoria/2009/C-417-09.htm

[38] *See also,* Republic of Colombia. Constitutional Court. Judgment C-417/09, of June 26, 2009. Available at: http://www.corteconstitucional.gov.co/relatoria/2009/C-417-09.htm

[39] Republic of Chile. Supreme Court of Justice. *Patricia Mujica Silva con Liceo Experimental Artístico y of Aplicación of Antofagasta República Juan Rojas Navarro* (2009). Judgment of April 23, 2009, Rol N°1.740-2009. Available at: http://www.poderjudicial.cl/juris_pjud/muestra_doc.php?docid=49718&row_id=&ciudad_palabras=&rol_buscar=1.740?2009;1.740?09;1740?2009;1740?09&todos_ministros=&sala_buscar=&flag_ninguna=0

29, 2011,[40] that "suspending a conference because the presenter had expressed a series of controversial ideas prevents both public discussion on those subjects and the formation of public opinion. Further, the expression of the ideas of the presenter could allow those who disagree with him to further refine their convictions, or allow those who agree with him to change their opinions on hearing the public debate, or just the opposite. However, this is how a democracy is built: through dissent and consensus."

4. Case law on specially protected speech

43. The Office of the Special Rapporteur has held that although all forms of expression are in principle protected by the right enshrined in Article 13 of the American Convention, certain types of speech receive special protection due to their importance for the exercise of other human rights or for the consolidation, functioning and preservation of democracy.

44. Effectively, inter-American case law has repeatedly recognized that the functioning of democracy requires the greatest possible level of public discourse on the functioning of society and the State in all its aspects - that is, on matters of public interest. In a democratic and pluralist system, the actions and omissions of the State and its officials must be subjected to rigorous scrutiny, not only by internal oversight bodies, but also by the press and public opinion. Public administration and matters of common interest must be subjected to oversight by society as a whole. Democratic oversight of public administration through public opinion increases transparency in State activities and causes public officials to take responsibility for their actions. It is also a measure for achieving the highest degree of citizen participation.

45. According to the case law developed in recent years by the bodies of the inter-American system, a democratic and pluralist system must tend toward greater and broader circulation of information, opinions and ideas relating to the State, matters of public interest, public officials performing their duties or candidates to public positions, or private individuals voluntarily involved in public matters, as well as speech and political debate, leaving little space for State restriction of information, opinions and ideas.[41] In this regard, Principle 11 of the Declaration of Principles states that, "[p]ublic officials are subject to greater scrutiny by society."

46. In clear harmony with this development, the region's courts have handed down important decisions in the last decade that provide special guarantees for this type of speech with regard to illegitimate limitations, in particular limitations oriented toward protecting the honor and reputation of public officials. For example, in the previously cited September 20, 2012, judgment of the Plurinational Constitutional Tribunal of Bolivia in which it ruled crimes of *desacato* unconstitutional, it stated that "due to the very nature of

[40] Republic of Costa Rica. Constitutional Chamber of the Supreme Court of Justice. *Amparo* Remedy Res. Nº 2011004160, of March 29, 2011. Available at: http://sitios.poder-judicial.go.cr/salaconstitucional/Constitucion%20Politica/Judgmenton2011/11-004160.html

[41] I/A Court H.R. *Case of Kimel v. Argentina*. Judgment of May 2, 2008. Series C No. 177, para. 88; *Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile*. Judgment of February 5, 2001, Series C No. 73, para. 69; *Case of Ivcher Bronstein v. Peru*. Judgment of February 6, 2001. Series C No. 74, para. 152; *Case of Ricardo Canese v. Paraguay*. Judgment of August 31, 2004. Series C No. 111, para. 83.

the work they do - work in the public interest - authorities are exposed to a variety of criticism. Thus, in the case of Herrera Ulloa [v.] Costa Rica (2004), the Inter-American Court of Human Rights recalled that: "[t]hose individuals who have an influence on matters of public interest have laid themselves open voluntarily to a more intense public scrutiny and, consequently, in this domain, they are subject to a higher risk of being criticized, because their activities go beyond the private sphere and belong to the realm of public debate"."[42]

47. According the Constitutional Court of Guatemala, Principle 11 the Declaration of Principles on Freedom of Expression "reveals that due to the performance of the function that falls to them, public officials are subject to greater scrutiny by society, therefore laws that penalize offensive expression directed at public officials are in violation of the right to freedom of expression and the right to information." For this high court, a democratic system needs critical expression "to encourage the corresponding scrutiny of the public function. Prohibiting this type of speech is inappropriate in a system [...] that delegates the exercise of sovereignty that belongs to the people. Therefore, those who make up this latter element of the State must be permitted the right to criticize official conduct, especially the conduct of those who serve in the three bodies which have been delegated with the power to govern, particularly if that conduct exceeds limits established in the Constitution and by law".[43]

48. In judgment T-298/09 of April 23, 2009,[44] the Constitutional Court of Colombia, citing once more its settled case law on the subject, indicated that "on issues of clear relevance to the public in which a public servant is involved, the right to freedom of expression and information becomes broader and less flexible. Effectively, as already indicated, when a person has voluntarily decided to become a public personality or when he or she has the power to in some way exercise State authority, that person has the duty to bear up under greater criticism and questioning than a common person who holds no public authority and who has not decided to submit him or herself to public scrutiny." In further development in judgment C-442-11 of May 25, 2011,[45] the Court indicated that "*political* speech, debate on matters of public interest, and speech that constitutes a direct and immediate exercise of additional fundamental rights that must necessarily be connected to freedom of expression in order to be exercised, all enjoy a greater degree of protection". This reinforced protection "has a direct effect on admissible State regulation, and the standard of constitutional oversight to which the limitations [on these types of expressions] are subjected."

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[42] Plurinational State of Bolivia. Constitutional Tribunal. Action of Unconstitutionality, Case File 00130-2012-01-AIC Judgment 1250/2012 of September 20, 2012. Available at: http://www.tribunalconstitucional.gob.bo/moduleonver_resolucion/indexnew.php?id=125150

[43] Republic of Guatemala. Court of Constitutionality. Judgment of General Partial Unconstitutionality, Case File 1122-2005, of February 1, 2006. Available at: http://www.cc.gob.gt/siged2009/mdlWeb/frmConsultaWebVerDocumento.aspx?St_DocumentoId=807270.html

[44] Republic of Colombia. Constitutional Court. Judgment T-298/09, of April 23, 2009. Available at: http://www.corteconstitucional.gov.co/relatoria/2009/T-298-09.htm

[45] Republic of Colombia. Constitutional Court. Judgment C-442-11, of May 25, 2011. Available at: http://www.corteconstitucional.gov.co/relatoria/2011/C-442-11.htm In this judgment, the court declared that judges who hear cases involving defamation [*injurias y calumnias*] should interpret the relevant criminal norms strictly in order to favor "an expansive concept of freedom of expression."

49. In similar terms, in a judgment dated November 23, 2011,[46] the Supreme Federal Tribunal of Brazil ruled in a case of a direct action of unconstitutionality on the interpretation of Article 33(2) of Law No. 11.343 of 2006, which criminalizes drug consumption. The Tribunal found that the law should not include anything that could allow for a ban on demonstrations and public debate on the legalization or decriminalization of drug consumption. The Court explained that criticism of crime policy, being as it is a matter in the public interest, is specially protected by the right to freedom of expression. The high court recalled that "the collectivization of critical thought and the right to criticize institutions, persons and institutes must be fomented as expression of the citizenry and as a way of seeking out the truth or essence of things." Finally, it emphasized that "criminalization of conduct cannot be confused with discussion about its criminalization [...] Otherwise, it would not be compatible with the dynamism and diversity - both cultural and political (pluralism) - of the democratic society in which we live, where freedom of expression is the best expression of freedom."

50. Following this reasoning, in a ruling dated June 24, 2008,[47] the Supreme Court of Justice of Argentina found that "one of this Court's functions is to support, contribute to and protect the basic consensuses for the functioning of a society in which different opinions can coexist together in tolerance. One of these fundamental principles is that of freedom of expression and oversight of public officials, as well as discussion of their decisions." In that sense, the Court emphasized that "there can be no liability for criticism or dissent, even when expressed heatedly, as every plural and diverse society needs democratic debate nurtured with opinions whose goal is social peace." The same tone is found in a recent ruling by the Supreme Court of Justice of Argentina dated October 30, 2012.[48] In *Quantín, Norberto Julio v. Benedetti, Jorge Enrique et al. on derechos personalísimos*, following what has been established by the Inter-American Court, the Supreme Court of Justice of Argentina found that expression regarding a person's suitability for holding a public office enjoys greater constitutional protection.

51. Likewise, in a ruling dated June 18, 2012,[49] the 33rd Criminal Court of the Superior Court of Justice of Lima explicitly adopted the case law and scholarship of the organs of the inter-American system regarding broad debate in matters of public interest and greater scrutiny in speech about public officials, as well as the narrower space for restrictions in these areas. In this regard, it recognized the case law of the Inter-American Court of Human rights in the sense that there should be less opportunity for restrictions to political debate or debate on questions of public interest, and that in the terms of Article 13 of the American Convention, opportunity for restrictions on expression concerning

[46] Supreme Federal Tribunal of Brazil. Judgment of November 23, 2011. Direct action of unconstitutionality 4274. Available at: http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=1955301

[47] Republic of Argentina. Supreme Court of Justice. Judgment of June 24, 2008, P.2297.XL, *Patitó, José Ángel et al. v. Diario La Nación et al.*. Available at: http://www.cpj.org/newon2008/americaonArgentina.Court.24-06-08.pdf

[48] Republic of Argentina. Supreme Court of Justice. Judgment of October 30, 2012, *Quantín, Norberto Julio cl Benedetti, Jorge Enrique et al. si derechos personalísimos*. Available at: http://www.csjn.gov.ar/confal/ConsultaCompletaFallos.do?method=verDocumentos&id=693527

[49] Republic of Peru. 33° Criminal Court of the Superior Court of Justice of Lima. Case file 24304-2009-0-1801-JR-PE-33. Resolution No. 38 of June 18, 2012.

public officials or other persons exercising functions of a public nature must be particularly narrow. Regarding this latter issue, it reiterated that "those persons who have an influence on issues in the public interest are exposed to greater scrutiny, and are consequently at greater risk of criticism."

52. In analyzing the case in question, the Court found that "honor with regard to individuals who have exercised a public function and are public personalities [as in the case of complainant] are based on the legal status they assume." For the Court, "on having been a State minister and member of the Congress of the Republic, a greater opportunity for criticism is required, [which] does not mean that he does not have honor, but rather that he does but in a more limited sense due to the function he has taken up."

53. The 17th Criminal Circuit Court of the First Circuit in Panama ruled likewise in judgment No. 13 of July 17, 2012,[50] whereby it acquitted three journalists that had been charged with the crime of defamation [*injuria y calumnia*] for expression that supposedly damaged the honor of a National Police of Panama official. The Court recognized that the facts leading to the criminal complaint were verified in the exercise of public functions and therefore deserved the attention and coverage of the accused as part of their work as journalists. In this regard, the Court recognized that "this is established in Article 11 of the Declaration of Basic Principles on Freedom of Expression of the Inter-American Commission on Human Rights, (X ANNIVERSARY - October 19, 2000-2010), which indicates, among other things, that '*public officials are subject to greater scrutiny by society*.'"

54. For its part, the Supreme Court of Justice of the Nation of Mexico, with the support of the jurisprudence and scholarship of the organs of the inter-American system, has established case law standards in this regard. Thus, in its judgment dated June 17, 2009,[51] the Supreme Court held that "freedom of the press and the right to give and receive information provides especially vigorous protection for expression and circulation of information related to politics, and more broadly, matters of public interest." For this high court, protection of the free circulation of this kind of speech "is especially relevant in order for these freedoms to fully accomplish their strategic functions with regard to the formation of public opinion in the structural scheme of representative democracy." Citing this Office of the Special Rapporteur's 2008 annual report, it highlighted that special protection for political speech and speech on matters of public interest "extends to electoral speech, which focuses on candidates seeking to hold public office." For this Tribunal, "citizen oversight of the activities of individuals who hold public office or have held it in the past (officials, elected positions, members of political parties, diplomats, private individuals performing state or other functions in the public interest, etc.) increases transparency in State activities and promotes the accountability of all of those who have governing duties. This necessarily means that there is greater space for disseminating the statements and evaluations that are inseparable from the political debate or matters of public interest."

[50] Republic of Panama. Seventeenth Court of the First Criminal Circuit of Panama. Judgment No. 13 of July 17, 2012.

[51] United States of Mexico. Supreme Court of Justice. Direct *Amparo* Appeal 2044-2008, of June 17, 2009. Available at: http://www2.scjn.gob.mx/juridica/engroseoncerradoonpublico/08020440.010.doc

55. It emphasized that, "[o]ne of the specific rules that has been most agreed upon in the area of comparative law and international human rights law […] is the rule according to which individuals who hold or have held public responsibilities […], as well as candidates seeking to hold them, have a right to privacy and honor that is generally more flexible than the right held by ordinary citizens when it comes to the actions of the mass media in exercising their rights to express themselves and inform." In this regard, it recalled "the instrumental relationship between freedom of expression and information and the proper development of democratic practices."

56. As a corollary to this, for the Supreme Court of Justice of Mexico, it is possible to speak of a favorable "bonus" or "special" position of the right to freedom of expression and the right to information when those rights come in conflict with the so-called "personal rights" [*derechos de la personalidad*] of public officials, among which are the right to privacy and the right to honor; "this is for reasons strictly linked to the type of activity that they have decided to perform, which requires intense public scrutiny of their activities." On referring to the facts of the case, it found that "the threshold of the intensity of the criticism and debate to which persons like the one referenced in the news item in question can be exposed to is very high and not easy to cross for reasons that open the door to claims of civil or criminal liability."

5. Case law on crimes of desacato

57. Likewise, in accordance with the foregoing, the IACHR and its Office of the Special Rapporteur have indicated repeatedly that application of the criminal offense of *desacato* to those who disseminate expression that is critical of public officials is, *per se*, contrary to the American Convention,[52] given that it constitutes an application of subsequent liability for the exercise of freedom of expression. This is unnecessary in a democratic society, and it is disproportionate due to the serious effects it has on the person issuing the expression and on the free flow of information in a society. Likewise, Principle 11 of the Declaration of Principles establishes that, "[l]aws that penalize offensive expressions directed at public officials, generally known as '*desacato* laws,' restrict freedom of expression and the right to information."[53]

[52] See, IACHR, Annual Report 1994. OEA/Ser.L/V.88 Doc. 9 rev. 1. 17 February 1995. Chapter V (Report on the Compatibility of "*Desacato*" Laws with the American Convention on Human Rights). Title I. Available at: http://www.cidh.org/annualrep/94eng/chap.5.htm

[53] The Inter-American Court has also examined, in specific cases, the disproportionate nature of *desacato* laws and of the prosecution under those laws of individuals who exercise their freedom of expression. For example, in the Case of *Palamara Iribarne v. Chile* the Inter-American Court noted that "by pressing a charge of contempt, criminal prosecution was used in a manner that is disproportionate and unnecessary in a democratic society, which led to the deprivation of Mr. Palamara-Iribarne's right to freedom of thought and expression with regard to the negative opinion he had of matters that had a direct bearing on him and were closely related to the manner in which military justice authorities carried out their public duties during the proceedings instituted against him. The Court believes that the contempt laws applied to Palamara-Iribarne established sanctions that were disproportionate to the criticism leveled at government institutions and their members, thus suppressing debate, which is essential for the functioning of a truly democratic system, and unnecessarily restricting the right to freedom of thought and expression." In the Case of *Tristán Donoso* v. Panama, the Inter-American Court highlighted the positive fact that after convicting Mr. Tristán Donoso for defamation [*calumnia*] based on the statements he made about a senior official, the country's laws changed to prohibit sanctions for *desacato* and other limitations on freedom of expression. *Cf.,* IACHR, Office of the Special Rapporteur for Freedom of

58. According to the Inter-American Commission, these types of laws are a measure to silence unpopular ideas and opinions and dissuade criticism by causing fear of legal action, criminal sanctions and fines. Regarding this, the IACHR has been emphatic that the *desacato* legislation is disproportionate due to the sanctions it establishes for criticism leveled at government institutions and their members, thus suppressing debate that is essential for the functioning of a truly democratic system, as well as unnecessarily restricting the right to freedom of thought and expression.[54]

59. In what has been a clear showing of fruitful dialogue that has arisen between the organs of the system and the States in the region, in the last decade laws that criminalize defamation of public officials in Mexico, Panama, Uruguay, Costa Rica, Argentina and El Salvador have been struck down.[55] Legal rulings that have sought to adjust legal frameworks to meet inter-American standards on the subject have been particularly important for this trend, declaring as they have that these types of laws are not compatible with Article 13 of the American Convention.

60. This was the case with the Court of Constitutionality of Guatemala in the aforementioned judgment dated February 1, 2006,[56] in which it found that criticism of the performance of a public function is constitutionally exempt from criminal liability. In this regard, it explained that "due to the performance of the function that falls to them, [public officials] are subject to greater scrutiny by society, such that laws that penalize offensive expression directed at public officials are in violation of the right to freedom of expression and the right to information."

Expression. *Inter-American Legal Framework of the Right to Freedom of Expression*. OEA/Ser.L/V/II CIDH/RELE/INF. 2/09. December 30, 2009. Paras. 142-143. Available at: http://www.oas.org/en/iachr/expression/doconpublicationonINTER-AMERICAN%20LEGAL%20FRAMEWORK%20OF%20THE%20RIGHT%20TO%20FREEDOM%20OF%20EXPRESSION%20FINAL%20PORTADA.pdf

[54] See, IACHR, Annual Report 1994. OEA/Ser.L/V.88 Doc. 9 rev. 1. 17 February 1995. Chapter V (Report on the Compatibility of "*Desacato*" Laws with the American Convention on Human Rights). Title I. Available at: http://www.cidh.org/annualrep/94eng/chap.5.htm

[55] For Instance, Mexico repealed the federal norms that permitted individuals who offended the honor of a public official to be tried for criminal defamation, and a number of the states of the Mexican Federation have done the same. In 2007, the National Assembly of Panama similarly decriminalized defamation in relation to criticism or opinions regarding official acts or omissions of high-ranking public servants. In April 2009, the Supreme Court of Brazil declared the Press Law incompatible with the Brazilian Constitution; the Law had imposed severe prison and pecuniary penalties on journalists for the crime of defamation. In June 2009, the legislature of Uruguay eliminated from the Criminal Code the sanctions for the dissemination of information or opinions about public officials and matters of public interest, with the exception of those cases where the person allegedly affected could demonstrate the existence of "actual malice". In November 2009, the legislature of Argentina passed a reform to the Criminal Code doing away with prison terms for the crime of defamation, and decriminalizing speech about matters of public interest. Following this trend, in December of 2009, the Supreme Court of Costa Rica derogated a provision of the Press Law that established a prison penalty for crimes against honor. Similarly, in December of 2011 the Legislative Assembly of El Salvador approved a reform that substituted fines for prison sentences where crimes against honor are concerned and established greater protection for expressions dealing with public figures or matters of public interest.

[56] Republic of Guatemala. Court of Constitutionality. Judgment of General Partial Unconstitutionality, Case file 1122-2005, of February 1, 2006. Available at: http://www.cc.gob.gt/siged2009/mdlWeb/frmConsultaWebVerDocumento.aspx?St_DocumentoId=807270.html

61. For the Court, "it is inescapable that the expectation of being criminally sanctioned for expression of opinions can have a chilling effect on those who express them, such that although the criminal provision does not explicitly provide for censorship, it indeed can cause citizens to self censor in matters regarding which, in a democratic system, criticism is necessary for providing a basis for the corresponding scrutiny of public functions."

62. In this ruling, the high court recognized that the right to freedom of expression is not absolute and is subject to subsequent liability. However, it held that "in the case of statements about public officials regarding actions taken in the exercise of their duties, [subsequent liability] can only be established and later punished through civil sanctions, as […] the existence of a criminal sanction could inhibit the oversight of public administration that is necessary in a democratic society should the sanction be used as an instrument to repress criticism of public administration."

63. This Court explicitly recognized that "the Inter-American Commission on Human Rights has found that laws that establish the crime of *desacato* are not compatible with Article 13 of the American convention on Human Rights. It determined that they are not compatible with the standard of necessity and that the objectives they seek are not legitimate, on finding that this type of law lends itself to abuse as a means of silencing unpopular ideas and opinions and repressing debate that is necessary for the effective functioning of democratic institutions." The Court of Constitutionality of Guatemala ruled similarly in judgment 863-2010 of August 24, 2010.[57]

64. In a similar fashion, in a judgment dated September 20, 2012,[58] the Constitutional Plurinational Tribunal of Bolivia declared Article 162 of the Penal Code unconstitutional. The article called for a harsher prison sentence for those who commit defamation [*calumnia, injuria o difamación*] against a public official (*desacato*). The judgment includes a broad reflection on the history of the criminal offense, the proportionality of this kind of punishment, the right to equal treatment of citizens and public officials, and the incompatibility of the crime of *desacato* with international human rights commitments.

65. For the Tribunal, *desacato* creates an unconstitutional situation of inequality of public officials and citizens, which in turns disproportionately affects the right to freedom of expression. For example, on examining the constitutionality of the criminal offense of defamation against a public official, the Constitutional Tribunal held that "the opportunity to allege, in the public interest, the commission of a crime and, fundamentally, acts of corruption, must be practically without restrictions. The ability to make those allegations must be guaranteed for all citizens, who cannot find their capacity to allege acts of corruption to be limited."

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[57] Republic of Guatemala. Court of Constitutionality. Appellate Judgment of *Amparo*, Case file 4628-2009, of September 14, 2010. Available at: http://www.cc.gob.gt/siged2009/mdlWeb/frmConsultaWebVerDocumento.aspx?St_DocumentoId=815146.html

[58] Plurinational State of Bolivia. Constitutional Tribunal. Action of Unconstitutionality Case file: 00130-2012-01-AIC Judgment 1250/2012 of September 20, 2012. Available at: http://www.tribunalconstitucional.gob.bo/moduleonver_resolucion/indexnew.php?id=125150

66. In this regard, it emphasized that "the crime of *desacato* represents a disproportionate reaction to false allegations of the commission of crimes by public servants, as it means that a criminal complaint can only be brought against a public official when it is certain that a crime has been committed. This unnecessarily disincentivizes citizens from denouncing irregularities and prevents serious criminal investigations from being launched to corroborate or dismiss the complaints. This understanding [of *desacato* laws] does not mean leaving public servants defenseless when they are accused falsely of the commission of crimes."

67. In this judgment, the Constitutional Tribunal recognized "the regional tendency of eliminating the aforementioned criminal offense, a trend that is also broadly supported by human rights bodies: fundamentally, on our continent, by the case law of the Inter-American Court of Human Rights and the work of the Inter-American Commission on Human Rights." In this regard, it held that "maintaining this criminal offense in a domestic legal system not only represents a failure to comply with our international commitments, but also discredits democratic and legitimate governments in the eyes of the rest of the international community - of course, including the Plurinational Constitutional Tribunal itself - by raising unjustified suspicions regarding the violation of freedom of expression, an aspect that necessarily should be taken into consideration for finding the crime of *desacato* unconstitutional."

6. Case law on the admissibility of limitations to freedom of expression: general framework

68. The Commission and the Inter-American Court have indicated that the right to freedom of expression is not absolute and can be subjected to certain limitations, according to subparagraphs 2, 4 and 5 of Article 13 of the American Convention. In order to be legitimate, those limitations must meet a series of specific conditions. Particularly, Article 13(2) requires that three basic conditions be met for a limitation on the right to freedom of expression to be admissible: 1) the limitation must be defined precisely and clearly in a law – in the formal and material sense, 2) the limitation must be oriented toward achieving the legitimate objectives authorized by the American Convention, and 3) the limitation must be necessary in a democratic society for achieving the legitimate aims that it seeks; strictly proportional to the aim pursued; and suitable for achieving the crucial objective that it seeks to achieve.[59]

69. During the last decade, the highest courts in the region have explicitly incorporated inter-American precedents on the subject. This has been done, among other places, by the Court of Constitutionality of Guatemala, in previously cited ruling 1122-2005;[60] the Supreme Court of Justice of Argentina in *Patitó, José Ángel et al. v. Newspaper*

[59] IACHR, Office of the Special Rapporteur for Freedom of Expression. *Inter-American Legal Framework of the Right to Freedom of Expression*. OEA/Ser.L/V/II CIDH/RELE/INF. 2/09. December 30, 2009. Paras. 66 *et seq*. Available at: http://www.oas.org/en/iachr/expression/doconpublicationonINTER-AMERICAN%20LEGAL%20FRAMEWORK%20OF%20THE%20RIGHT%20TO%20FREEDOM%20OF%20EXPRESSION%20FINAL%20PORTADA.pdf

[60] In its judgment, the Court of Constitutionality indicated that "responsibility in the exercise of free expression of thought is supported in the framework of international human rights law, as set forth in the

La Nación et al.;[61] the Plurinational Constitutional Tribunal of Bolivia,[62] in its recent judgment of September 25, 2012; the Supreme Court of Justice of the Nation of Mexico; and the Constitutional Court of Colombia in its reiterated case law.[63] In their rulings, the courts extensively cite inter-American case law and scholarship, demonstrating its crucial role in the implementation of inter-American standards.

70. For example, in its previously-cited judgment of September 20, 2012,[64] the Plurinational Constitutional Tribunal of Bolivia found that the reasoning used by the Inter-American Court of Human Rights in the case of *Herrera Ulloa* v. *Costa Rica* as far as the requirements for establishing subsequent liability "must be used to interpret the Constitution" of Bolivia.

71. Likewise, the Constitutional Court of Colombia has in a number of rulings explicitly recognized that "the general framework of admissible limitations to freedom of expression is provided by articles 19 of the International Covenant on Civil and Political Rights and 13 of the American Convention on Human Rights, which orient interpretation of Article 20 of the [Colombian Constitution] and other concordant law."[65] Effectively, for the

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principles contained in Articles 13(2) of the American Convention on Human Rights and 19(3) of the International Covenant on Civil and Political Rights."

[61] In the judgment, the Supreme Court of Argentina indicated that "as held by the Inter-American Court of Human Rights in the case "*Herrera Ulloa v. Costa Rica*", the legality of restrictions placed on the freedom of expression contained in Article 13(2) of the American Convention on Human Rights turns on whether they seek to satisfy an imperative public interest." The Court emphasized that "given various means of achieving this objective, the one that least restricts the right protected should be chosen. In light of this standard, it is insufficient to demonstrate, for example, that the law fulfills a useful or convenient purpose; in order to be compatible with the Convention, restrictions must be justified according to collective goals that, due to their importance, clearly prevail over the social need to enjoy to the fullest extent the right guaranteed by Article 13 and do not limit this right to a greater degree than is strictly necessary. That is, the restriction must be proportionate to the interest that it justifies and be narrowly tailored to reach this legitimate objective (Advisory Opinion 5/85, November 13, 1985, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism; "Case of Herrera Ulloa v. Costa Rica", Judgment of July 2, 2004; European Court of Human Rights, Case of "The Sunday Times v. United Kingdom", Judgment of March 29, 1979, Series A, N° 30; "Barthold v. Germany", Judgment of March 25, 1985, Series A. N° 90)".

[62] In this judgment, the Plurinational Constitutional Tribunal of Bolivia reiterates the holding in: I/A Court H.R. *Caso Herrera Ulloa v. Costa Rica*. Judgment of July 2, 2004. Series C No. 107, paras. 113. 120.

[63] Republic of Colombia. Constitutional Court. Judgment T-391/07, of May 22, 2007. Available at: http://www.corteconstitucional.gov.co/relatoria/2007/T-391-07.htm; Constitutional Court of Colombia. Judgment C-442-11, May 25, 2011. Available at: http://www.corteconstitucional.gov.co/relatoria/2011/C-442-11.htm; Constitutional Court of Colombia. Judgment C-010/00, of January 19, 2000. Available at: http://www.corteconstitucional.gov.co/relatoria/2000/C-010-00.htm; Constitutional Court of Colombia. Judgment T-298/09, of April 23, 2009. Available at: http://www.corteconstitucional.gov.co/relatoria/2009/T-298-09.htm; Constitutional Court of Colombia. Judgment C-179-1994, April 13, 1994. Available at: http://www.corteconstitucional.gov.co/relatoria/1994/C-179-94.htm; Constitutional Court of Colombia. Judgment T-293-1994, of June 27, 1994. Available at: http://www.corteconstitucional.gov.co/relatoria/1994/T-293-94.htm; and Constitutional Court of Colombia. Judgment C-586-1995, of December 7, 1995. Available at: http://www.alcaldiabogota.gov.co/sisjur/normaonNorma1.jsp?i=4315.

[64] Plurinational State of Bolivia. Constitutional Tribunal. Action of Unconstitutionality Case file: 00130-2012-01-AIC Judgment 1250/2012 of September 20, 2012. Available at: http://www.tribunalconstitucional.gob.bo/moduleonver_resolucion/indexnew.php?id=125150

[65] Republic of Colombia. Constitutional Court. Judgment T-298/09, of April 23, 2009. Available at: http://www.corteconstitucional.gov.co/relatoria/2009/T-298-09.htm; Republic of Colombia. Constitutional Court. Judgment T-391/07, of May 22, 2007. Available at: http://www.corteconstitucional.gov.co/relatoria/2007/T-391-07.htm

Colombian high court, "a close reading of these provisions reveals that in order to be constitutional, limitations on freedom of expression (in the strict sense), information and the press must meet the following basic requirements: (1) they must be established by law precisely and in a limited fashion; (2) they must seek to achieve certain crucial aims; (3) they must be necessary for achieving those aims; (4) they must be subsequent and not prior to the expression; (5) they must not constitute censorship in any of its forms, which includes the requirement to remain neutral regarding the content of the expression being limited; and (6) they must not interfere excessively with the exercise of this fundamental right."[66]

72. For this high court, "any legal or factual action, either general or specific in nature, that directly or indirectly limits the exercise of freedom of expression in any of its manifestations, carried out by any Colombian State authority, regardless of its rank or position within the State structure, must be considered a possible invasion of the exercise of this right, and therefore must be submitted to strict constitutional review for the purposes of determining if the requirements that make a State limitation on the exercise of this important freedom admissible have been met."[67]

73. Likewise, the Supreme Court of Justice of the Nation of Mexico has indicated repeatedly in its case law that "the general rule is that people can freely express their opinions without any limitation."[68] In that sense, the court has found that in order to be considered legitimate, "restrictions on the right to freedom of expression and information must be established by law, seek the protection of one of the interests or rights protected by law under Article 13(2) of the American Convention, and meet the standards of reasonableness and proportionality."[69]

7. Case law on the need for limitations to be established clearly and precisely by law

74. Both the Commission and the Inter-American Court have held "that every limitation on freedom of expression must be established beforehand in a law and established explicitly, strictly, precisely and clearly, both substantively and procedurally. This means that the law's text should clearly establish the grounds for subsequent liability

[66] Republic of Colombia. Constitutional Court. Judgment T-391/07, May 22, 2007. Available at: http://www.corteconstitucional.gov.co/relatoria/2007/T-391-07.htm. According to the Constitutional Court of Colombia, "[t]his presumption is *de facto* and allows for the submission of evidence to the contrary; nevertheless, the authority that establishes the limitation bears the burden of demonstrating that the strict constitutional requirements for establishing a limitation in this area are met." In this sense, it explained that the presumptions impose three burdens on the authorities: (i) *the burden of definition*, which consists of defining the end that is pursued by restricting the freedom, the legal base for the restriction and the specific effect that the freedom could have on the legal interest that is sought to be protected by the limitation; (ii) *the burden of argument*, according to which the authority must demonstrate that the constitutional presumptions do not apply to the case; (iii) *the burden of proof*, by which the authorities must demonstrate the validity of the evidence that they present in order to justify restrictions on freedom of expression.

[67] Republic of Colombia. Constitutional Court. Judgment T-391/07, of May 22, 2007. Available at: http://www.corteconstitucional.gov.co/relatoria/2007/T-391-07.htm

[68] United States of Mexico. Supreme Court of Justice. Judgment of *Amparo* Appeal 248/2011, July 13, 2011. Available at: http://www2.scjn.gob.mx/juridica/engroseoncerradoonpublico/11002480.002.doc

[69] United States of Mexico. Supreme Court of Justice. Judgment of *Amparo* Appeal 248/2011, July 13, 2011. Available at: http://www2.scjn.gob.mx/juridica/engroseoncerradoonpublico/11002480.002.doc

to which the exercise of freedom of expression could be subjected."[70] It has been emphasized that vague, ambiguous, broad or open-ended punitive laws, by their mere existence, discourage the dissemination of information and opinions out of fear of punishment and can lead to broad judicial interpretations that unduly restrict freedom of expression.

75. In the cases *Kimel* v. *Argentina* and *Usón Ramírez* v. *Venezuela*, the Inter-American Court specified that "should the restrictions or limitations be of a criminal nature, it is also necessary to strictly meet the requirements of the criminal definition in order to adhere to the *nullum crimen nulla poena sine lege praevia* principle. Thus, they must be formulated previously, in an express, accurate, and restrictive manner. The legal system must affor legal certainty to the individuals,"[71] especially when criminal law is the most severe and restrictive measure for establishing liability for illegal conduct.[72] For the Inter-American Court, "this means a clear definition of the conduct in question that establishes its characteristics and allows for it to be differentiated from activity that is not punishable or from noncriminal illegal activity."[73]

76. The review of judgments contained hereinafter will examine closely not only the existence of a prior law as a basis for limitations to the right to freedom of expression, but also the degree of precision and clarity of its provisions as one of the essential aspects of this requirement.

77. For example, in its previously cited ruling T-391/07 of May 22, 2007,[74] the Constitutional Court of Colombia explained that "pursuant to applicable international human rights treaties and by virtue of the legality principle, limitations on freedom of expression must be established by law clearly, explicitly, in a restrictive manner, beforehand, and precisely, for which reason authorities establishing those restrictions outside legal authorization or without such authorization violate this constitutionally protected freedom." According to this high court, "the degree of precision with which the corresponding laws are drafted must be sufficiently specific and clear to allow individuals to regulate their conduct in keeping with them. This requirement is identified with the prohibition on limiting freedom of expression with vague, ambiguous, broad or nonspecific legal mandates." Although the court recognizes that it is impossible to reach a level of absolute certainty in the wording of laws, "the degree of precision, specificity and clarity in the legal definition of the limitation must be such that it avoids discrimination, persecution

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[70] IACHR, Office of the Special Rapporteur for Freedom of Expression. *Inter-American Legal Framework of the Right to Freedom of Expression*. OEA/Ser.L/V/II CIDH/RELE/INF. 2/09. December 30, 2009. Para. 69. Available at: http://www.oas.org/en/iachr/expression/doconpublicationonINTER-AMERICAN%20LEGAL%20FRAMEWORK%20OF%20THE%20RIGHT%20TO%20FREEDOM%20OF%20EXPRESSION%20FINAL%20PORTADA.pdf

[71] I/A Court H.R. *Case of Kimel v. Argentina. Merits, Reparations and Costs*. Judgment of May 2, 2008. Series C No. 17, para. 63; *Case of Usón Ramírez v. Venezuela*. *Preliminary Exceptions, Merits, Reparations and Costs*. Judgment of November 20, 2009. Series C No. 207, para. 55.

[72] I/A Court H.R. *Case of Usón Ramírez v. Venezuela*. *Preliminary Exceptions, Merits, Reparations and Costs*. Judgment of November 20, 2009. Series C No. 207, para. 55.

[73] I/A Court H.R. *Case of Usón Ramírez v. Venezuela. Preliminary Exceptions, Merits, Reparations and Costs*. Judgment of November 20, 2009. Series C No. 207, para. 55.

[74] Republic of Colombia. Constitutional Court. Judgment T-391/07, of May 22, 2007. Available at: http://www.corteconstitucional.gov.co/relatoria/2007/T-391-07.htm

and arbitrary actions by the authorities in charge of enforcing the law in question." On ruling on the action for protection, the Constitutional Court of Colombia found that the restriction under discussion was based on vague parameters whose specific content was not clarified by the judge who ordered the measure, such as "public morality," the "defense of public patrimony," the "cultural heritage of the nation," "public safety," "public health," and the "rights of radio consumers and users in Colombia."

78. The legitimacy of vague and ambiguous restrictions to freedom of expression had already been taken up by the Constitutional Court of Colombia in ruling C-010/00 of January 19, 2000,[75] which raised questions regarding a law ordering radio broadcasters to follow "ambiguous and nonexistent 'universal dictates of decorum and good taste,' as the order implies the predominance of certain world views over others."[76] It expressed that these notions have to do with aesthetic criteria that is highly indeterminate and culturally relative, subject to *ex post facto* definition by the entities regulating radio frequencies, and that the law fails to recognize "the requirement that limitations to freedom of expression be established specifically, restrictively and beforehand, by law, as Article 13-2 of the Inter-American Convention (*sic*) and Article 19 of the International Covenant on Civil and Political Rights of the United Nations indicate."

79. In that judgment, the Court also ruled unconstitutional the provision that prohibited a "haranguing, speechifying or declamatory tone" in radio broadcasts. For the court, "the enormous ambiguity that the application of this restriction would imply would place freedom of expression at excessive risk, without it being clear that the provision helps to achieve an important constitutional aim." Thus, it highlighted that "even if one could eventually theoretically define what a haranguing, speechifying, or declamatory tone is, the practice of defining whether a specific broadcast should or should not be classified as having one or more of these features would be very problematic, as what is at issue is a classification of degree that is very difficult to specify. It is therefore not clear as of what level of vehemence or passion on the part of the speaker we would begin to see a tone that could be qualified as harassing or speechifying. For this reason, the definition of which content is punishable would be left to the subjective criteria of the authorities in charge of monitoring compliance with those regulations."

80. Similarly, in a judgment dated June 21, 2012, the Supreme Court of the United States ruled in the cases of *FCC, et al. v. Fox Television Stations, Inc., et al., Petitioners v. Fox Television Stations, Inc. et al.* and the case of *FCC, et al., petitioners v. ABC, Inc., et al.*[77] that the provisions on the use of "fleeting expletives" that the Federal Communications Commission applied to issue fines to these networks and their affiliates were excessively vague from a constitutional point of view, which may have had a chilling effect on expression. In its analysis of the cases, the Court found that the history of Federal

[75] Republic of Colombia. Constitutional Court. Judgment C-010/00, of January 19, 2000. Available at: http://www.corteconstitucional.gov.co/relatoria/2000/C-010-00.htm

[76] Article 2. "Without prejudice to the freedom of information, broadcasting services should be designed to diseminate culture and affirm the essentials values of the Colombian nationality. Radio programs must use the Castillian language properly and respect the universal standards of decorum and good taste."

[77] United States of America. Supreme Court. *Federal Communications Commission, et al. v. Fox Television Stations, Inc.*, Opinion No. 10-1293 (2012). Available at: http://www.supremecourt.gov/opinionon11pdf/10-1293f3e5.pdf

Communications Commission regulation makes it clear that the policy in force at the time of the broadcasts in question did not provide reasonable warning to Fox or ABC. In this regard, the Court recalled that according to the "void for vagueness" doctrine, a punishment or sanction does not provide due process if its legal basis does not give a "person of ordinary intelligence" reasonable warning regarding what is prohibited or is so standardless that it authorizes or invites arbitrary or discriminatory application.

81. Although the Supreme Court did not examine the First Amendment implications of the Federal Communications Commissions' indecency policies, it indicated that "even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech."

82. As a corollary to this, in recent years some courts in the region have ruled specifically on the formulation of the crime of defamation [*injuria y calumnia*] in criminal codes and their compatibility with the fundamental *nullum crimen nulla poena sine lege praevia* principle and the right to freedom of expression. For example, in the judgment declaring Article 1 of the Press Law of the state of Guanajuato unconstitutional,[78] the Supreme Court of Justice of Mexico explained that when rules that establish subsequent liability "are criminal in nature and allow individuals to be deprived of property and fundamental rights - including, in some cases, their liberty - the requirements regarding [strict formulation of the law] are even more vigorous." On examining the facts of the specific case, it concluded that the provision that served as the basis for the criminal conviction in question[79] does not "satisfy the conditions of the restrictiveness that is part of the general *nullum crimen nulla poena sine lege praevia* principle, nor the requirement, functionally equivalent in this case, that every restriction of freedom of expression be established beforehand in a law with the status of statute, whose wording is clear and precise."

83. In this regard, the Supreme Court explained that, first of all, there is "a patent lack of clarity […] produced by the structurally defective construction of something that in our system […] is subjected to strict requirements: the wording of a criminal offense." Second, it found that some of the terms of the provision were obviously vague and excessive in scope, as they made reference to merely hypothetical damages and covered both direct violations of reputation, such as simple "discrediting," and violations that individuals could suffer "to their interests." For the Court, "the presence of this latter expression irredeemably blurs the interest or right that the legislators supposedly must protect from abusive exercises of freedom of expression and leaves the criminal offense completely open."

[78] United States of Mexico. Supreme Court of Justice. Direct *Amparo* Appeal 2044-2008, of June 17, 2009. Available at: http://www2.scjn.gob.mx/juridica/engroseoncerradoonpublico/08020440.010.doc.

[79] United States of Mexico. Article 1 of the Press Law of Guanajuato. Available at: http://docs.mexico.justia.com/estataleonguanajuato/ley-de-imprenta-del-estado-de-guanajuato.pdf

84. Analogously, the Court of Constitutionality of Guatemala indicated in the aforementioned ruling of February 1, 2006, that the principle of legality in criminal matters is even more relevant in democratic systems when what is at issue is punishing "the carrying out of conduct that according to the spirit of a constitutional system cannot be punished as criminal."[80]

8. Case law on the need for limitations to be oriented toward achieving a legitimate aim recognized by the American Convention

85. The second condition that limitations on freedom of expression must meet according to the Convention is that they must be oriented toward achieving aims that are authorized by the Convention. Effectively, the American Convention narrowly establishes the aims that can serve as a basis for a legitimate limitation of freedom of expression, those being respect for the rights or reputations of others and the protection of national security, public order, or public health or morals. These are the only aims authorized. This is explained by the fact that the limitations must be necessary in order to achieve imperative public interests that, due to their importance in specific cases, clearly prevail over society's need for full enjoyment of the freedom of expression protected by Article 13.

86. This Office of the Special Rapporteur has emphasized that States are not free to interpret the content of these aims however they wish in order to justify the limitation of freedom of expression in specific cases.[81]

87. With a similar tone, in previously-cited judgment T-391/07,[82] the Constitutional Court of Colombia explained that in order to be legitimate, limitations on freedom of expression must "seek to accomplish certain imperative ends or aims that have been set forth in the abstract in applicable treaties - the protection of the rights of others, protection of security and public order, protection of public health and protection of public morals - but that the limitations must be specific and set forth by law."

88. In this regard, the Court observed that these ends (a) must be subjected to strict interpretation in order to maximize the range of freedom of expression; (b) the list of aims must be a restrictive one, outside of which there are no additional justifications or aims for limiting freedom of expression; (c) in harmony with the principle of legality, it is not enough to invoke aims in the abstract to justify a particular limitation; it must be demonstrated in each specific case that the elements exist to conclude that a specific and imperative public interest effectively exists; (d) it must be compatible with the essential

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[80] Republic of Guatemala. Court of Constitutionality. Judgment of General Partial Unconstitutionality, Case file 1122-2005, February 1, 2006. Available at: http://www.cc.gob.gt/siged2009/mdlWeb/frmConsultaWebVerDocumento.aspx?St_DocumentoId=807270.html

[81] IACHR, Office of the Special Rapporteur for Freedom of Expression. *Inter-American Legal Framework of the Right to Freedom of Expression*. OEA/Ser.L/V/II CIDH/RELE/INF. 2/09. December 30, 2009. Para. 75. Available at: http://www.oas.org/en/iachr/expression/doconpublicationonINTER-AMERICAN%20LEGAL%20FRAMEWORK%20OF%20THE%20RIGHT%20TO%20FREEDOM%20OF%20EXPRESSION%20FINAL%20PORTADA.pdf

[82] Republic of Colombia. Constitutional Court. Judgment T-391/07, of May 22, 2007. Available at: http://www.corteconstitucional.gov.co/relatoria/2007/T-391-07.htm

principles of a democratic society and social rule of law, and (e) it must be compatible with the principle of human dignity.

89. In the case in question, the Court specified that "it is not enough to limit the broadcasting of sexually explicit expression with the mere invocation of "public morality" - a very vague concept - without specifying the form this takes in this particular case as far as a specific interest deserving of constitutional protection. Nor can broadcasts be restricted based on a mention of the "rights of children" in the abstract, without closely and strictly bearing the burden of proof of demonstrating both the predominant presence of children in the audience to a particular expression and the damage that they have suffered or could clearly suffer by virtue of that expression."

9. Case law on the requirement that the limitation must be necessary in a democratic society, suitable for achieving the imperative aim that it seeks to achieve, and strictly proportional to the end sought

90. Inter-American case law has been emphatic in the sense that States that place limitations on freedom of expression are required to demonstrate that the limitations are necessary in a democratic society for achieving the imperative aims that they seek. In this sense, it has specified that in order for a restriction to be legitimate, it must clearly establish the true and imperative need for establishing a limitation: that is, that the aim cannot be reasonably achieved by means that are less restrictive to human rights, which in turn suggests that the means of restriction is in reality the least burdensome available. In addition, it has established that any limitation to the right to freedom of expression must be a suitable instrument for achieving the end sought through its imposition - that is, it must be a measure that effectively leads to achieving the legitimate and imperative aims pursued.

91. But restrictions to freedom of expression must be more than suitable and necessary. In addition, they must be strictly proportional to the legitimate aim that justifies them, and they must hew strictly to achieving that aim, interfering as little as possible in the legitimate exercise of that freedom.[83] According to the Inter-American Court, in order to establish the proportionality of a restriction that limits freedom of expression with the aim of preserving other rights, three factors must be evaluated: (i) the degree to which the other right is affected - greatly, intermediately, moderately; (ii) the importance of ensuring the other right; and (iii) if ensuring the other right justifies restriction of freedom of expression. There are no *a priori* answers or formulas for general application in this area: the result of the balance struck will be different in each case, in some cases giving precedence to freedom of expression, in others to the other right.[84] If subsequent liability

[83] I/A Court H.R. *Case of Eduardo Kimel v. Argentina*. Judgment of May 2, 2008. Series C No.177, para. 83; *Case of Palamara Iribarne v. Chile*. Judgment of November 22, 2005. Series C No. 135, para. 85; *Caso Herrera Ulloa v. Costa Rica*. Judgment of July 2, 2004. Series C No. 107, para. 123; *The Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 of the American Convention on Human Rights). Advisory Opinion 5/85 of November 13, 1985. Series A No. 5, para. 46; IACHR. Pleadings before the Inter-American Court of Human Rights in the *Case of Herrera Ulloa v. Costa Rica*. Transcribed in: I/A Court H.R. *Case of Herrera Ulloa v. Costa Rica*. Judgment of July 2, 2004. Series C No. 107, para. 101.1.B).

[84] I/A Court H.R. *Case of Kimel v. Argentina.* Judgment of May 2, 2008. Series C No. 177, para. 84.

applied in a specific case turns out to be disproportionate or does not serve the interests of justice, Article 13(2) of the American Convention has been violated.[85]

92. In harmony with this, a number of judgments from the Constitutional Court of Colombia have explained that pursuant to international treaties, "the third requirement established in order for limitations on freedom of expression to be acceptable […] is that they must be necessary and proportional for achieving the aim pursued."[86] In a number of its rulings, the Court has found legal provisions, administrative actions and court orders to be in violation of the Constitution for failing to meet this requirement.

93. For example, in previously cited ruling C-010/00,[87] the Court found a number of provisions of Law 74 of 1966, on radio broadcasting, to be unconstitutional after subjecting them to a strict examination of proportionality pursuant to the requirements established by the country's Constitution and the American Convention. First, the high court observed that a provision that prohibits certain types of expression on the radio may seek a constitutionally significant aim, such as preventing the disturbance of public order, but it would not be constitutional solely for this reason. The Court explained that the measure must also be suitable and proportional on pursuing that aim. In this regard, it emphasized that "in order for the limitations to be legitimate, it is necessary, pursuant to the terms of the Inter-American Court, for the restriction not only to hew closely to achieving that aim, but that in addition, that the restriction be the one that places the least limitation on freedom of expression."

94. In the specific case in question, the Constitutional Court found that a provision that prohibits radio broadcasts with a "haranguing, speechifying or declamatory tone" does not meet this standard, as "one could call on listeners in a heated and emphatic tone to respect public order and obey laws, meaning the provision would exclude completely innocuous speech." A provision prohibiting journalistic or news programs on the radio from portraying another person through imitation of that person's voice also does not meet this standard. The Court indicated that although the prohibition in question is a clear and narrow restriction, "it restricts freedom of expression beyond what is strictly necessary to ensure the truth of the news." It explained that "those programs could include a section, clearly differentiated from the presentation of the news, in which imitations and parodies of some personality are used in a critical or humorous way. Under those conditions, and as long as the media outlet takes the necessary measures to prevent causing any confusion for the listener, the Court finds that the absolute prohibition of voice imitations is excessive, even for these programs."

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[85] IACHR, Office of the Special Rapporteur for Freedom of Expression. *Inter-American Legal Framework of the Right to Freedom of Expression*. OEA/Ser.L/V/II CIDH/RELE/INF. 2/09. December 30, 2009. Paras. 84-89. Available at: http://www.oas.org/en/iachr/expression/doconpublicationonINTER-AMERICAN%20LEGAL%20FRAMEWORK%20OF%20THE%20RIGHT%20TO%20FREEDOM%20OF%20EXPRESSION%20FINAL%20PORTADA.pdf

[86] Republic of Colombia. Constitutional Court. Judgment C-417/09, June 26, 2009. Available at: http://www.corteconstitucional.gov.co/relatoria/2009/C-417-09.htm

[87] Republic of Colombia. Constitutional Court. Judgment C-010/00, January 19, 2000. Available at: http://www.corteconstitucional.gov.co/relatoria/2000/C-010-00.htm

95. Finally, on examining the legitimacy of a law that bans broadcasting person-to-person messages over the radio, such as greetings and dedications, the Court expressed that it could not find a constitutional interest of great importance to justify it. On one hand, it considered an argument according to which the ban seeks to ensure "greater seriousness among broadcasters on preventing the dissemination of banal, capricious or colloquial messages over the radio." Regarding this, the Court found that "this aim is not sufficiently constitutionally relevant for authorizing a general legal restriction of freedom of expression, as established in the law being challenged." On the other hand, it weighed an argument according to which this prohibition protected the reputation of individuals and the public order. Although it recognized that the aims were legitimate in this case and of sufficient constitutional importance to authorize a restriction of radio freedom, it emphasized that "in no way is it clear that a general ban on broadcasting these interpersonal messages constitutes a proportional and necessary measure for achieving these aims, given that not only is the prohibition absolute, meaning that totally innocuous and banal communications are unjustly excluded, but also, the law could establish more effective measures that are less harmful to freedom of expression in order to protect these same constitutional rights."

96. Another case relevant for the application of a balance of proportionality can be found in judgment, C-417/09 of June 26, 2009,[88] in which the Constitutional Court of Colombia used the standards developed previously to examine the legitimacy of a provision of the Penal Code that restricted individuals accused of defamation [*calumnia*] from exercising the *exceptio veritatis.* The provision in question prevented the judge from admitting evidence regarding the veracity of the imputation of a sanctionable conduct that has been the subject of a judgment of acquittal, termination of investigation or dismissal of the charges.[89] The Constitutional Court found that as the issue involves a fundamental right that is especially valuable for the Colombian constitutional system, as is the right to freedom of expression and information, a more strict and intense balance of proportionality must be applied. In its ruling, the Court indicated that in these kinds of balances, it is not enough to establish that the measure is legitimate, apt and effectively leads to achieving the proposed aim: "one also must also study whether the provision is necessary and strictly proportional."

97. The judgment found that the provision under examination had a legitimate aim from a constitutional perspective, as it sought to protect fundamental rights like honor and good name. In addition, the provision was adequate and even effectively led

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[88] Republic of Colombia. Constitutional Court. Judgment C-417/09, June 26, 2009. Available at: http://www.corteconstitucional.gov.co/relatoria/2009/C-417-09.htm. Similarly, in Judgment T-391/07 the Constitutional Court of Colombia further developed the criteria according to which the constitutional judge must perform the strict proportionality test in these cases.

[89] The provision examined is Article 224(1) of the Criminal Code, according to which:

"Article 224. Defenses. Criminal responsibility will not result from the conduct described in the preceding articles if the truth of the imputations is proven.

However, no proof will be admitted:

1. Regarding the imputation of any sanctionable conduct that has been the subject of a judgment of acquittal, termination of investigation or dismissal of the charges or the equivalent, unless it is due to the prescription of the cause of action, and

2. Regarding the imputation of conduct that involves sexual, romantic, marital or family life, or the victim of a crime against liberty and sexual integrity.

to achieving that aim. However, the Court found that the balance of proportionality related with necessity and strict proportionality led to a different conclusion. After noting that other legal measures existed that were sufficient and pertinent for achieving the legitimate aim sought, the Court then stated the following:

> "The measure taken by the provision is neither imperative, nor useful; in contrast, it is extremely burdensome for freedom of expression. *Exceptio veritatis* frees a plaintiff accused of the crime of defamation [*calumnia o injuria*] of criminal liability when that person demonstrates that the statements were true. Specifically, what distinguishes the provision under review is that it excludes these grounds for exemption even for situations in which the person accused of the crime of defamation [*calumnia*] demonstrates the truth of his or her statements. [...] That is, according to the provision under review, for cases in which a final ruling has been handed down by the criminal justice system, the only possible route is forgetting, independent of the conduct a person has been accused of and its seriousness for the legal system and the functioning of national institutions.
>
> Evidently, this represents a radical limitation to freedom of expression that, given the preeminent character of this right, cannot be accepted from a constitutional perspective. Therefore, the conclusion is that the provision under review does not cross the threshold of necessity, as it employs an excessive measure for protecting honor and good name, and, from that substantive point of view, the principles of *res judicata* and legal certainty, abolishing in practice the freedom of expression and information for the cases in question. That is, in the words of the Inter-American Court of Human Rights, which have been taken up by this constitutional court, the provision does not meet the requirement of providing for a measure 'interfere to the least extent possible with the effective exercise of the right.'"

10. Case law on subsequent civil liability

98. As far the imposition of subsequent liability through civil sanctions, the Inter-American Court established in the case of *Tristán Donoso v. Panama* that these could be just as intimidating and have just as much of a chilling effect on the exercise of freedom of expression as a criminal sanction. In this regard, it observed that "the fear of a civil penalty, considering the claim […] for a very steep civil reparation, may be, in any case, equally or more intimidating and inhibiting for the exercise of freedom of expression than a criminal punishment, since it has the potential to attain the personal and family life of an individual who accuses a public official, with the evident and very negative result of self-censorship both in the affected party and in other potential critics of the actions taken by a public official."[90]

99. In a judgment dated April 30, 2009, the Supreme Federal Tribunal of Brazil found after examining the unconstitutionality of the Press Act passed during the military regime that the rewarding of excessive pecuniary indemnities against media outlets can constitute in itself a powerful inhibiting influence on freedom of expression. For the tribunal indemnities of this kind violate the proportionality principle of restrictions and are therefore a violation of freedom of expression. In this sense, it found that "the magistrate must take into account that every conviction of a media outlet, in whatever

[90] I/A Court H.R. *Case of Tristán Donoso v. Panamá.* Preliminary Exception, Merits, Reparations and Costs. Judgment of January 27, 2009 Series C No. 193, para. 129.

form it may take or tool it may use, inhibits the future exercise of freedom of expression and therefore reduces the possibility of moving forward in democratic learning."

11. Case law on the special protection of opinions and the nonexistence of a crime of opinion

100. As inter-American scholarship and case law have specified, "truthfulness or falseness may only be established in respect of facts, not opinions."[91] Consequently, no one can be held liable for a simple opinion about a person or particular fact.[92]

101. The Supreme Court of Justice of Argentina ruled similarly in a October 30, 2012, judgment in the case of *Quantín, Norberto Julio v. Benedetti, Jorge Enrique et al* on *derechos personalísimos.* In that ruling, the high court granted constitutional protection to the broadcasting of opinions over the radio that, although potentially considered shocking or painful for the listener, must be tolerated for the purposes of fostering broad and democratic debate in society.

102. In the case, the Supreme Court examined through an extraordinary remedy the legitimacy of a civil damages award for the broadcast of expression that was allegedly defamatory [*injuriosas y calumniosas*] toward a former public official. The first thing that the high court observed was that it was necessary to specify whether what was at issue was expression in which "priority is given to the statement of facts (factual assertions) or if on the contrary, one is in the presence of expression in which ideas, opinions, critical or value judgments, or, why not, conjectures and hypotheses are what predominate."[93] In this regard, it held that the expression could be guilty of serious hyperbole without making accusations "of any specific illegal fact and that, therefore, the expression cannot be subjected to a test of veracity. Thus one is limited to attributing a certain ideology" to the author; the court reiterated that, pursuant to inter-American case law, on issues of public interest, freedom of expression protects the expression of ideas that "shock, irritate or upset public officials or any sector of the population."[94]

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[91] I/A Court H.R. *Case of Kimel v. Argentina.* Judgment of May 2, 2008. Series C No. 177, para. 93; *Case of Tristán Donoso v. Panamá*. Preliminary Exception, Merits, Reparations and Costs. Judgment of January 27, 2009 Series C No. 193, para.124.

[92] IACHR, Office of the Special Rapporteur for Freedom of Expression. *Inter-American Legal Framework of the Right to Freedom of Expression*. OEA/Ser.L/V/II CIDH/RELE/INF. 2/09. December 30, 2009. Para. 109. Available at: http://www.oas.org/en/iachr/expression/doconpublicationonINTER-AMERICAN%20LEGAL%20FRAMEWORK%20OF%20THE%20RIGHT%20TO%20FREEDOM%20OF%20EXPRESSION%20FINAL%20PORTADA.pdf

[93] Republic of Argentina. Supreme Court of Justice. Judgment of October 30, 2012, "Quantín, Norberto Julio v. Benedetti, Jorge Enrique et al. on derechos personalísimos". Available at: http://www.csjn.gov.ar/confal/ConsultaCompletaFallos.do?method=verDocumentos&id=693527

[94] Republic of Argentina. Supreme Court of Justice. Judgment of October 30, 2012, "Quantín, Norberto Julio v. Benedetti, Jorge Enrique et al. on derechos personalísimos". Available at: http://www.csjn.gov.ar/confal/ConsultaCompletaFallos.do?method=verDocumentos&id=693527. The Constitutional Court of Colombia has also examined the different treatment that should be accorded to opinions or value judgments. In the previously cited judgment 417/09 of June 26, 2009, the Court indicated generally that "an opinion, unless it is expressed with the express and effective purpose of offending and causing real harm to persons or unless it involves the inclusion of speech that is not protected, ... is and must be free, because in a democratic and pluralistic State founded upon the dignity of the human being, *inter alia*, taking into account that an opinion consists of a point of view, a judgment, a perception of reality derived from the exercise of other

103. With that same structure of ideas, the Constitutional Chamber of the Supreme Court of Costa Rica[95] has emphasized in a number of judgments that the right to correction and reply is granted only in response to the dissemination of newsworthy or factual information considered to be inaccurate and damaging, and not with regard to "personal ideas or opinions held by their author - good or bad, and whether or not they are shared - and whose free expression is also protected by constitutional law." On the same subject, individual criminal court judge of Paraguay Manuel Aguirre Rodas, in a judgment dated June 30, 2011, acquitted a journalist accused of the crime of defamation [*injuria y calumnia*], on finding that the news item, which referred to allegations of political corruption, contained opinions based on verifiable documents and sources, which did not merit a sanction[96].

12. Case law on the application of the principle of "actual malice" when establishing subsequent liability

104. Interpreting the American Convention, Principle 10 of the Declaration of Principles states that, "[p]rivacy laws should not inhibit or restrict investigation and dissemination of information of public interest. The protection of a person's reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest. In addition, in these cases, it must be proven that in disseminating the news, the social communicator had the specific intent to inflict harm, was fully aware that false news was disseminated, or acted with gross negligence in efforts to determine the truth or falsity of such news."

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fundamental liberties such as thought, conscience and religion, and must be the subject of broad respect and protection, even when it contains expressions that are considered ungracious, offensive or disturbing for the State or for others. That is to say that in contrast to the affirmation of facts that are presented by means of the exercise of freedom of information or the press, which are seen as having factual support, complying with the constitucional requirements of truth and impartiality or social responsibility in the case of the communications media, an opinion is an idea, an appearance or a way of seeing the world, and if it is found to be unjust or impertinente, it should be fought with other opinions or appearances, and not with sanctions of any kind, least of all criminal." Constitutional Court of Colombia. Judgment C-417/09, of June 26, 2009. Available at: http://www.corteconstitucional.gov.co/relatoria/2009/C-417-09.htm

[95] Republic of Costa Rica. Constitutional Chamber of the Supreme Court of Justice. Judgment of November 7, 2002, issued in a remedy of *amparo* filed by Roberto Hernández González against the newspaper *La Nación* and Edgar Espinoza. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&nValor2=221646&strTipM=T&strDirSel=directo

[96] Individual Tribunal of the Republic of Paraguay. Presiding Judge Manuel Aguirre Rodas. June, 30 2011. Case Sandra López Curtido on difamación et al. S.D.N. No. 41. Available at: http://archivo.abc.com.py/descargables/sd-sandra-lopez262.pdf; See also: Instituto Prensa y Sociedad (IPYS). July 1, 2011. *Paraguay: Absuelven a periodista acusada de difamación por empresaria.* Available at: http://www.ipys.org/index.php?q=noticia/695; ABC. July 1, 2011. *Magistrado absuelve a periodista y ratifica libertad de prensa y opinión*. Available at: http://www.abc.com.py/nota/magistrado-absuelve-a-periodista-y-ratifica-libertad-de-prensa-y-opinion/; ABC. June 29, 2011. *Abogados de Zuni pidieron pena de dos años y medio contra periodista*; Available at: http://www.abc.com.py/nota/abogados-de-zuni-solicitaron-pena-de-dos-anos-y-medio-contra-periodista/; Paraguay.com. June 30, 2011. *Sandra López: "Con el fallo ganó la libertad de expresión"*. Available at: http://www.paraguay.com/nacionales/sandra-lopez-con-el-fallo-gano-la-libertad-de-expresion-72501

105. The Inter-American Court has taken the opportunity to rule on the application of the standard of "actual malice." Thus for example, in the case of *Usón Ramírez v. Venezuela*, the Inter-American Court found that the statements for which Usón was convicted had been formulated conditionally, and as a consequence could not be understood as an expression intended to cause damage: "[i]n this case, when conditioning his opinion in such a way, it is clear that Mr. Usón Ramírez was not stating that a premeditated crime had been committed, but that in his opinion such a crime seemed to have been committed in case the hypothesis about the use of the flamethrower was true. An opinion conditioned in such a way cannot be subjected elements which question veracity. Furthermore, the above shows that Mr. Usón Ramírez lacked any specific intention to insult, offend, or disparage since if he had had the intent to do so, he would not have conditioned his opinion in such a way."[97]

106. In harmony with this, in cases of subsequent liability, senior courts in the region have used this standard when evaluating whether someone is individually liable for the publication of information that is in the public interest. For example, in the previously-cited judgment of June 28, 2008, the Supreme Court of Justice of Argentina noted in the case of *Patitó, José Ángel et al.* v. *Diario La Nación et al.*[98] that it has incorporated into its case law "the principle of actual malice, and not the test of truth as adequate protection of freedom of expression" when what is at issue is the publication of expression that may have negative effects on the reputation of persons connected with public issues. Effectively, in this ruling, the high court reiterated its settled case law in the sense that "with regard to information referring to public officials, public figures, or private individuals who have participated in public issues, when the news item contains false or inaccurate expressions, those who consider themselves affected must demonstrate that those who made the expression or accusation knew the news item was false and acted with the knowledge that it was false or with evident recklessness with regard to its veracity."

107. The Supreme Court explained that "the principle of actual malice, in contrast to the test of veracity, does not operate based on the objective truth or falsehood of expression, given that it is applied when it is already accepted that the truth of the statements at issue cannot be proven, or when the statements are erroneous, or even false. What is subject to discussion and proof, if actual malice is at issue, is whatever knowledge that the journalist or media outlet had (or should have had) of the falsehood or possible falsehood. This is the first difference, and an important one. The second difference, no less important, is that the specific content of the subjective factor to which the concept of actual malice alludes (knowledge of the falsehood or negligent indifference regarding the possibility of falsehood) cannot be presumed to be the case; rather, it must be proven with evidence by the person bringing suit against the journalist or media outlet."

108. In this ruling, the Supreme Court expressed that the principle of actual malice is based on the recognition of the role that investigative journalism plays in public

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[97] I/A Court H.R. *Case of Usón Ramírez v. Venezuela.* Preliminary Exception, Merits, Reparations and Costs. Judgment of November 20, 2009. Series C No. 207. Para. 86.

[98] Republic of Argentina. Supreme Court of Justice. Judgment of June 24, 2008, P.2297.XL, *Patitó, José Ángel et al. v. Diario La Nación et al.*. Available at: http://www.cpj.org/newon2008/americaonArgentina.Court.24-06-08.pdf

matters in a democratic system. According to the court, "excessive rigor and intolerance of error would lead to self-censorship, depriving the citizenry of the crucial information necessary for making decisions about their representatives." Based on these considerations, the Court concluded that on having failed to apply this principle in the case in question, "the space necessary for the development of broad and robust public debate on subjects of general interest and that has been guaranteed by Article 14 of the National Constitution was unacceptably restricted." This standard was repeated in a later ruling handed down on May 19, 2010, in the case of *Di Salvo, Miguel Ángel* v. *Diario La Mañana on daños y perjuicios."*[99]

109. Likewise, the First Chamber of the Mexican Supreme Court of Justice found in a judgment dated June 17, 2009,[100] that the standard of malice "requires expression that allegedly causes damage to the reputation of a public official to have been issued with the intention of causing that damage, with the knowledge that the facts being disseminated were false, or with clear negligence regarding the review of apparent veracity or lack of veracity of the facts. Otherwise, individuals could be gripped by the fear of completely accidentally committing a violation and becoming liable for the issuing of expression or information, which could directly or indirectly lead to abruptly restricting the exercise of their rights to express themselves or inform."

110. The Permanent Criminal Chamber of the Supreme Court of Justice of Peru explained that "meddling with the reputation or the right to honor of a politician or a public official - whose position is political in nature - subject to appointment by a political body or not - in the exercise of political authority will be legitimate [...] as long as the facts, which entail matters of public or general interest, are true - understood as subjective veracity: knowledge of the falsehood of what was expressed or later knowledge that the fact being alleged is false (specific intent and willful ignorance, respectively) - and that, where appropriate, the judgment calls have sufficient factual basis."[101] In this regard, it recalled that when what is at issue is expression directed at public officials exercising their public authorities, the limitations on the right to freedom of expression must be interpreted restrictively.

111. Another case that is illustrative in its application of the doctrine of "actual malice" can be found in judgment No. 161 handed down on June 2, 2010, by the Criminal Appeals Court of Uruguay.[102] In this ruling, the Tribunal overturned the conviction of the managing director of weekly *Tres Puntos*, in Paysandú, for the crime of defamation that had been based on two articles raising questions about connections between regional

[99] Republic of Argentina. Supreme Court of Justice. Judgment of May 19, 2010, D 281 XLIII*, Di Salvo, Miguel Ángel v. Diario La Mañana on daños y perjuicios.* Available at: http://www.csjn.gov.ar/expcon/documentoonCase fileoncons_expe.jsp

[100] United States of Mexico. Supreme Court of Justice. Direct *Amparo* Appeal 2044-2008, June 17, 2009. Available at: http://www2.scjn.gob.mx/juridica/engroseoncerradoonpublico/08020440.010.doc.

[101] Republic of Peru. Permanent Criminal Chamber of the Supreme Court of Justice. Judgment of June 18, 2010. RN No. 1372/2010. Available at: http://www.pj.gob.pe/wponwcm/connect/fdec1e004bf42509a767b73aa702a2d1/SPP+R.N.+N%C2%BA+1372-2010+-+Amazonas.pdf?MOD=AJPERES&CACHEID=fdec1e004bf42509a767b73aa702a2d1

[102] Oriental Republic of Uruguay. Court of Criminal Appeals. Judgment No. 161 of July 12, 2010. Case files: COELHO *JURIOL—Ricardo José. Denuncia Ley 16.099 v. MORALES BARTABURO, Rodrigo. I.U.E.*: 30257/2009.

police and acts of corruption. According to the Tribunal, the facts must be examined "according to the 'actual malice' of the author of the article, which is what is legally required in order to cross the threshold of criminal responsibility." In this regard, it found that the accusation was exempt from liability, as pursuant to this doctrine, "the news items do not reflect and the plaintiff has not proven - in keeping with his burden of proof under the law - that the author intended to offend anyone or violate their privacy." For the tribunal, "the journalist divulged information about the public official that appeared plausible according to the evidence and in addition, there is no indication of any intention to discredit the official or violate his privacy with actual malice." Finally, the Tribunal expressed that on issues in the public interest, the legal system in force in that country places the burden on the plaintiff to prove that the journalists acted with knowledge that the fact attributed was false or with the sole purpose of insulting the person or violating his privacy.

112. The 17th Criminal Circuit Court of the First Circuit in Panama ruled similarly in judgment No. 13 of July 17, 2012[103], whereby it acquitted three journalists accused of the crime of defamation [*injuria y calumnia*] for expression issued to the alleged detriment of the honor of an official of the Panama National Police. In its ruling, the Court indicated that the journalists "did not act with actual malice, as there is no indication of a reckless disregard for the truth."

13. Case law on the application of the principle of fair (or neutral) reporting

113. The ruling of the Inter-American Court in the case of *Herrera Ulloa* v. *Costa Rica* introduces the principle of "neutral reporting" or "fair reporting" to the inter-American system. According to this principle, those who disseminate a news item that is limited to copying statements or information from third parties will not be subjected to tests of veracity, as long as the source is cited. In the case in question, the journalist was criminally convicted because according to the judge ruling on the case, he was not able to prove the truth of facts narrated in his articles that referred to the conduct of a public official abroad, even though the news item was a faithful reproduction of content from a number of different European newspapers.[104] In its ruling, the Inter-American Court found that the conviction of journalist Herrera Ulloa constituted an excessive limitation of freedom of expression, as the news item disseminated by him had been faithfully attributed to a source.

114. In a judgment dated October 11, 2011, the Temporary Criminal Chamber of the Supreme Court of Justice of Peru[105] acquitted a journalist of the crime of aggravated defamation and fully annulled the July 27, 2011, judgment of the Superior Court of Ucayali upholding a conviction. The journalist had been convicted and sentenced to 18 months in prison and payment of 20,000 *nuevos soles* in civil damages (about US$7,400). In its ruling,

[103] Republic of Panama. Seventeenth Court of the First Criminal Circuit of Panama. Judgment of Acquittal No. 13 of July 17, 2012.

[104] I/A Court H.R. *Case of Herrera Ulloa v. Costa Rica*. Judgment of July 2, 2004. Series C No. 107. Paras. 131-133.

[105] Republic of Peru. Transitory Criminal Chamber of the Supreme Court of Justice. October 11, 2011 (R.N. No. 2436-11). Available at: http://historico.pj.gob.pe/CorteSuprema/documentoonSPT_R_N_N_2436_2011_UCAYALI.pdf

the Criminal Chamber indicated that "what the defendant did […] was disseminate something that had already been previously disseminated. In the scholarship, the aforementioned conduct is known as neutral reportage." Regarding this, it explained that "scholarship on the issue indicates that there is no liability when: 1) the individual issuing the expression limits him or herself to disseminating content that has already been disseminated, 2) the media outlet that previously disseminated the news item is identified, and 3) what is being repeated is not distorted."

115. On ruling in the case in question, it held that "in sum, it is not that the defendant before the court has accused the citizen [...] of committing criminal acts; to think this would be irrational if one takes into account that the citizen has already been brought to trial for the facts indicated in the publication, and that the publication even indicates this using underlined sections of text corresponding to links on the internet that according to the defendant would take us to the source of the information from which the information in the news item related with the plaintiff was taken, having [...] faithfully reported what appeared in previous publications." Based on this, it concluded that "the defendant has made proper use of his right to inform through neutral reportage - that is, he has not surpassed the limits imposed on this fundamental right, in the sense that the defendant's right to honor has not been affected, as his status as a politician holding state office subjects him to a degree of criticism."

116. On referring to the publication of information on a private individual based on information provided by an official source, the Supreme Court of New Jersey ruled that the "fair-report privilege" protects journalists who have provided accurate information regarding official documents such as court records and final judgments. Thus, in a judgment dated May 11, 2010, in the case of *Salzano v. North Jersey Media Group,* [106] the Court explained that in general terms, "one such privilege is accorded to the publication of defamatory matter concerning another in a report of an official action or proceeding, or of a meeting open to the public that deals with a matter of public concern". Accordingly, "if the publication, in fact, satisfies that standard, the state of mind of the publisher is irrelevant […] and thus, immune from a defamation suit because of the fair-report privilege".

117. According to this line of reasoning, it found that the "fair-report privilege" also applies to briefs filed in any court action related to the proceedings. In this regard, it specified that "we are convinced that the public policy underpinning of the fair-report privilege—advancement of the public's interest in the free flow of information about official actions—would be thwarted by the recognition of the initial pleadings exception. A full, fair, and accurate report regarding a public document that marks the commencement of a judicial proceeding deserves the protection of the privilege**".**

118. The Supreme Court of Justice of Argentina ruled in a similar sense in the case of *Canavesi, Eduardo Joaquín et al. v. el Diario 'El Día' Soc. Impr. Platense SACI on*

[106] United States of America. Supreme Court of New Jersey. *Salzano v. North Jersey Media Group.* Judgment of May 11, 2010. Available at: http://www.aclu-nj.org/download_file/view_inline/65/391/

daños y perjuicios[107], brought against newspaper *El Día* in the city of La Plata for having published false information on a private individual based on information provided by an official source. In a brief judgment handed down on June 8, 2010, the Supreme Court overturned the ruling against the newspaper, indicating that "it shares and adopts the reasoning and conclusions put forth in the report by the Public Prosecutor which shall be remitted for reasons of brevity." In that report, the prosecutor held that, "the simple reproduction of news provided for distribution by public authorities does not, even when false, cross beyond what is the regular exercise of the right to report, as the status of the source excuses the press from having to confirm the truth of the facts, and because prior confirmation of the news under these circumstances would limit this right, establishing a true restriction on the freedom of information. These are the circumstances in place in the case under adjudication." In this regard, it recalled that based on the case law of that high court in the case of Campillay, "the journalistic medium is exempt from liability when it faithfully attributes a news item to a source - as happened in this case - given that the news therein ceases to be its own. In addition, it has found that when this standard is adopted, the origin of information becomes transparent, allowing readers to connect it not with the medium through which the information has been received, but with the specific source generating it. This is beneficial for those affected by the information, as their eventual complaints - if they believe they have a right to raise them - can be directed against those who truly issued the news item, and not against those who simply provided a channel for distribution."[108]

119. The Third Criminal Chamber of the First Section of the Center of El Salvador followed a similar line of reasoning in a judgment dated July 22, 2011. In that ruling, the Chamber rejected a suit against three directors and a journalist of the newspaper *La Prensa Gráfica* for the crime of defamation [*calumnia*]. The suit had been brought by a member of the military named in a news item published on November 30, 2010. The Chamber found that there was no harmful intent in the publication and ruled that it was transmitting information from third parties. The case began when *La Prensa Gráfica* published that unidentified sources of the Drug Enforcement Agency (DEA) of the United States and the National Civilian Police of El Salvador had revealed the names of two soldiers - one on active duty and the other retired - being investigated for alleged connections with organized crime.

14. Case law on the liability of intermediaries on the Internet and the application of the principle of "mere conduit"

120. In their Joint Declaration on Freedom of Expression and the Internet (2011), the special rapporteurs for freedom of expression of the UN, the OSCE, the OAS and the African Commission rejected attempts by some States to hold actors considered to be intermediaries in the provision of Internet services liable for damaging or illegal Internet

[107] Republic of Argentina. Supreme Court of Justice. *Canavesi, Eduardo Joaquín et al. v. Diario 'El Día' Soc. Impr. Platense SACI on daños y perjuicios.* Judgment of June 8, 2010. Case file C. 3548. XLII. Available at: http://www.csjn.gov.ar/expcon/documentoonCase fileoncons_expe.jsp

[108] Republic of Argentina. Public Ministry, Attorney General of the Nation. *Canavesi, Eduardo Joaquín et al. v. Diario 'El Día' Soc. Impr. Platense SACI on daños y perjuicios.* Case file C. 3548. XLII. Decision of November 29, 2007.

content.[109] This includes a broad range of actors who participate as intermediaries on the Internet - and provide services such as access to Internet connections, transmission, processing and routing of Internet traffic, storage of material published by third parties, and access to it, references to content or searches for information on the Internet, financial transactions and the facilitation of social networks. For the special rapporteurs, according to the mere conduit principle, "as long as they do not specifically intervene in that content or refuse to obey a court order to remove that content, where they have the capacity to do so", intermediaries must not be held responsible.[110]

121. With this logic, this Office of the Special Rapporteur recognizes the ruling handed down on October 19, 2010, by the Supreme Court of Canada in the case of *Crookes v. Newton*,[111] in which it analyzed whether an individual could be convicted for defamation for placing links on a website that lead to content that is defamatory (or allegedly defamatory) toward third parties. In its ruling, the Court found that a link or hyperlink can never in and of itself be seen as a publication of the content to which it makes reference. For this reason, the person who made it cannot in principle be sued for defamation. In this regard, it explained that a person who makes a hyperlink does not have control over the content referenced - that is, that person is only an intermediary.

122. To reach this conclusion, the Court was categorical on indicating that, "The Internet cannot, in short, provide access to information without hyperlinks." According to the Court, "limiting their usefulness by subjecting them to the traditional publication rule would have the effect of seriously restricting the flow of information and, as a result, freedom of expression". In this sense, it noted the potentially devastating chilling effect on the way in which the Internet functions, as the authors of articles would not risk possible repercussions by linking to other articles over whose content they have no control. For the Court, "given the core significance of the role of hyperlinking to the Internet, we risk impairing its whole functioning. Strict application of the publication rule in these circumstances would be like trying to fit a square archaic peg into the hexagonal hole of modernity."

15. Case law on the prohibition of prior censorship and the requirement of neutrality toward the content of expression or information

[109] The United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. *Joint Declaration on Freedom of Expression and the Internet*. June 1, 2011. Available at: http://www.oas.org/en/iachr/expression/showarticle.asp?artID=849&lID=1

[110] Article 2(a), of the Joint Declaration on Freedom of Expression and the Internet of the United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-operation in Europe (OSCE) Representative on Freedom of the Media, the Organization of American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples' Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information. *Joint Declaration on Freedom of Expression and the Internet*. June 1, 2011. Available at: http://www.oas.org/en/iachr/expression/showarticle.asp?artID=849&lID=1

[111] Canada. Supreme Court of Justice. *Crookes v. Newton*, 2011 SCC 47. Available at: http://scc.lexum.org/decisia-scc-csv.scc-csv.scc-csv.en/item/7963/index.do

123. This Office of the Special Rapporteur has explained that prior censorship takes place when the government takes *prior* measures to prevent the free circulation of information, ideas, opinions or news using any type of proceeding that gives the State control over expression or circulation of information - for example, by prohibiting publications or confiscating them, or by carrying out any other procedure oriented toward that same end.[112]

124. In this regard, Principle 5 of the Declaration of Principles establishes that, "[p]rior censorship, direct or indirect interference in or pressure exerted upon any expression, opinion or information transmitted through any means of oral, written, artistic, visual or electronic communication must be prohibited by law. Restrictions to the free circulation of ideas and opinions, as well as the arbitrary imposition of information and the imposition of obstacles to the free flow of information violate the right to freedom of expression;" and Principle 7 establishes that, "prior conditioning of expressions, such as truthfulness, timeliness or impartiality is incompatible with the right to freedom of expression recognized in international instruments."

125. Likewise, in the case of *"The Last Temptation of Christ " (Olmedo Bustos et al.)* v. *Chile*,[113] the Inter-American Court examined a prohibition imposed by the Chilean judicial authorities on the exhibition of the film "The Last Temptation of Christ" at the request of a group of citizens who had sought a remedy by invoking protection of the image of Jesus Christ, the Catholic Church, and their own rights. In highlighting some of the most important characteristics of freedom of expression - for example, its dual individual and collective dimensions and its critical democratic function, and recalling that this right protects both information that is positive, indifferent or inoffensive and information that is shocking, upsetting or offensive to the State or society - the Inter-American Court concluded that Chilean authorities had committed an act of prior censorship not compatible with Article 13 of the American Convention. The Tribunal noted that the violation of the American Convention had occurred not only due to the court rulings in question, but also due to the existence of an article in the Chilean Constitution setting forth a system of prior censorship for cinematic exhibition, thus conditioning the acts of all three branches of public power; it therefore ordered Chile to adapt its internal legal system to the Convention's provisions.[114] The Court ruled similarly later on in its judgment in the case of *Palamara Iribarne v. Chile*.[115]

126. In this line of reasoning, in the aforementioned judgment dated April 30, 2009, the Supreme Federal Tribunal of Brazil[116] found after examining the

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[112] I/A Court H.R. *Case of Palamara Iribarne v. Chile*. Judgment of November 22, 2005. Series C No. 135, para. 68.

[113] I/A Court H.R. *Case of "The Last Temptation of Christ" (Olmedo Bustos et al.) v. Chile.* Judgment of February 5, 2001. Series C No. 73.

[114] IACHR, Office of the Special Rapporteur for Freedom of Expression. *Inter-American Legal Framework of the Right to Freedom of Expression*. OEA/Ser.L/V/II CIDH/RELE/INF. 2/09. December 30, 2009. Para 149. Available at: http://www.oas.org/en/iachr/expression/doconpublicationonINTER-AMERICAN%20LEGAL%20FRAMEWORK%20OF%20THE%20RIGHT%20TO%20FREEDOM%20OF%20EXPRESSION%20FINAL%20PORTADA.pdf

[115] I/A Court H.R. *Case of Palamara Iribarne v. Chile*. Judgment of November 22, 2005, Series C No. 135.

[116] Federative Republic of Brazil. Supreme Federal Tribunal. Complaint of breach of fundamental precept 130 Federal District. April 30, 2009. Available at:

unconstitutionality of the Press Act passed during the military regime that the State cannot, through any of its agencies, define beforehand what can or cannot be said by journalists. Closely following inter-American case law and the scholarship of this Office of the Special Rapporteur, the Tribunal was emphatic in indicating that "freedom of the press cannot exist between or under the claws of censorship." In this regard, it explained that "the law prohibits the establishment of "core journalism activity," understood as time and content guidelines on expression of thought, information and creation understood broadly."

127. This standard was reiterated in the previously-cited judgment of September 2, 2010.[117] In this important ruling, the Supreme Tribunal reiterated that the State cannot decide ahead of time what individuals or journalists can or cannot say. This duty of omission, which includes its own legislative activity, includes a prohibition on determination of the content of basic journalism activities (both the moment – during elections or not – when speech can be issued and its content and information). In this sense, it emphasized that "in general, by virtue of its relationship with the public interest, journalistic criticism is not susceptible to prior censorship."

128. Likewise, in previously-cited judgment C-010-00,[118] the Constitutional Court of Colombia explained that "pursuant to the terms of the Inter-American Convention (*sic*) and constitutional law, prior censorship takes place when for any number of reasons; authorities prevent or seriously obstruct the issuing of a message or publication containing particular content. It is a measure of preventative control given that the broadcast or publication is subject to prior authorization from an authority. [...] This type of practice is strictly prohibited by the Inter-American Convention (*sic*) and by the Constitution."

129. In the same way, in a ruling dated March 29, 2011,[119] the Constitutional Chamber of the Supreme Court of Justice of Costa Rica reiterated the prohibition of prior censorship and found that prior censorship includes "every act that seeks *a priori* to censor or silence any demonstration, dissemination or communication of thought, ideas, opinions, beliefs, convictions or value judgments. Any prior condition, including requirements of the veracity, opportunity, or impartiality of information, will also be considered prior censorship."

16. Case law on the prohibition of discriminatory placement of government advertising

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http://www.stf.jus.br/portal/inteiroTeor/obterInteiroTeor.asp?id=605411&idDocumento=&codigoClasse=776&numero=13

[117] Federative Republic of Brazil. Supreme Federal Tribunal. Judgment of September 2, 2010. Precautionary Measure in Direct Action of Unconstitutionality ADI-4451. Available at: http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=2613221

[118] Republic of Colombia. Constitutional Court. Judgment C-010/00, of January 19, 2000. Available at: http://www.corteconstitucional.gov.co/relatoria/2000/C-010-00.htm

[119] Republic of Costa Rica. Constitutional Chamber of the Supreme Court of Justice. *Amparo* Remedy Res. Nº 2011004160. March 29, 2011. Available at: http://sitios.poder-judicial.go.cr/salaconstitucional/Constitucion%20Politica/Judgmenton2011/11-004160.html

130. Interpreting the American Convention, Principle 13 of the Declaration of Principles establishes that "[t]he exercise of power and the use of public funds by the state, the granting of customs duty privileges, the arbitrary and discriminatory placement of official advertising and government loans; the concession of radio and television broadcast frequencies, among others, with the intent to put pressure on and punish or reward and provide privileges to social communicators and communications media because of the opinions they express threaten freedom of expression, and must be explicitly prohibited by law. The means of communication have the right to carry out their role in an independent manner. Direct or indirect pressures exerted upon journalists or other social communicators to stifle the dissemination of information are incompatible with freedom of expression."

131. Regarding this, this Office of the Special Rapporteur has indicated that arbitrary distribution of government advertising is an indirect mechanism of censorship. It is a form of pressure that acts to reward or punish and whose purpose is to place conditions on the editorial stance of a media outlet according to the wishes of the individual exercising the pressure.[120] In that sense, it has been emphasized that regulation of the placement of government advertising must follow a series of principles as follows: (1) the establishment of special, clear and precise laws; (2) the use of government advertising for legitimate aims (to inform about public services offered and public policies implemented by the government and, in general, to disseminate information in the public interest); (3) the establishment of criteria for the allocation of government advertising, that is the States must establish procedures for the contracting and allocation of government advertising that reduce discretion and prevent suspicion of political favoritism in its distribution. Advertising funds must be allocated according to pre-established criteria that are clear, transparent, and objective; (4) adequate planning of the guidelines for placing government advertising; (5) the establishment of open, transparent and nondiscriminatory mechanisms for placing advertising; (6) the promotion of transparency and access to information on government advertising; (7) the establishment of external oversight of the allocation of government advertising; and (8) the promotion of media diversity and pluralism.[121]

132. One of the main local precedents on this issue was set in the case of *Editorial Río Negro S.A. v. Provincia de Neuquén.* A ruling in the case was handed down by the Supreme Court of Justice of Argentina in September of 2007.[122] The case has to do with a suit brought by the newspaper *Río Negro* against the province of Neuquén, whose

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[120] IACHR, Office of the Special Rapporteur for Freedom of Expression. *Principles on the Regulation of Government Advertising and Freedom of Expression*. OEA/Ser.L/V/II. CIDH/RELE/INF.6/12. March 7, 2011. Para. 10. Available at: http://www.oas.org/en/iachr/expression/doconpublicationonADVERTISING%20PRINCIPLES%202012%2005%2007%20reduce.pdf

[121] IACHR, Office of the Special Rapporteur for Freedom of Expression. *Principles on the Regulation of Government Advertising and Freedom of Expression*. OEA/Ser.L/V/II. CIDH/RELE/INF.6/12. March 7, 2011. Para. 33-82. Available at: http://www.oas.org/en/iachr/expression/doconpublicationonADVERTISING%20PRINCIPLES%202012%2005%2007%20reduce.pdf

[122] Republic of Argentina. Supreme Court of Justice, *Editorial Río Negro S.A*. Judgment of September 5, 2007, considerando 11.e. Available at: http://www.csjn.gov.ar/confal/ConsultaCompletaFallos.do?method=verDocumentos&id=632580

government had suspended its advertising in that media outlet because the newspaper had published accusations of corruption. In its ruling, the Supreme Court found that the if the State decides to place government advertising, it must do so based on two constitutional standards: "1) it cannot manipulate advertising, placing it and withdrawing it from certain media outlets [based on] discriminatory criteria; 2) it cannot use advertising as an indirect means of affecting freedom of expression."

133. Citing the Office of the Special Rapporteur's 2003 annual report, the Court found that "the State cannot arbitrarily assign advertising resources based on unreasonable standards," and found that such arbitrary placement "is a kind of pressure that, far from preserving the integrity of public debate, puts it at risk, unjustly and indirectly affecting freedom of the press and the legitimate interest that newspaper *Río Negro* and its readers have in the performance of provincial political officials in the exercise of their functions."

134. Later, in a judgment dated March 2, 2011, the Supreme Court of Justice reiterated the State's obligation to adopt a government advertising policy with objective and nondiscriminatory standards, as set forth in the *Editorial Río Negro (S.A.)* ruling.[123] The judgment upheld a 2009 ruling of the National Chamber of Administrative Contentious Federal Appeals[124] that ordered the National State "to order government advertising to be distributed among the different publications" of *Editorial Perfil* and *Diario Perfil*, which had brought the *amparo* action against the Media Secretariat of the Leadership of the Cabinet of Ministers. This standard was reiterated in the judgment handed down on February 29, 2012, by federal Argentine judge Ernesto Marinelli.[125]

135. The second Chamber of the Supreme Court of Justice of Mexico ruled on a remedy of *amparo* and protection of guarantees filed by a radio broadcaster against the Secretary of Health over its refusal to place government advertising with the appellant.[126] With explicit references to inter-American standards on the issue of freedom of expression, the Court concluded that the refusal to place advertising was based on standards that do not meet the requirements of reasonableness and proportionality established in the Constitution and the American Convention. The Secretary of Health argued that the radio broadcaster did not have the characteristics necessary for disseminating the Secretary's

[123] Republic of Argentina. Supreme Court of Justice, *Editorial Perfil S.A. et al. v. E.N. —Jefatura Gabinete de Ministros— SMC on amparo ley 16.986*. Judgment of March 2, 2011. Available at: http://www.csjn.gov.ar/confal/ConsultaCompletaFallos.do?method=verDocumentos&id=3843

[124] Chamber IV of the Chamber of Federal Contentious Administrative Law of Argentina resolved a claim presented by Editorial Perfil against the national government for having been excluded in the distribution of government advertising as a consequence of its critical editorial line. In this case, the judges of Chamber IV held that "[t]he government should avoid acts that intentionally or exclusively aim to limit the exercise of freedom of the press, as well as those that indirectly produce this result. That is to say, it is sufficient that the government action have this aim to constitute an alleged affection of this freedom. As a result, it is not necessary to cause the economic asphixiation or bankruptcy of the newspaper."

[125] Republic of Argentina. Judicial Branch of the Nation. Case File 18.639/06 *Editorial Perfil S.A. et al. v. Jefatura de Gabinete de Ministros- SMC on Amparo Ley 16.986*. Available at: http://www.perfil.com/doconfallo_perfil_2012.pdf

[126] United States of Mexico. Second Chamber of the Supreme Court of Justice. Amparo Appeal 248/2011, of 13 July 2011. Available at: http://www2.scjn.gob.mx/juridica/engroseoncerradoonpublico/11002480.002.doc

activity, given its status as a community broadcaster and for supposedly not yet being in operation.

136. In a later judgment,[127] referring to facts of the same nature, the aforementioned court found that on privileging some media outlets over others "solely based on the general range (capacity) of their broadcasts and not on their real coverage of all regions or communities in the country, [it is possible] that the placement of government advertising may become discretionary and restrictive due to unequal and undue distribution; these measures could lead to reduced protection of the rights of other radio broadcasters; this, in turn, could lead to undue restrictions to the communication and circulation of ideas and opinions through the discriminatory placement of government advertising, given the absence of specialized legislation and transparent and measurable criteria for placing government advertising; in this sense, these measures of restriction prevent the full exercise of the right to expression and information. Based on these arguments, it is concluded that the aforementioned measures of restriction are lacking in constitutional reasonableness and proportionality."

17. Case law on requirement of membership in a professional organization or holding of an academic degree to exercise the profession

137. This issue was addressed in detail by the Inter-American Court in *Advisory Opinion on Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism OC-5*.[128] In that opinion, the Inter-American Court explained that because of its close relationship with freedom of expression, journalism "cannot be equated to a profession that is merely granting a service to the public through the application of some knowledge or training acquired in a university or through those who are enrolled in a certain professional "*colegio*."" Thus, for the Court, reasons of public order that justify the requirement that other professionals be members of professional organizations cannot be invoked validly in the case of journalism because it would permanently limit - to the detriment of those not members of the professional association - the right to make full use of the rights that Article 13 of the American Convention recognizes for all individuals, "it would violate the basic principles of a democratic public order on which the Convention itself is based."

138. In this sense, Principle 6 of the Declaration of Principles expresses that, "[c]ompulsory membership or the requirements of a university degree for the practice of journalism constitute unlawful restrictions of freedom of expression."

139. In agreement with what the Inter-American Court found in Advisory Opinion OC 5/85, in a judgment dated August 24, 2010,[129] the Court of Constitutionality of Guatemala ruled on an action of *amparo* brought by the Constitutional Vice President of

[127] United States of Mexico. Supreme Court of Justice. August 24, 2011. *Amparo* Appeal 531-2011. Available at: http://www2.scjn.gob.mx/juridica/engroseoncerradoonpublico/11005310.002.doc

[128] I/A Court H.R. *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-5/85 of November 13, 1985. Series A No. 5.

[129] Republic of Guatemala. Court of Constitutionality. Case file 863-2010 of 24-08-2010. Available at: http://www.cc.gob.gt/documentosCV.ResolucionesIntPub/863-2010%2024-08-2010.pdf

the Republic of Guatemala. The action sought the nullification of a court ruling rejecting a criminal complaint filed for defamation charges [*calumnia, injuria y difamación*] that held that these offenses were committed in an opinion column published in a newspaper. One of the arguments put forth by the plaintiff during the court proceeding was that the author of the column was not registered with the Professional Council of Humanities and that based on this, the proceeding provided for in the Thought Distribution Act did not apply; rather, the plaintiff argued, standard proceedings must be used.

140. In ruling the *amparo* action inadmissible, the Court held that one of the bases for its decision was that "on being a right inherent to persons, the freedom to express a thought does not require the possession of an academic degree in journalism in order to be exercised."

141. Similarly, in a judgment dated June 17, 2009, the Supreme Federal Tribunal of Brazil ruled that the requirement to hold a journalism degree and for the professionals to register with the Ministry of Labor, as a condition for the exercise of the profession of journalist, was unconstitutional.[130] In its ruling, the Tribunal examined whether the requirement to hold a degree was an unjustified barrier to freedom of expression. In its analysis, it explicitly included Article 13 of the American Convention and the relevant scholarship of the organs that monitor compliance with that treaty, as well as the considerations put forth by the Office of the Special Rapporteur in the 2008 annual report.

142. The first issue that the Supreme Court addressed was the scope of Article 5.XIII of the Federal Constitution, which authorizes the legislature to establish requirements and regulations for the exercise of specific professions. On this point, the Supreme Court stressed that this reservation of legal authority is not absolute and, therefore, must be in keeping with proper standards of reasonableness and proportionality. Accordingly, the Supreme Court then questioned whether the requirement of a professional degree to engage in journalistic activity could be considered a reasonable and proportionate regulation in a democratic society. To answer this question, the Supreme Court used inter-American doctrine and case law expressly.

143. First, the Court sought to establish whether journalistic activity was related to or different from other professions that required a university degree in order to practice, such as medicine or law. The Supreme Court thus considered that journalism is a profession that is distinct from those others due to the fact that it is closely related to the exercise of freedom of expression. In this respect, journalism is "the very expression and dissemination of thought and information, in continuous, professional and remunerated form." Therefore, journalism and freedom of expression are two activities that overlap due to their very nature and cannot be considered and treated separately.

144. Based on this interrelatedness, the Supreme Court held that, "the requirement of a university diploma for the practice of journalism or the professional

[130] Federative Republic of Brazil. Supreme Federal Tribunal. Judgment of June 17, 2009. Extraordinary Remedy 511.961 São Paulo. Available at: http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=605643

development of the freedoms of expression and information is not authorized by the Constitution, as it is a restriction, an impediment, a true, flat-out suppression of the effective exercise of freedom of expression, which is prohibited expressly by Article 220(1) of the Constitution." The Supreme Court found that the offending law did not pass the proportionality test, as it was a prior restriction on the exercise of the right to freedom of expression. According to the Supreme Court, any control of this type that interferes with access to journalistic activity is a prior control that constitutes real prior censorship of freedom of expression. Analogously, on examining the validity of the requirement that Brazilian musicians be members of a professional organization, the Supreme Federal Tribunal held in a judgment dated August 1, 2011, that as far as the manifestation of the right to freedom of expression, one should be able to exercise artistic expression without any censorship, and without requirements of licenses or permits.[131]

18. Case law on source confidentiality

145. In its interpretation of Article 13 of the American Convention, Principle 8 of the Declaration of Principles explicitly indicates that, "[e]very social communicator has the right to keep his/her source of information, notes, personal and professional archives confidential."

146. In this regard, in judgment T-298/09 of April 23, 2009,[132] the Constitutional Court of Colombia ruled on an action of protection brought by a member of Congress requesting that an article published in the newspaper connecting him with acts of corruption based on an anonymous letter be corrected. With regard to the confidentiality of the source, the Court found that what is at issue is "a fundamental and necessary guarantee for the protection of true independence for journalists and for them to be able to exercise the profession and satisfy the right to information without any indirect limitations or threats that inhibit the distribution of information relevant for the public." The Court based its statement on its case law, the Colombian Constitution, the Declaration of Principles on Freedom of Expression of the Inter-American Commission on Human Rights (Principle 8: "Every social communicator has the right to keep his/her source of information, notes, personal and professional archives confidential"), and on the interpretation that the court itself has performed of that Declaration. In conclusion, it indicated that "in principle, and as long as statutory legislation does not establish a clear, reasonable, necessary and proportional provision to the contrary, the confidentiality guaranteed by Article 74 of the Constitution is not subject to limitations. Any attempt to impose a restriction on that guarantee currently lacks the statutory legal support necessary."

147. In reference to the conflict between the confidentiality of the source and the rights of third parties, the Court expressed that "in some circumstances, the confidentiality of a source is necessary even when it could compromise the rights of good-

[131] Federative Republic of Brazil. Supreme Federal Tribunal. Judgment of August 1, 2011. Extraordinary Remedy 414.426 Santa Catarina. Available at: http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=628395

[132] Republic of Colombia. Constitutional Court. Judgment T-298/09 of April 23, 2009. Available at: http://www.corteconstitucional.gov.co/relatoria/2009/T-298-09.htm

faith third parties. These are cases in which, without a guarantee of source confidentiality, information of great importance for society would remain unavailable. Effectively, especially in cases in which mafia or organized crime are involved, organizations that are not afraid to intimidate a source to keep him or her from revealing information that could affect their interests, source confidentiality becomes a priority guarantee necessary for brave and independent journalism to be able to carry out its work. In any case, it is true that journalists have important duties when publishing information that could incriminate third parties but that has been provided by a confidential source. In this sense, as the majority of pleadings received in this case have indicated that, in principle, ethical and professional rules require the media to offer to the public all the information that is available to them, except in special cases in which a source can be trusted and there are latent risks, and the information is relevant to the public. In these cases, greater diligence is required of journalists in the collection and assessment of information, although they cannot be required to reveal their sources."

19. Case law on the obligation to guarantee the life and safety of journalists covering armed conflict and emergency or high-risk situations

148. In a judgment issued this year case of *Veléz Restrepo and family v. Colombia*, the Inter-American Court found that "States have the obligation to adopt special measures of prevention and protection for journalists subject to special risk owing to the exercise of their profession. Regarding the measures of protection, the Court underlines that States have the obligation to provide measures to protect the life and integrity of the journalists who face this special risk owing to factors such as the type of events they cover, the public interest of the information they disseminate, or the area they must go to in order to do their work, as well as to those who are the target of threats in relation to the dissemination of that information or for denouncing or promoting the investigation of violations that they suffered or of those they became aware of in the course of their work. The States must adopt the necessary measures of protection to avoid threats to the life and integrity of journalists under those conditions."[133]

149. In this sense, judgment T-1037/08 of October 23, 2008, of the Constitutional Court of Colombia,[134] ruled on an action for protection brought against the Ministry of the Interior and Justice by a Colombian journalist who investigates issues of human rights and armed conflict. The journalist had been subjected to threats, harassment, persecution and psychological torture because of her professional activities.

150. In this ruling, the Court found that the fact of publicly questioning risk studies or the danger of the situation or the feeling of fear of someone who is being threatened is not compatible with State obligations, as one of the State's special duties with regard to individuals facing situations of high or extraordinary risk is the recognition of the situation. In that sense, the State attitude "intended to ignore, hide, lie about,

[133] I/A Court H.R. *Case of Vélez Restrepo and family v. Colombia. Preliminary Exceptions, Merits, Reparations and Costs*. Judgment of September 3, 2012. Series C No. 248. para. 194.

[134] Republic of Colombia. Constitutional Court. Judgment T-1037/08, of October 23, 2008. Available at: http://www.corteconstitucional.gov.co/relatoria/2008/T-1037-08.htm

minimize, or justify the crimes committed" constituted an additional violation of the rights of those facing a situation of risk.

151. In these cases, the Court found, it is not possible to justify the authorities' discrediting of the situation of risk faced by the journalist, given that "the right to freedom of expression when exercised by public officials exercising their duties has greater limitations than when that right is exercised by a common citizen," as the Inter-American Court of Human Rights has also found.[135] The limited scope of freedom of expression for public officials exercising their duties will be addressed in greater detail in the following section.

152. In addition, the Court held first that in order to determine that the protection that should be provided to a journalist facing special or extraordinary risk be withdrawn, "a process must be carried out in which, at least, the minimum guarantees of due process are guaranteed." These guarantees, it stated, "must extend to all criminal and administrative areas in which the State exercises a legal authority to sanction - that is, whenever it can affect the rights of a person as a result of the actions or omissions of this person that violate or injure a right that is legally protected by the system."

153. Finally, the Court argued that "when what is at issue is a journalist who, despite threats, decides to continue his or her investigations, that person will likely require special provisions that take into account the totality of the rights involved. In particular, it is obvious that communicators may need a certain amount of privacy to be able to interview a confidential source or make certain inquiries. In these cases, it becomes necessary to make special allotments designed to guarantee both the journalist's safety, and his or her work and the important rights associated with freedom of expression. Specifically, the Court cannot fail to note that in these cases, not only is the right of all persons to free personal development at issue, but also the rights to freedom of expression and source confidentiality."

154. Based on the foregoing, the Court concluded that the mandate had been violated according to which "the Ministry is obliged to adopt whatever specific, adequate and sufficient measures are necessary to prevent the extraordinary risk that has been identified from resulting in harm and to implement those measures, also in a timely fashion and according to the circumstances of each case, such that the protection is effective."

20. Case law on the limited scope of freedom of expression for public officials exercising their duties

155. The organs of the system have recognized that the exercise freedom of expression by public officials has certain specific characteristics and connotations. Thus, when public officials exercise their freedom of expression, "they are subjected to certain limitations as far as confirming to a reasonable - although not necessarily exhaustive - degree the facts on which their opinions are based. They must do so with even greater

[135] I/A Court H.R. *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*. *Preliminary Exception, Merits, Reparations and Costs*. Judgment of August 5, 2008. Series C No. 182.

diligence than necessary of private individuals based on the high degree of credibility they enjoy and in order to prevent citizens from receiving a manipulated version of the facts."[136]

156. In this regard, this office has also specified that public officials have a duty to ensure that on exercising their freedom of expression, they are not causing a violation of fundamental rights; that their statements do not constitute arbitrary, direct or indirect interference with the rights of those who contribute to public debate through expression and dissemination of their thought; and that their statements do not interfere with the independence and autonomy of legal authorities.

157. In a similar tone, in judgment T-1191, of November 25, 2004,[137] the Constitutional Court of Colombia ruled on an action of protection filed by a group of nongovernmental organizations dedicated to the defense of human rights against the then-President of the Republic of that country. The action argued that his statements - in which he accused them of having connections to terrorist groups - were a violation of their rights to honor and good name, and their rights to promote and defend human rights, as well as to the rights of their members to physical safety and life. In its ruling, the Court explained that the "President of the Republic [holds] the power-duty to maintain permanent contact with citizens through his speeches and public appearances," but that "this power-duty of the President differs substantially from simple freedom of expression recognized in general for citizens. In reality, it constitutes a legitimate means of exercising the governmental authority held by contemporary democracies."

158. In this sense, it held that "the public statements of the President of the Republic are not absolutely free, and that (i) they must strictly respect parameters of objectivity and veracity when they are simply transmitting public information or data; (ii) they are more free when taking political positions, proposing governmental policies or responding to criticism from the opposition, but that even in these events, expression of the President must include a minimum of real factual justification and meet a basic standard of reasonableness, and (iii) in all cases, his communication with the Nation must contribute to the defense of the fundamental rights of persons, especially those deserving of special protection." Regarding this latter aspect, the Constitutional Court expressed that "as with all authorities, the President holds a position as guarantor with regard to the fundamental rights of all inhabitants of his country's territory. This means that when he addresses himself to citizens, he must refrain from issuing any declaration or statement that damages or puts at risk that category of rights." The Court expressed that "this obligation [to refrain from making declarations that threaten fundamental rights] becomes more relevant when dealing with subjects who enjoy special constitutional protection such as human rights defenders, the reinserted, those displaced by violence, or members of peace communities." In addition, it emphasized that the use of mass media generates

[136] I/A Court H.R. *Case of Apitz Barbera et al. ("First Court of Administrative Disputes") v. Venezuela*. Preliminary Exception, Merits, Reparations and Costs. Judgment of August 5, 2008. Series C No. 182. para. 131. See also, I/A Court H.R. *Case of Ríos et al. v. Venezuela.* Preliminary Exception, Merits, Reparations and Costs. Judgment of January 28, 2009. Series C No. 194, para. 139; *Case of Perozo et al. v. Venezuela.* Preliminary Exception, Merits, Reparations and Costs. Judgment of January 28, 2009. Series C No. 195, para. 151.

[137] Republic of Colombia. Constitutional Court. Judgment T-1191-04 of November 25, 2004. Available at: http://www.corteconstitucional.gov.co/relatoria/2004/T-1191-04.htm

"greater responsibility than what arises through the use of other non-mass communication systems."

159. These standards were made to extend to other senior state authorities or public officials through judgments T-263/10[138] and T-627/12[139] issued later on by the Constitutional Court of Colombia. In this regard, in the judgment issued on August 12, 2012, after a review of its constitutional case law, as well as the case law of the Inter-American Court established in the cases of *Perozo et al.* and *Ríos et al.*, both against Venezuela, the Constitutional Court of Colombia found that "the statements of senior public officials – whether national, local or departmental – on matters of general interest are not part of their right to freedom of expression or opinion but rather constitute a manner of exercising their duties through communication with the citizenry."

D. National Jurisprudence on the Right to Access to Information[140]

Introduction

160. The right to access to information is a fundamental right protected by Article 13 of the American Convention. It is a particularly important right for the consolidation, functioning, and preservation of democratic systems, and as such has received significant attention from the Member States of the OAS[141] and in international case law and doctrine.

161. The Inter-American Court has established that Article 13 of the American Convention, by expressly stipulating the rights to "seek [and] receive . . . information," protects the right of every individual to access information under the control of the State, with the exceptions permitted under the narrow system of restrictions set forth in that instrument.[142]

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[138] Republic of Colombia. Constitutional Court. Judgment T-263-10 of April 19, 2010. Available at: http://www.corteconstitucional.gov.co/relatoria/2010/t-263-10.htm

[139] Republic of Colombia. Constitutional Court. Judgment T-627-12 of August 12, 2012. Available at: http://www.corteconstitucional.gov.co/relatoria/2012/t-627-12.htm

[140] The right of access to information has been one of the recurrent topics of the annual reports and publications of the Office of the Special Rapporteur. This chapter contributes to the collection of material compiled by the Office on best judicial practices of Member States in the area of access to information contained in the annual reports of 2005 (Chapter IV), 2008 (Section F of Chapter III), 2009 (Chapter IV), 2010 (Chapters III and IV), as well as the study on *The Inter-American Legal Framework regarding the Right to Access to Information (Second Edition)* of 2011.

[141] The General Assembly of the OAS holds that the right of the access to information is "a requisite for the very functioning of democracy." In this sense, all democratic American States "are obliged to respect and promote respect for everyone's access to public information and to promote the adoption of any necessary legislative or other types of provisions to ensure its recognition and effective application." General Assembly of the Organization of American States. Resolution AG/RES. 1932 (XXXIII-O/03), Access to Public Information: Strengthening Democracy, June 10, 2003. Also see: AG/RES. 2057 (XXXIV-O/04), AG/RES. 2121 (XXXV-O/05), AG/RES. 2252 (XXXV-O/06), AG/RES. 2288 (XXXVII-O/07), AG/RES. 2418 (XXXVIII-O/08), AG/RES. 2514 (XXXIX-O/09), and AG/RES. 2661 (XLI-O/11).

[142] I/A Court H.R. *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. para. 58.a)-b). See also, I/A Court H.R. *Case of López Álvarez v. Honduras.*

162. The right to access to information has been considered an essential tool for the public oversight of government and the operation of the State—especially for the control of corruption,[143] for citizen participation in public matters through, *inter alia*, the informed exercise of political rights and, in general, for the effective exercise of other human rights, especially by the most vulnerable groups.[144]

163. Indeed, the right to access to information is a critical tool for monitoring the public administration and operation of the State, and for keeping corruption in check. The right to access to information is a fundamental requirement for guaranteeing transparency and good governance. The full exercise of the right to access to information is an essential guarantee for preventing abuses by public servants, promoting accountability and transparency in public management, and preventing corruption and authoritarianism. Free access to information is also a means by which, in a representative and participatory democratic system, citizens can properly exercise their political rights. Indeed, political rights necessarily require the existence of a broad and vigorous debate, for which it is essential to have the public information that makes it possible to evaluate reliably progress and difficulties in the achievements of different authorities. Only through access to information under the control of the State is it possible for citizens to know whether government is operating properly.[145] Finally, access to information has an essential, instrumental function. Only through an adequate implementation of this right can individuals know exactly what their rights are, and what mechanisms are available for their protection. In particular, the proper implementation of the right to access to information, in all of its aspects, is a basic condition for the effective realization of social rights among socially excluded or marginalized sectors. Indeed, those sectors do not usually have safe and systematic alternative ways of knowing the scope of the rights that the State has recognized and the mechanisms for asserting and enforcing them.

164. This chapter continues in the vein of the reports on freedom of expression and access to public information put out by the Office of the Special Rapporteur in the fulfillment of its mandate, highlighting the good practices recognized and implemented by the judicial authorities of the OAS Member States. In the future, this Office of the Special Rapporteur also hopes to advance the study and systematization of

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Judgment of February 1, 2006. Series C No. 141, para. 77; *Case of Herrera Ulloa v. Costa Rica.* Judgment of July 2, 2004. Series C No. 107, para. 108.

[143] "Free access to information is a measure that, in a representative and participative democratic system, the citizens exercise their political rights; effectively, the full exercise of the right of access to information is necessary for preventing abuses by public officials, promoting transparency in government administration, and allowing solid and informed public debate that ensures the guarantee of effective recourses against government abuse and prevents corruption. Only through access to State-controlled information in the public interest can citizens question, investigate, and weigh whether the government is adequately complying with its public functions." *Cf.* I/A Court H.R. *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. paras. 86-87.

[144] IACHR. Annual Report 2008. OEA/Ser.L/V/II.134 Doc. 5 rev. 1. February 25, 2009. *Annual Report of the Office of the Special Rapporteur for Freedom of Expression*. Chapter III (Inter-American Legal Framework of the Right to Freedom of Expression). Para. 147. Available at: http://cidh.oas.org/annualrep/2008eng/Annual%20Report%202008-%20RELE%20-%20version%20final.pdf

[145] I/A Court H.R. *Case of Claude-Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151. Paras. 86-87.

the decisions rendered by some of the autonomous bodies entrusted with protecting the right to access to public information in OAS Member States, such as the Federal Institute for Access to Information and Data Protection in Mexico [*Instituto Federal de Acceso a la Información y Protección de Datos de Mexico*] (IFAI) or the Chilean Council for Transparency [*Consejo para la Transparencia*] (CPLT), which have made significant progress in the improvement of good practices in the field.

165. This Office of the Special Rapporteur has recognized that, regardless of the legal frameworks of the OAS Member States, there are some court decisions that have notably promoted the standards of access to public information in the domestic law of each one of the States. The study of this case law has been vitally important, in that it makes it possible to observe, in practice, the ways in which different judges and courts have implemented the guiding principles of the right to access to public information.

166. In addition, the Office of the Special Rapporteur continues to affirm the special importance of inter-American comparative law and its role in enriching the regional case law and doctrine. Although one of the objectives of the regional human rights protection bodies is to achieve the domestic application of inter-American standards, those standards have also been elevated thanks to developments in the institutional practices of the Member States of the OAS. The interpretations of civil society and the domestic bodies of the different States continue to create the conditions for the regional system to keep on the path of strengthening and refining its doctrine and case law on the right to access to information.

167. The following paragraphs summarize some of the most important recent decisions on access to information to which the Office of the Special Rapporteur has had access. These decisions were organized according to the main issues they address. Nevertheless, it is important to note that most of the decisions refer to various issues, and therefore it is relevant to view them comprehensively.

1. Case law on access to information as a fundamental, autonomous, universal right

168. The courts of the region have continued with the good practice of recognizing the right to access to information as a fundamental universal right.

169. In a decision dated December 5, 2012,[146] the Constitutional Division of the Supreme Court of El Salvador ruled on the constitutionality of some articles of the Regulations to the Access to Public Information Act, finding that its "indisputable status as a fundamental right" is a "starting point for approaching the right to access to information." The Court found that this status rests on two essential pillars: "the constitutional recognition of the right to freedom of expression, which assumes the right to

[146] Republic of El Salvador. Constitutional Chamber of the Supreme Court of Justice. Judgment 13-2012 (Unconstitutionality). December 5, 2012. Available at: http://www.jurisprudencia.gob.sv/visormlx/pdf/13-2012.pdf

investigate or to seek and receive public or private information of all kinds that is of public interest; and (…) the democratic principle of the rule of law or the Republic as a form of government, which imposes upon public authorities the duty to guarantee transparency and disclosure in government, as well as accountability with respect to the use of public funds and resources."[147]

170. The "fundamental right status" of the right to access to information has certain significant regulatory implications, according to the Constitutional Division of the Supreme Court of El Salvador. Indeed, the recognition of the right to access to information as a fundamental right entails, in regulatory terms: "(a) the prohibition against altering its essential content, in both its interpretation and its regulation; (b) the recognition of its objective or institutional dimension, with its positive implications of guarantees; (c) the requirement of its harmonization, proportion, or balance with other, conflicting rights; and (d) the recognition of its expansive and optimizing force."[148]

171. The Argentine Supreme Court ruled similarly in its December 4, 2012[149] decision on a petition for a constitutional remedy (*amparo*), which addressed whether the National Institute of Social Services for Retirees and Pensioners (PAMI) "is obligated to provide information regarding the official advertising developed by the institute." In resolving this issue, the Court found that it was necessary to "clarify the meaning and scope of the right to access to information." It held on this point that, "even when the [entity requesting the information] is not a State entity, given its special characteristics and the important and significant public interests involved, the refusal to provide the requested information is an arbitrary and illegitimate act [that amounts to] an action that severely curtails rights to which (…) any citizen is entitled, insofar as the information is unquestionably of public interest; those same rights make transparency and disclosure in government fundamental pillars of a society that considers itself democratic."

172. In a judgment handed down on February 8, 2012, the Supreme Court of Panama[150] recognized the universal nature of the right to access to information. The case involved the appeal of a *habeas data* petition seeking information about the Curricular Transformation system, filed by a citizen in his capacity as the Secretary of a Teachers' Association. When he failed to receive a reply within the legally established time period, the citizen filed the writ of *habeas data* in his individual capacity. The Institute questioned the petitioner's legal standing, and the Supreme Court determined that "regardless of the letterhead on which the request was filed, or whether Mr. Herrera acted in his own name or on behalf of a third party, the information in this case is public, accessible to any

[147] Republic of El Salvador. Constitutional Chamber of the Supreme Court of Justice. Judgment 13-2012 (Unconstitutionality). December 5, 2012. Considerando III.1. Available at: http://www.jurisprudencia.gob.sv/visormlx/pdf/13-2012.pdf

[148] Republic of El Salvador. Constitutional Chamber of the Supreme Court of Justice. Judgment 13-2012 (Unconstitutionality). December 5, 2012. Considerando III.1. Available at: http://www.jurisprudencia.gob.sv/visormlx/pdf/13-2012.pdf

[149] Republic of Argentina. Supreme Court of Justice. December 4, 2012. *Asociación de Derechos Civiles v. EN – PAMI – (dto. 1172-03) on amparo ley 16.986*. Available at: http://www.cij.gov.ar/nota-10405-La-Corte-Suprema-reconocio-el-derecho-de-los-ciudadanos-de-acceso-a-la-informacion-publica.html

[150] Republic of Panama. Supreme Court of Justice. February 8, 2012. Case file 156-11. Available at: http://bd.organojudicial.gob.pa/registro.html

interested party, without any need to justify the request." The Court added that "every person has the right to request public access to information in the hands of the State, without the need to provide a justification. At the same time, they will have standing to file a writ of *habeas data*, which does not require further legal formalities—unless the information in question is personal or confidential, in which case it is understood to be of interest only to the person concerned, and no one else." The Court thus concluded that "the nature of the writ of *habeas data*, its purposes, the law in question, and the public nature of the information sought, overcome the censorship of the administrative authority. The State is therefore required to provide information about its workings and activities to any person, except where it involves data that is confidential or personal, or restricted."[151]

173. In a November 30, 2010 decision, the Constitutional Court of Guatemala[152] ruled on several constitutional challenges to the Public Information Access Act. The Court dismissed the four charges relating to: legal entitlement to the right and the need to verify the interest in order for the right to be exercised; information considered confidential; the obligation to publish information on the salaries and emoluments of public servants; and changes to the system of the autonomous bodies as a result of requiring them to implement the Act.

174. With respect to legal entitlement to the right to access to information and the need for prior verification of interest in the information sought, the Constitutional Court found that "the constitutional recognition of the right to access to public information (…) signifies the ability of any citizen to obtain information from the government, without having to prove any interest other than that which arises from his own will as a citizen, in connection with the principle of transparency in government." According to the Court, in view of the international standards, the Constitution of Guatemala recognizes that "all acts of government are public" and also that the people have the right "to access this information, as the owners of national sovereignty." Consequently, in order to exercise this right, "the citizen needs only to express their legitimate desire to gain knowledge of the organization, the workings, and the decision-making processes of the government apparatus meant to secure their welfare and that of their peers; it is herein that their interest in the matter in question is understood to exist, and not in the purely procedural sense of the term."[153]

175. The Third Chamber of the Civil and Commercial Appeals Division of the Province of Salta, Argentina, handed down a decision on May 28, 2010,[154] ruling on an

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[151] Republic of Panama. Supreme Court of Justice. February 8, 2012. Case file 156-11. *Fundamentos jurídicos* 1, 2, 3 y 10. Available at: http://bd.organojudicial.gob.pa/registro.html

[152] Republic of Guatemala. Court of Constitutionality. November 30, 2010. Case files 1373-2009, 1412-2009, 1413-2009. Available at: http://www.cc.gob.gt/siged2009/mdlWeb/frmConsultaWebVerDocumento.aspx?St_DocumentoId=819889.html&St_RegistrarConsulta=yes&sF=fraseabuscar

[153] Republic of Guatemala. Court of Constitutionality. November 30, 2010. Case files 1373-2009, 1412-2009, 1413-2009. *Considerando IV*. Available at: http://www.cc.gob.gt/siged2009/mdlWeb/frmConsultaWebVerDocumento.aspx?St_DocumentoId=819889.html&St_RegistrarConsulta=yes&sF=fraseabuscar

[154] Republic of Argentina. Chamber III of the Civil and Commercial Chamber of Appeals of the Province of Salta. May 28, 2010. *CORNEJO, Virginia v. SECRETARÍA GENERAL DE LA GOBERNACIÓN DE LA PROVINCIA DE SALTA – ACCIÓN DE AMPARO-* Case files N° CAM 301.440/10. Available at:

amparo petition arising from a request for access to detailed information on government advertising expenditures in the Province of Salta. Regarding the nature of the right to access to information, the Court found that, "the right to access to information acquires substance because of its procedural and instrumental status. Without it, other rights could not exist, and thus it is vitally important to pave the way for it to be protected, refined, and maximized." Therefore, understanding the right to access to information "as a fundamental right, and beyond the debatable notions of the concept, the general rule then will be for the citizen to have free access to public information in the hands of, or under the control of, State entities."[155]

176. In this same decision, the Third Chamber asserted the universal nature of the right to access to public information, noting in particular that the person who was requesting the access to information was a representative in the provincial legislature. On this point, it found that, "If any person can request public information, with no exclusion provided under the law, if the requesting party cannot be required to state the purpose of his request—and therefore there is no reason to inquire about his motivations or whether he has a specific interest—there is no justification to exclude the legislators of the province from the access to public information provided for in Decree No. 1.574/02, as the respondent asserts."[156]

177. In Judgment 48 of September 11, 2009, the Trial Court of Mercedes, Uruguay (Second Rotation)[157] ruled on a petition for *habeas data* (*amparo informativo*) related to the disclosure of information on the procurement of government advertising. The Court held that the right to access to public information "follows from" the right to information, and it found that the latter is "a basic right, inherent in the human personality." This understanding, says the Court's judgment, has also been set forth in the relevant doctrine, even before the Access to Information Act entered into force.

178. In general, the essential and universal nature of the right to access to information has been widely recognized in most of the decisions cited in this report, which will be reviewed in greater detail in the sections below.

2. Case law on the principle of maximum disclosure

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http://justicia.salta.gov.ar/nuevo/index.php?option=com_content&view=article&id=325:publicidad-oficial-sala-iii&catid=48:derecho-de-acceso-a-la-informacion-publica

[155] Republic of Argentina. Chamber III of the Civil and Commercial Chamber of Appeals of the Province of Salta. May 28, 2010. *CORNEJO, Virginia v. SECRETARÍA GENERAL DE LA GOBERNACIÓN DE LA PROVINCIA DE SALTA – ACCIÓN DE AMPARO*- Case Files N° CAM 301.440/10. *Consideración IIIa*. Available at: http://justicia.salta.gov.ar/nuevo/index.php?option=com_content&view=article&id=325:publicidad-oficial-sala-iii&catid=48:derecho-de-acceso-a-la-informacion-publica

[156] Republic of Argentina. Chamber III of the Civil and Commercial Chamber of Appeals of the Province of Salta. May 28, 2010. CORNEJO, *Virginia v. SECRETARÍA GENERAL DE LA GOBERNACIÓN DE LA PROVINCIA DE SALTA – ACCIÓN DE AMPARO*- Case Files N° CAM 301.440/10. *Consideración IIIg*. Available at: http://justicia.salta.gov.ar/nuevo/index.php?option=com_content&view=article&id=325:publicidad-oficial-sala-iii&catid=48:derecho-de-acceso-a-la-informacion-publica

[157] Oriental Republic of Uruguay. Trial Court of Mercedes (Second Rotation). September 11, 2009. AA v. Junta Depatamental of Soriano- *Amparo* Action. I.u.e. 381-545/2009. Available at: http://www.uaip.gub.uy/wponwcm/connect/60fff8804ad59ad8a98beb5619f13f97/Judgment-juzgado-letrado-de-2do-turno-de-mercedes.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=60fff8804ad59ad8a98beb5619f13f97

179. In a judgment handed down on March 18, 2011, the Constitutional Division of the Supreme Court of Costa Rica[158] heard an amparo petition that was filed against the Costa Rican Labor Ministry for refusing to turn over information relating to three lists (persons who were visited by inspectors and written up for noncompliance with the minimum wage laws, persons visited by inspectors a second time, and persons against whom complaints were filed in court). The information had been requested for purposes of journalistic work. The Ministry made the information public, but using general data and percentages. In deciding the case, the Court affirmed its case law on government transparency and disclosure[159] in the following terms: "in the context of the social and democratic rule of law, each and every public entity and body within the respective administration must be subject to the implicit constitutional principles of transparency and disclosure that must be the rule that governs every administrative action or function. The collective organizations of Public Law—public entities—must be like glass houses, the insides of which all citizens must be able to view and supervise, in the light of day." In the opinion of the Court, "governments must create and foster permanent and fluid channels of communication or exchange of information with citizens and the collective media (…) According to this logic, administrative secrecy or confidentiality is an exception that is justified solely under qualified circumstances when constitutionally relevant values and interests are thereby protected."[160]

180. In this specific case, the Constitutional Division of the Supreme Court of Costa Rica found that the requested information had been denied under a law that prohibits "the disclosure of data that are obtained from inspections." In the Court's opinion, the government denied the right to access to information "without a necessary, sufficient, or reasonable justification," given that "the requested information is of clear public interest, as it refers to infractions involving the failure to pay minimum wages. It concerns both employees and employers, especially since the request was for general information and not information about a specific individual."[161]

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[158] Republic of Costa Rica. Constitutional Chamber of the Supreme Court of Justice. March 18, 2011. Judgment 2011-003320. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&cmbDespacho=0007&txtAnno=2011&strNomDespacho=Sala%20Constitucional&nValor2=506651&lResultado=&lVolverIndice=&param01=Judgments%20por%20Despacho&param2=3&strTipM=T&

[159] Republic of Costa Rica. Constitutional Chamber of the Supreme Court of Justice. Judgment 2003-2120 of March 14, 2003, which lays out the scope and nuances of the right protected in Article 30 of the Political Constitution, reiterated in Judgments, 2004-09234 of August 25, 2004, 2005-14563 of October 21, 2005, 2007-011455 of August 10, 2007 and 2010-010982 of June 22, 2010.

[160] Republic of Costa Rica. Constitutional Chamber of the Supreme Court of Justice. March 18, 2011. Judgment 2011-003320. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&cmbDespacho=0007&txtAnno=2011&strNomDespacho=Sala%20Constitucional&nValor2=506651&lResultado=&lVolverIndice=&param01=Judgments%20por%20Despacho&param2=3&strTipM=T&

[161] Republic of Costa Rica. Constitutional Chamber of the Supreme Court of Justice. March 18, 2011. Judgment 2011-003320. *Consideración V*. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&cmbDespacho=0007&txtAnno=2011&strNomDespacho=Sala%20Constitucional&nValor2=506651&lResultado=&lVolverIndice=&param01=Judgments%20por%20Despacho&param2=3&strTipM=T&

181. The Supreme Federal Tribunal of Brazil, in a June 9, 2011 decision[162] suspending the effects of two precautionary measures that barred the disclosure of data on the incomes of some municipal employees, underscored the preponderance of the "principle of disclosure" and the resulting "State duty to disclose public acts." According to the Court, that duty is "eminently republican, because the '*res publica*' […] must be managed with maximum transparency", with the sole exception being information "whose confidentiality is essential to the security of society and the State" according to current law.

182. The Supreme Court held that every person has the right to receive information of general or particular interest from government entities, and that it must be provided within the legally established period of time to avoid the pertinent sanctions. In the Court's opinion, the best instrument of personal defense against "possible unlawful assaults by the State" is the right to "denounce irregularities or unlawful acts" before oversight bodies. In this respect, the Supreme Court added that "the preponderance of the principle of disclosure" is an effective way to "realize the republic as a form of government." It also indicated that "if, on one hand, there is a republican mode of administering the Brazilian State, on the other hand it is the public itself that has the right to see its State administered as a republic. The question of 'how' the *res publica* is administered should outweigh the question of 'who' administers it […] and the fact is that this public way of administering the government machine is a conceptual element of our Republic." The Court concluded that failing to observe the principle of disclosure could cause serious harm to public law and order.[163]

183. In Judgment 48 of September 11, 2009, the Trial Court of Mercedes, Uruguay (Second Rotation)[164] held, in relation to the principle of maximum disclosure, that: "the right to access public information is related to specific principles, namely, the principle of transparency in government; this is what makes it possible to clearly see the government's actions with respect to the use of public funds. The principle of disclosure in government activity […] in a system such as ours, the first solution is always disclosure, and restriction is the exception. Finally, […] the principle of participation, which means that citizens are informed and consulted on the matters that concern them. These principles […] are important in taking account of the purpose of this [access to information] law and the objective it pursues, which provides guidance for interpretation in case of doubt."[165]

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[162] Federative Republic of Brazil. Supreme Federal Tribunal. June 9, 2011. *Segundo Ag. Reg. na Suspensão of Segurança* No. 3.902 – São Paulo. Available at: http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=628198

[163] Federative Republic of Brazil. Supreme Federal Tribunal. June 9, 2011. *Segundo Ag. Reg. na Suspensão of Segurança* No. 3.902 – São Paulo, paras. 12 y 16 Available at: http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=628198

[164] Oriental Republic of Uruguay. Trial Court of Mercedes (Second Rotation). September 11, 2009. AA v. Junta Depatamental of Soriano- *Amparo* Action. I.u.e. 381-545/2009. Available at: http://www.uaip.gub.uy/wponwcm/connect/60fff8804ad59ad8a98beb5619f13f97/Judgment-juzgado-letrado-de-2do-turno-de-mercedes.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=60fff8804ad59ad8a98beb5619f13f97

[165] Oriental Republic of Uruguay. Trial Court of Mercedes (Second Rotation). September 11, 2009. AA v. Junta Depatamental de Soriano- *Amparo* Action. I.u.e. 381-545/2009. Available at: http://www.uaip.gub.uy/wponwcm/connect/60fff8804ad59ad8a98beb5619f13f97/Judgment-juzgado-letrado-de-2do-turno-de-mercedes.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=60fff8804ad59ad8a98beb5619f13f97

3. Case law on limits to the principle of maximum disclosure

184. In a November 30, 2010 decision on a constitutional challenge, the Constitutional Court of Guatemala,[166] based on the standards set forth in the decision of the Inter-American Court of Human Rights in *Claude Reyes v. Chile*, in the IACHR's 2009 annual report[167] and in the Declaration of Principles on Freedom of Expression,[168] among others, found that the limitations on access to public information contained in the Access to Information Act were consistent with the Constitution. Thus, for example, with regard to the confidentiality "of court files in cases that have not become final," it found that the confidentiality was not applicable "in cases or proceedings that are of clear public interest, even the mere handling of their procedural aspects, whether for objective reasons pertinent to the subject addressed—e.g., general unconstitutionality—or subjective, that is, relating to the capacity in which the parties are involved, as in the case of a trial determining the liability of a public servant […]. In society it is indispensable to have public opinion be the comptroller of government acts, and the actions of judges cannot be excluded."[169] In addition, in relation to information defined as "confidential under the Comprehensive Protection of Juveniles Act," the Court found that children and adolescents "who are involved in court cases […] require special treatment, given the implications of their age, in order to adequately preserve their human dignity; discretion in the handling of information is vital in view of that objective."[170] Finally, the Court concluded by leaving the door open to the possibility of limiting the exceptions to the principle of maximum disclosure. Indeed, at the end of point VI of its conclusions of law, the Court stressed that, "naturally, in each specific case, the authority in charge of the information (those considered bound by Article 6 of the challenged law) must weigh the particular circumstances, using the necessary premises of the previously underscored canons and scopes. It can thus determine, in accordance with the constitutional principles, whether the information being requested contains elements that justify its confidentiality or secrecy as an exception to the principle of maximum disclosure."[171]

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[166] Republic of Guatemala. Court of Constitutionality. November 30, 2010. Case files 1373-2009, 1412-2009, 1413-2009. Available at: http://www.cc.gob.gt/siged2009/mdlWeb/frmConsultaWebVerDocumento.aspx?St_DocumentoId=819889.html&St_RegistrarConsulta=yes&sF=fraseabuscar

[167] IACHR. Annual Report 2009. OEA/Ser.L/V/II. Doc. 51. December 30, 2009. *Annual Report of the Office of the Special Rapporteur for Freedom of Expression*. Chapter IV (The Right of Access to Information). Available at: http://www.oas.org/en/iachr/expression/doconreportonannual/Informe%20Anual%202009%202%20ENG.pdf

[168] IACHR. Declaration of Principles on Freedom of Expression. Available at: http://www.oas.org/en/iachr/expression/showarticle.asp?artID=26&lID=1

[169] Republic of Guatemala. Court of Constitutionality. November 30, 2010. Case files 1373-2009, 1412-2009, 1413-2009. Considerando VI. Available at: http://www.cc.gob.gt/siged2009/mdlWeb/frmConsultaWebVerDocumento.aspx?St_DocumentoId=819889.html&St_RegistrarConsulta=yes&sF=fraseabuscar

[170] Republic of Guatemala. Court of Constitutionality. November 30, 2010. Case files 1373-2009, 1412-2009, 1413-2009. Considerando VI. Available at: http://www.cc.gob.gt/siged2009/mdlWeb/frmConsultaWebVerDocumento.aspx?St_DocumentoId=819889.html&St_RegistrarConsulta=yes&sF=fraseabuscar

[171] Republic of Guatemala. Court of Constitutionality. November 30, 2010. Case files 1373-2009, 1412-2009, 1413-2009. Considerando VI. Available at: http://www.cc.gob.gt/siged2009/mdlWeb/frmConsultaWebVerDocumento.aspx?St_DocumentoId=819889.html&St_RegistrarConsulta=yes&sF=fraseabuscar

185. In *amparo* appeal (*amparo en revisión*) decision 168/2011, of November 30, 2011[172] the First Division of the Supreme Court of Mexico recognized a limit to the confidentiality of information concerning preliminary investigations in criminal matters. According to this exception "secrecy cannot be claimed when the preliminary investigation concerns acts that constitute serious human rights violations or crimes against humanity."[173] This assertion is supported in general terms by the "preferential position" of the right to access to information "*vis-à-vis* the interests that would limit it, as well as its operation as a general rule *vis-à-vis* the exceptional limitations established by law."[174]

186. In this specific case, the Supreme Court held that the duty to turn over information is also based on the judgment of the Inter-American Court of Human Rights in the *Case of Rosendo Radilla Pacheco v. Mexico*, paragraph 258 of which recognized the rights of victims "to obtain copies of the preliminary inquiry carried out by the Attorney General of the Republic, [which] is not subject to confidentiality, since it refers to the investigation of crimes that constitute grave violations of human rights." The Supreme Court held that such considerations are "binding upon the Mexican State, including all judges and courts that carry out essentially judicial functions."[175]

187. In its decision of March 14, 2007 on a petition of *habeas data* seeking access to a file relating to the denial of a promotion to a government official, the Superior Court of Justice of Brazil[176] ruled on the principle of maximum disclosure. The Court found that that principle must be "observed by the government […] including, beyond the Union, the States, the Federal District, and the municipalities." According to the Court, disclosure is the general rule and is subject to "few exceptions, which also must be based on [current law]." In the case under examination, the Court did not find the exception for information that "is essential to the security of society and the State" contained in the Constitution; consequently, it applied the principle of maximum disclosure.[177]

188. In a decision of September 5, 2010, the Constitutional Court of Peru,[178] ruling on the refusal of a municipality to turn over copies of a file on the rehabilitation of a public road, addressed the "relevance of the principle of transparency in a democratic

[172] United States of Mexico. Supreme Court of Justice. First Chamber. November 30, 2011. Amparo Appeal 168/2011. Available at: http://www2.scjn.gob.mx/red2/Case fileon

[173] United States of Mexico. Supreme Court of Justice. First Chamber. November 30, 2011. Amparo Appeal 168/2011. Consideración 3. Available at: http://www2.scjn.gob.mx/red2/Case fileon

[174] United States of Mexico. Supreme Court of Justice. First Chamber. November 30, 2011. Amparo Appeal 168/2011. Consideración 1. Available at: http://www2.scjn.gob.mx/red2/Case fileon

[175] United States of Mexico. Supreme Court of Justice. First Chamber. November 30, 2011. Amparo Appeal 168/2011. Consideración 3. Available at: http://www2.scjn.gob.mx/red2/Case fileon

[176] Federative Republic of Brazil. Superior Court of Justice. Third Session. March 14, 2007. *Habeas data* No. 91-DF. Case file 2003/0235568-0. Available at: https://ww2.stj.jus.br/revistaeletronica/Abre_Documento.asp?sSeq=669609&sReg=200302355680&sData=20070416&formato=PDF

[177] Federative Republic of Brazil. Superior Court of Justice. Third Session. March 14, 2007. *Habeas data* No. 91-DF. Case file 2003/0235568-0. Available at: https://ww2.stj.jus.br/revistaeletronica/Abre_Documento.asp?sSeq=669609&sReg=200302355680&sData=20070416&formato=PDF

[178] Republic of Peru. Constitutional Tribunal. First Chamber. Exp. N° 00565-2010-PHD/TC. September 5, 2010. Available at: http://www.tc.gob.pe/jurisprudencia/2010/00565-2010-HD.html

State." On this point, it held: "*habeas data* is linked directly to the importance that the principle of transparency in the exercise of government power has acquired in today's democratic systems. It is a constitutionally relevant principle that is implicit in the model of social and democratic rule of law […] Where power emanates from the people, as stated in Article 45 of the Constitution, it must be exercised not only in the name of the people but also for the people." In addition, in the Court's opinion, "putting the principle of transparency into practice helps fight corruption in the State and, at the same time, is an effective tool against the impunity of power. It enables the public to have access to the way in which power is delegated. One of the manifestations of the principle of transparency is, without doubt, the right to access to public information that this Court has developed in its case law."[179]

189. In addition, with respect to the regulatory implications and the content of the principle of transparency, the Constitutional Court of Peru held that it imposes "several obligations upon public entities, not only in relation to information but also in the management of public administration in general. Thus, for example, it has been held that not just any information creates transparency in the exercise of State power; rather, it is the information that is timely and reliable for the citizen. In that respect, the World Bank Institute, which puts out the well-known governance indicators, has established four components to transparent information: accessibility, relevance, quality, and reliability." The Court later added that the right to access to information "is also linked directly to […] the principle of responsibility. […] It is thus clear that the more transparent a government is, the more responsible and committed to public aims it will be. Secrecy, in general, encourages practices in the defense of individual or group interests, but not necessarily public objectives."[180] In this case, the Court ordered that the requested information be turned over.

190. In Judgment 354/11 of November 22, 2011, the Court of Civil Appeals of Uruguay (Third Rotation)[181] ruled on the supposed existence of a limit to the right to access to information (sensitive data). The case concerned a request for information on the number of labor union organizations (with government ties), the number of members in each organization, and the number of labor union hours requested and granted during the period from February to November of 2011. The Court found that such limitations were inadmissible, given that "neither the names of the unions nor their members were requested; rather, the request sought simply to establish quantitative data. Therefore, that information does not fall within the exceptions established in Art.10 of Law 18.381. The petitioner is interested in monitoring the criteria used by the government to comply with the allocation of "labor union hours" […] As such, there is no infringement of the fundamental rights of any identified subject, and the requested information is excluded from the concept of sensitive or protected data." The Court consequently indicated that "it can in no way be understood that the act of providing the number of labor unions that the

[179] Republic of Peru. Constitutional Tribunal. First Chamber. Exp. N.° 00565-2010-PHD/TC. September 5, 2010. Fundamento §3.5. Available at: http://www.tc.gob.pe/jurisprudencia/2010/00565-2010-HD.html

[180] Republic of Peru. Constitutional Tribunal. First Chamber. Exp. N.° 00565-2010-PHD/TC. September 5, 2010. Fundamento §3.6. Available at: http://www.tc.gob.pe/jurisprudencia/2010/00565-2010-HD.html

[181] Oriental Republic of Uruguay. Civil Court of Appeals (Third Rotation). November 22, 2011. *Sindicato de Policía del Uruguay v. Ministerio del Interior- Acceso a la Información Pública Art. 22 Ley 18.381*, i.u.e. 2-105220/2011. Available at: http://bjn.poderjudicial.gub.uy/BJNPUBLICA/hojaInsumo2.seam?cid=323

respondent ministry recognizes and negotiates or has dealings with in such capacity, nor the number of members in those unions (at least what is known to the respondent from making the deductions for union dues), nor the number of "labor union hours" requested in the detailed form previously expressed, exposes either the legal entities—the labor unions—or the individuals who belong to them, to any discrimination, or entails the disclosure of sensitive data relating to those particular individuals."[182]

4. Case law on parties bound by the right to access to public information

191. In the above-cited decision handed down on December 4, 2012,[183] the Supreme Court of Argentina found that by virtue of the international obligation of the Argentine State established in Article 2 of the American Convention (obligation to bring domestic law into line with international standards) in relation to the right to access to information, it was necessary "to guarantee this right not only in the purely administrative sphere or in institutions tied to the Executive Branch but also in all government bodies." As such, the Court found that, in "overseeing the institutions that perform public functions, the States must take account of both public and private entities that perform such functions. The important thing is for the focus to be on the service they provide or the duties they perform. Such scope means imposing this requirement not only upon public State bodies in all their branches and at all their levels, local and national, but also upon State-owned enterprises, hospitals, private institutions, or others that act in a government capacity or perform public duties." The Supreme Court found support for this in the "principle of maximum disclosure" recognized in the Inter-American Court's *Case of Claude Reyes v. Chile*. Based on these considerations, the Supreme Court ruled that the Institute (PAMI), in spite of not "forming part of the national State" and having a "legal personality and financial individuality legally differentiated from the State," had the obligation to turn over the information requested by the non-governmental organization relating to the 2009 government advertising budget and the advertising outlay made during some months in that year. This was in view of the fact that the case involved "the request for public information from an institution that manages public interests and has a function delegated by the State, and the interaction between the respondent and the government is indisputable."

192. In a decision rendered on March 18, 2011, the Constitutional Division of the Supreme Court of Costa Rica[184] addressed the question of which entities are subject to the principle of maximum transparency. It reiterated that "all public entities and their

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[182] Oriental Republic of Uruguay. Civil Court of Appeals (Third Rotation). November 22, 2011. *Sindicato de Policía del Uruguay v. Ministerio del Interior- Acceso a la Información Pública Art. 22 Ley 18.381*, i.u.e. 2-105220/2011. *Considerando* VI. Available at: http://bjn.poderjudicial.gub.uy/BJNPUBLICA/hojaInsumo2.seam?cid=323

[183] Republic of Argentina. Supreme Court of Justice. December 4, 2012. *Asociación de Derechos Civiles v. EN – PAMI – (dto. 1172-03) on amparo ley 16.986*. Available at: http://www.cij.gov.ar/nota-10405-La-Corte-Suprema-reconocio-el-derecho-de-los-ciudadanos-de-acceso-a-la-informacion-publica.html

[184] Republic of Costa Rica. Constitutional Chamber of the Supreme Court of Justice. March 18, 2011. Judgment 2011-003320. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&cmbDespacho=0007&txtAnno=2011&strNomDespacho=Sala%20Constitucional&nValor2=506651&lResultado=&lVolverIndice=&param01=Judgments%20por%20Despacho&param2=3&strTipM=T&

bodies, both of the Central Government and the Decentralized Government, whether institutional or corporate service providers, are required to observe [the right to access to information] (…) The right of access must be observed broadly by public enterprises that assume collective forms of organization under private law, through which some government entity performs a business, industrial, or commercial activity, and participates in the economy and the market." The Court also found that "private persons who exercise public power or authority, on a temporary or ongoing basis, by virtual of legal or contractual authorization (…) such as utilities or public works concessionaires, interested managers, public notaries, public accountants, engineers, architects, topographers, etc., may potentially become subject to this requirement when they handle or possess information—documents—of clear public interest."[185]

5. Case law on access to public information related to the investigation of human rights violations

193. The First Division of the Supreme Court of Mexico, in amparo appeal decision 168/2011 of November 30, 2011,[186] ordered the Office of the Attorney General "to allow access and provide certified copies of the preliminary investigation" to the petitioner, in relation to the judicial investigations into the forced disappearance of Rosendo Radilla Pacheco. In spite of the fact that the Transparency and Access to Public Information Act of Mexico has, since 2002, prohibited the invocation of confidentiality with respect to files on the "investigation of serious violations of fundamental rights or crimes against humanity," the Office of the Attorney General had refused to provide access to preliminary investigations. With this decision, the Supreme Court sets an important precedent in the area of access to public information related to the defense of human rights.

194. In this case, the First Division of the Supreme Court of Mexico found that "with respect to the right to public information, the general rule in a democratic State under the rule of law must be to favor access and the maximum disclosure of information," the exceptions to which, "by constitutional mandate, must be provided by law, substantively and procedurally."[187] It also acknowledged the dual nature of the right to access to information, "as a right in and of itself, but also as a means or instrument for the exercise of other rights," in which case "the right to access to information is the basis upon which citizens exercise the respective oversight of the institutional workings of the State."[188]

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[185] Republic of Costa Rica. Constitutional Chamber of the Supreme Court of Justice. March 18, 2011. Judgment 2011-003320. *Consideración IV*. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&cmbDespacho=0007&txtAnno=2011&strNomDespacho=Sala%20Constitucional&nValor2=506651&lResultado=&lVolverIndice=&param01=Judgments%20por%20Despacho&param2=3&strTipM=T&

[186] United States of Mexico. Supreme Court of Justice. First Chamber. November 30, 2011. Amparo Appeal 168/2011. Available at: http://www2.scjn.gob.mx/red2/Case fileon

[187] United States of Mexico. Supreme Court of Justice. First Chamber. November 30, 2011. Amparo Appeal 168/2011. *Consideración* 3. Available at: http://www2.scjn.gob.mx/red2/Case fileon

[188] United States of Mexico. Supreme Court of Justice. First Chamber. November 30, 2011. Amparo Appeal 168/2011. *Consideración* 3. Available at: http://www2.scjn.gob.mx/red2/Case fileon

6. Case law on access to information on government advertising

195. In a May 28, 2010 decision,[189] the Third Chamber of the Civil and Commercial Appeals Division of the Province of Salta, Argentina, in ruling on a petition for amparo stemming from a request for access to detailed information on government advertising expenditures in the Province of Salta, Argentina, held that, "the refusal of the respondent [the Office of the Governor of the Province of Salta] to provide the requested information is unjustified and is not based on any law; it also violates the principle of the disclosure of acts of government and the scope of the right to access to information as established in Article 13 of the Inter-American Convention of Human Rights (*sic*)." In the opinion of the Court, according to the evidence in the case, "the requested information arises from the State's own administrative action, which, as such, must be documented not only because it involves the decision and execution of public spending but also because it concerns government advertising, a matter of indisputable public interest in that it is linked to freedom of expression. As stated by Dolores Lavalle Cobo, there is a very close relationship among freedom of expression, the allocation of government advertising, and access to information." Finally, the Court held that "we must consider that observance of the duty to inform in this case is simple, since it only requires making available to the requesting party the file or files containing the documentation of the government's decision to place the advertising in question, the action itself, and the accounting records (invoices or similar documents) that reflect its execution. In other words, the response required of the respondent does not mean that it has to draft a complete report, or perform any activity more demanding than what is stated."[190]

196. In Judgment 48 of September 11, 2009, the Trial Court of Mercedes, Uruguay (Second Rotation)[191] ruled on a *habeas data* petition filed against the Departmental Board of Soriano, and ordered the disclosure of information on the procurement of government advertising. The Court found that the information relating to the procurement of government advertising must be disclosed by the respective agency to the extent that such information is not "turned over to the Board, but rather produced by the Board, and is public information from the moment it is [included] in the Board's five-year budget."

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[189] Republic of Argentina. Chamber III of of the Civil and Commercial Chamber of Appeals of the Province of Salta. May 28, 2010. *CORNEJO, Virginia v. SECRETARÍA GENERAL DE LA GOBERNACIÓN DE LA PROVINCIA DE SALTA – ACCIÓN DE AMPARO*- Case files N° CAM 301.440/10. Available at: http://justicia.salta.gov.ar/nuevo/index.php?option=com_content&view=article&id=325:publicidad-oficial-sala-iii&catid=48:derecho-de-acceso-a-la-informacion-publica

[190] Republic of Argentina. Chamber III of of the Civil and Commercial Chamber of Appeals of the Province of Salta. May 28, 2010. *CORNEJO, Virginia v. SECRETARÍA GENERAL DE LA GOBERNACIÓN DE LA PROVINCIA DE SALTA – ACCIÓN DE AMPARO*- Case files N° CAM 301.440/10. *Consideración VI*. Available at: http://justicia.salta.gov.ar/nuevo/index.php?option=com_content&view=article&id=325:publicidad-oficial-sala-iii&catid=48:derecho-de-acceso-a-la-informacion-publica

[191] Oriental Republic of Uruguay. Trial Court of Mercedes (Second Rotation). September 11, 2009. *AA v. Junta Depatamental de Soriano- Acción de Amparo*. I.u.e. 381-545/2009. Available at: http://www.uaip.gub.uy/wponwcm/connect/60fff8804ad59ad8a98beb5619f13f97/Judgment-juzgado-letrado-de-2do-turno-de-mercedes.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=60fff8804ad59ad8a98beb5619f13f97

7. Case law on the right to access to information on private government contractors or providers of public services

197. The Constitutional Court of Peru, in a decision of August 27, 2010,[192] addressed the obligation of private parties that provide public services to disclose requested information relating to their activities. In this case, a citizen requested that a private company (an electrical power service provider) disclose information relating to service complaints over the past five years. The company had refused to turn over the information. The Court ordered that it disclose the requested information, holding that, "[w]ith respect to access to information in the possession of non-state entities, that is, private legal entities, not all of the information they possess is exempt from disclosure. Bearing in mind the type of work they perform, it is possible for them to have some information that is public in nature, and that the general public is therefore entitled to request and obtain. In this context, the entities subject to requests for this type of information are those that, in spite of being private, provide public services or exercise government functions as provided [by law]." Indeed, according to the Court, "[p]rivate legal entities that perform public services or government functions are obligated to provide information on the nature of the public services they provide, their fees, and the government functions they perform. This means that accessible information must always pertain to one of these three aspects, and not to any others."[193]

198. In a decision dated April 29, 2009,[194] Court No. 2 for Administrative Disputes and Tax Matters of the Autonomous City of Buenos Aires, heard a petition for *amparo* stemming from the refusal of the Government of the City of Buenos Aires (hereinafter GCBA) to provide information related, *inter alia*, to the names of individuals associated with various private security firms, their percentages of ownership in the firms, and their membership in the armed forces. In relation to the classification and nature of the requested information and the criteria for considering it sensitive or classified, the Court held as follows: "[n]o part of the requested information can be considered sensitive under the terms of Article 3 of Law 1845. This is obvious. […] The GCBA has also not asserted, nor does it arise from any applicable law, that the requested records are classified for reasons of national or local security, or for strategic or intelligence reasons—a situation that would obviously not make the records inviolable, but could require greater care in judicially manipulating the disclosure of their content. In sum, neither the nature of the information requested, nor the characteristics of the database, provides any evidence to support the GCBA's restriction of the information that is the subject of the petition."[195]

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[192] Republic of Peru. Constitutional Tribunal. First Chamber. Exp. N.° 01347-2010-PHD/TC. August 27, 2010. Available at: http://www.tc.gob.pe/jurisprudencia/2010/01347-2010-HD.html

[193] Republic of Peru. Constitutional Tribunal. First Chamber. Exp. N.° 01347-2010-PHD/TC. August 27, 2010. Fundamentos 5 - 7. Available at: http://www.tc.gob.pe/jurisprudencia/2010/01347-2010-HD.html

[194] Republic of Argentina. Contentious Administrative and Tributary Court N° 2 of the autonomous city of Buenos Aires. Martínez. April 29, 2009. *Diego v. Gobierno de la Ciudad Autónoma de Buenos Aires*. Available at: http://www.cpdp.gov.ar/imageonarticuloscpdp/falloonmartinez.pdf

[195] Republic of Argentina. Contentious Administrative and Tributary Court N° 2 of the autonomous city of Buenos Aires. Martínez. April 29, 2009. *Diego v. Gobierno de la Ciudad Autónoma de Buenos Aires*. Consideración *VI*. Available at: http://www.cpdp.gov.ar/imageonarticuloscpdp/falloonmartinez.pdf

199. Additionally, in this case, the Court found that access to the information had "institutional gravity," to the extent that it facilitated compliance with some legal provisions relating to the transition from dictatorship to democracy in Argentina. Indeed, the Court found that, "Law 1913 (…) establishes as a requirement for the provision of private security services that the provider not have been convicted or pardoned for crimes that are human rights violations. […] In this case, the information on individual members of the agencies is of even greater institutional relevance. […] The institutionalization of the right to information and the institutionalization of criticism are conditions *sine qua non* of a democratic society." Accordingly, the Court concluded that, "the mere possibility that persons who participated in human rights violations during the last military dictatorship could directly or indirectly form part of business organizations engaged in the provision of private security services is of such a magnitude that it is hard to imagine what reasons the GCBA might have in mind for preventing the disclosure of the requested information, using clearly avoidable procedures to do so."[196]

8. Case law on the subject matter of the right to access and the definition of public document

200. In a decision of April 29, 2009,[197] Court No. 2 for Administrative Disputes and Tax Matters of the Autonomous City of Buenos Aires held as follows with regard to the subject matter of the right to access: "the aforementioned rules are related to the basic principle of the disclosure of acts of government, its nature being access to the information contained in documents—that is, physical formats of any type. As such, it does not concern access to the news, in the sense of the product or outcome of an activity performed by third parties; rather, it concerns direct access to the source of information—in this case, to the document." In the Court's opinion, "the activity of the government *vis-à-vis* the exercise of the right of access does not exactly consist of the provision of a benefit, but rather of intermediation. Certainly this configuration of the right entails some inevitable institutional requirements, including the prior existence of the document as an assumption for the exercise of the right. It can be held that the right to access to government documents is, structurally, a right to the freedom to be informed, which is based on the democratic principle of the disclosure of the information that is in the State's possession."[198]

201. On this same issue, in a decision handed down on March 18, 2011, the Constitutional Division of the Supreme Court of Costa Rica[199] reiterated that, "citizens or

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[196] Republic of Argentina. Contentious Administrative and Tributary Court N° 2 of the autonomous city of Buenos Aires. Martínez. April 29, 2009. *Diego v. Gobierno de la Ciudad Autónoma de Buenos Aires*. *Consideraciones VII y VIII*. Available at: http://www.cpdp.gov.ar/imageonarticuloscpdp/falloonmartinez.pdf

[197] Republic of Argentina. Contentious Administrative and Tributary Court N° 2 of the autonomous city of Buenos Aires. Martínez. April 29, 2009. *Diego v. Gobierno de la Ciudad Autónoma de Buenos Aires.* Available at: http://www.cpdp.gov.ar/imageonarticuloscpdp/falloonmartinez.pdf

[198] Republic of Argentina. Contentious Administrative and Tributary Court N° 2 of the autonomous city of Buenos Aires. Martínez. April 29, 2009. *Diego v. Gobierno de la Ciudad Autónoma de Buenos Aires. Consideración III.* Available at: http://www.cpdp.gov.ar/imageonarticuloscpdp/falloonmartinez.pdf

[199] Republic of Costa Rica. Constitutional Chamber of the Supreme Court of Justice. March 18, 2011. Judgment 2011-003320. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&cmbDespacho

individuals can access any information in the possession of the respective public entities and bodies, regardless of its format, whether it be documentary (files, records, archives), electronic or digital (databases, electronic files, automated filing systems, diskettes, compact discs), audiovisual, tape-recorded, etc."[200]

9. Case law on the material possibility of disclosing the requested information

202. In Judgment 354/11, of November 22, 2011, the Court of Civil Appeals of Uruguay (Third Rotation)[201] ordered the Ministry of Interior to provide the following information: the number of labor union organizations in a field, the number of members in each organization, and the number of labor union hours requested and granted in the period from February to November, 2011. In this case, the Ministry met the request for the specified information with silence, having reportedly stated before the court that its denial of access was justified on the basis of physical (nonexistent information) and legal (sensitive information) impossibility.

203. With regard to the impossibility of turning over information, the Court preliminarily dismissed "the respondent's simple assertion that it does not possess the records requested, and that the subject matter of the request is therefore impossible." With respect to the subject matter of the information, the Court found it necessary "to examine whether the plaintiff's request entails the 'production of information,'" to which, according to the Court, the respondent would not, in principle, be obligated. The decision stated that, "it must be understood that the request is for information about: (a) the number of labor union organizations in the field; (b) the number of members in each one; (c) the number of labor union hours requested from February 2011 to the present (specified month by month) for each organization; (d) the number of hours granted by the Ministry to each organization from February to the present." The Court thus opined that, "to the extent that the data, although not systematized, can be recorded in some form in the respondent's records and proceedings, it must be underscored that there is no demand for 'production,' but rather simply for compilation. Therefore, it is clear that they are not exempt from the potential aim of the 'improper *habeas data*'—as the provisions of Law 18.381 have been referred to in scholarly writings." This is the case, in that the Ministry, "at least in paying the salaries of its employees, had to have made records from which much of the information requested by the plaintiff can be gleaned." In addition, "the number of labor unions recognized by the respondent must be evident at least from the deduction of union dues from payments and/or the allocation of 'labor union hours' of leave granted to

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[200] Republic of Costa Rica. Constitutional Chamber of the Supreme Court of Justice. March 18, 2011. Judgment 2011-003320. *Consideración IV*. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&cmbDespacho=0007&txtAnno=2011&strNomDespacho=Sala%20Constitucional&nValor2=506651&lResultado=&lVolverIndice=&param01=Judgments%20por%20Despacho&param2=3&strTipM=T&

[201] Oriental Republic of Uruguay. Court of Civil Appeals (Third Rotation). November 22, 2011. *Sindicato de Policía del Uruguay v. Ministerio del Interior- Acceso a la Información Pública Art. 22 Ley 18.381*, i.u.e. 2-105220/2011. Available at: http://bjn.poderjudicial.gub.uy/BJNPUBLICA/hojaInsumo2.seam?cid=323

its employees. The number of members of each labor union can also be easily calculated in view of identical considerations, and the number of hours requested and granted will also emerge from those records."[202]

204. The Constitutional Court of Peru, in a decision of August 22, 2011,[203] ruled that the defense alleging the nonexistence of information was inadmissible to justify the denial of access. In the opinion of the Court, the guarantee of the right to access to public information "includes not only the obligation of public bodies to turn over the information requested but also that the information be complete, up-to-date, accurate, and true. Thus, if the right to access to information in its positive aspect imposes the duty to inform upon government bodies, in its negative aspect it requires that the information provided not be false, incomplete, fragmented, circumstantial, or confusing."[204]

205. In this case, a municipal government had alleged the "nonexistence" of the "file in which the property title was granted." The Constitutional Court rejected this defense on the argument of the government's duty to safeguard information storage media. The Court held that, "although it is inferred […] that the information requested by the plaintiffs was transferred from one file to another, it is the responsibility of the municipality to keep such information, and therefore it cannot avail itself of its "nonexistence" in order to avoid its obligation to provide it to the plaintiffs." The Court determined that, "the necessary procedures to locate the requested documentation must be exhausted. In its absence, and if it is proven to have been lost, the pertinent administrative file must be reconstructed, in order for copies to then be provided to the interested parties."[205]

10. Case law on the right to access to information on the salaries and incomes of public servants or contractors paid with public funds

206. In decision TC/0042/12 of September 21, 2012,[206] the Constitutional Court of the Dominican Republic ruled on a motion for the review of an amparo petition relating to the denial of access to information on the payroll and salaries of advisers working for the House of Representatives. The Court found that information relating to "names, positions, and salaries" in a public entity (House of Representatives) was not confidential. To reach this conclusion, the Court found it necessary to "weigh" the fundamental rights in apparent conflict—that is, the right to access to information and the right to privacy. This takes account of the fact that, according to one of the positions

[202] Oriental Republic of Uruguay. Court of Civil Appeals (Third Rotation). November 22, 2011. *Sindicato de Policía del Uruguay v. Ministerio del Interior- Acceso a la Información Pública Art. 22 Ley 18.381*, i.u.e. 2-105220/2011. Considerando V Available at: http://bjn.poderjudicial.gub.uy/BJNPUBLICA/hojaInsumo2.seam?cid=323

[203] Republic of Peru. Constitutional Tribunal. First Chamber. Exp. N° 01410-2011-PHD/TC. August 22, 2011. Available at: http://www.tc.gob.pe/jurisprudencia/2011/01410-2011-HD.html

[204] Republic of Peru. Constitutional Tribunal. First Chamber. Exp. N° 01410-2011-PHD/TC. August 22, 2011. *Fundamento 4*. Available at: http://www.tc.gob.pe/jurisprudencia/2011/01410-2011-HD.html

[205] Republic of Peru. Constitutional Tribunal. First Chamber. Exp. N° 01410-2011-PHD/TC. August 22, 2011. *Fundamento* 8. Available at: http://www.tc.gob.pe/jurisprudencia/2011/01410-2011-HD.html

[206] Dominican Republic. Constitutional Tribunal. September 21, 2012. Judgment TV.0042/12. Available at: http://www.tribunalconstitucional.gob.do/node/582

argued in the case, access to information relating to payroll and salaries—because it is private in nature—could "leave open the possibility of penetrating the private sphere of individuals."

207. In its balancing test, the Court found that "a name is a piece of information that makes it possible to identify people individually. [But it does not] involve data or information that every person might keep in a private personal and family space, removed from outside interference." It further considered that, "the purpose of the right of free access to public information is to monitor the use and management of public resources and, consequently, to put up obstacles to government corruption." Based on these premises, the Court concluded that "although the right to privacy is a fundamental value in the democratic system, just like the protection of personal data, they cannot (sic) generally—although they can in exceptional cases—restrict the right to free access to public information, since limiting it would deprive citizens of an essential mechanism for the control of government corruption."

208. In a decision of November 30, 2010, the Constitutional Court of Guatemala[207] found that the State's positive duty to publish information on salaries and other emoluments of public servants on its own initiative was consistent with the Constitution. In the Court's opinion, "those numbers are in the public interest by reason of their origin, which is the national treasury, the product of tax revenues paid by the citizens for the financial support of the State." It added that, "the citizens, being the holders of the sovereignty delegated to the government, have the prerogative to access the information administered by the government in and for the performance of its duties […] including the manner in which government resources are invested. The remuneration of public officials, employees, servants, and advisors to the public sector are, without a doubt, an important item in this respect. Herein lies the inflection point that validates the difference in treatment under the law of individuals who belong to this category, in terms of the open disclosure of their remuneration, as opposed to those in private sector employment relationships."[208]

209. Finally, the Court found that the information on salaries and other emoluments derived from public funds could not be considered "information included within the core of constitutionally protected personal privacy." It also found that although it "was not indifferent to the climate of insecurity that afflicts Guatemalan society," it was of the opinion "that such situation was not attributable to the legislative decision" being reviewed.[209]

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[207] Republic of Guatemala. Court of Constitutionality. November 30, 2010. Case files1373-2009, 1412-2009, 1413-2009. Available at: http://www.cc.gob.gt/siged2009/mdlWeb/frmConsultaWebVerDocumento.aspx?St_DocumentoId=819889.html&St_RegistrarConsulta=yes&sF=fraseabuscar

[208] Republic of Guatemala. Court of Constitutionality. November 30, 2010. Case files 1373-2009, 1412-2009, 1413-2009. *Considerando* VII. Available at: http://www.cc.gob.gt/siged2009/mdlWeb/frmConsultaWebVerDocumento.aspx?St_DocumentoId=819889.html&St_RegistrarConsulta=yes&sF=fraseabuscar

[209] Republic of Guatemala. Court of Constitutionality. November 30, 2010. Case files 1373-2009, 1412-2009, 1413-2009. *Considerando* VII. Available at: http://www.cc.gob.gt/siged2009/mdlWeb/frmConsultaWebVerDocumento.aspx?St_DocumentoId=819889.html&St_RegistrarConsulta=yes&sF=fraseabuscar

210. In a judgment handed down on June 9, 2011,[210] the Federal Supreme Court of Brazil upheld the suspension of the effects of two precautionary measures that barred the disclosure on a website of data on the incomes of public servants employed by the municipality of São Paulo. The precautionary measures had been granted by a lower court at the request of two organizations, under the theory that the disclosure of the information was a violation of the employees' rights to privacy and private life. In examining the case, the Supreme Court weighed the conflicting rights and concluded that the salaries of the municipal employees was information "of collective or general interest," and that it was therefore subject "to official disclosure." According to the Court, in this specific case, the public disclosure of the information did not pose a risk to "the security of the State or society as a whole." It was also not a violation of the employees' privacy or private lives, since "the data subject to disclosure referred to state agents (…) acting 'in that capacity'", and therefore the disclosure of the information is "the price they pay for choosing a career in public service in a republican State."[211]

11. Case law on the obligation to have a simple, rapid, and free administrative procedure for obtaining access to information

211. In a constitutionality decision handed down on November 30, 2010,[212] the Constitutional Court of Guatemala addressed the State's duty to provide an administrative mechanism for gaining access to information at all levels. In this case, the Court dismissed the constitutional challenge alleging that the Access to Information Act should have been passed by a special majority because it affected the autonomy of certain entities (the Act ordered the creation of information units in all government offices, including decentralized and autonomous agencies, as well as the creation of procedures to guarantee access to information). The Court held that the Act did not change the regulation of autonomous entities to the point of "altering their structure, functions, and responsibilities." In the Court's opinion, the Act, by creating "rules and procedures for all persons to be able to gain access to the information contained in the records, files, databases or systems of government offices" develops a "general mandate that concerns all levels of government, and does not affect the essential powers, responsibilities, or structure of decentralized or autonomous entities." Therefore, it was not necessary to have "the favorable vote of the qualified majority in order to validly enact the challenged law."[213]

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[210] Federative Republic of Brazil. Supreme Federal Tribunal. June 9, 2011. *Segundo Ag. Reg. na Suspensão of Segurança* No. 3.902 – São Paulo. Available at: http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=628198

[211] Federative Republic of Brazil. Supreme Federal Tribunal. June 9, 2011. *Segundo Ag. Reg. na Suspensão of Segurança* No. 3.902 – São Paulo, para. 15. Available at: http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=628198

[212] Republic of Guatemala. Court of Constitutionality. November 30, 2010. Case files 1373-2009, 1412-2009, 1413-2009. Available at: http://www.cc.gob.gt/siged2009/mdlWeb/frmConsultaWebVerDocumento.aspx?St_DocumentoId=819889.html&St_RegistrarConsulta=yes&sF=fraseabuscar

[213] Republic of Guatemala. Court of Constitutionality. November 30, 2010. Case files 1373-2009, 1412-2009, 1413-2009. *Considerando* III Available at:

212. The Supreme Court of Panama, in a December 27, 2011[214] decision, ordered the disclosure of copies of files pertaining to the allocation of land titles, determining that the Ministry of Agricultural Development had hindered access to information by requesting that the petitioner demonstrate particular interest. The Court found that, "since it was not confidential or restricted, the petitioner was fully entitled to request [the information], and therefore the respondent authority's demand was not necessary for the provision of the copies." The Court dismissed the ministry's reasons regarding the complexity of turning over the information, observing that the authority should have "communicated the reasons for the complexity to the petitioner in writing" when it responded to the request at the administrative level, and not at the judicial stage of the proceedings. It concluded that, "the information requested is not confidential or restricted, and therefore the authority had the obligation to heed the request and provide the respective information in writing within the 30-day period established in Article 7 of the Act, with the possibility of extending the period for an additional 30 days if the request was complex or extensive, through written notification to the requesting party of the extension of time and its justification."[215]

213. At the same time, amparo appeal decision 168/2011 of November 30, 2011,[216] handed down by the First Division of the Supreme Court of Mexico, ruled on the effectiveness of the administrative guarantee of the right to access to information. The Supreme Court recognized the duty of all parties subject to the Transparency and Access to Public Information Act, including the Office of the Attorney General, to "comply unconditionally with the resolutions issued by the Federal Institute for Access to Public Information in ruling on motions for review," and added that "the use of *de jure* or *de facto* remedies[217] aimed at blocking timely and effective access to public information" shall not be valid. This ruling addressed the fact that the Office of the Attorney General had refused to provide access to preliminary investigations, whether through legal channels (challenges to the decisions of the IFAI) or through the unlawful denial of fundamental rights (not turning over the information).

12. Case law on the duty of the State to justify a decision to deny access to information

214. In a decision dated June 5, 2012, the Supreme Court of Panama[218] heard a *habeas data* action in which a request was made to the Research and Development

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http://www.cc.gob.gt/siged2009/mdlWeb/frmConsultaWebVerDocumento.aspx?St_DocumentoId=819889.html&St_RegistrarConsulta=yes&sF=fraseabuscar

[214] Republic of Panama. Supreme Court of Justice. December 27, 2011. Case file 1068-10. Available at: http://bd.organojudicial.gob.pa/registro.html

[215] Republic of Panama. Supreme Court of Justice. December 27, 2011. Case file 1068-10. Available at: http://bd.organojudicial.gob.pa/registro.html

[216] United States of Mexico. Supreme Court of Justice. First Chamber. November 30, 2011. Amparo Appeal 168/2011. Available at: http://www2.scjn.gob.mx/red2/Case fileon

[217] United States of Mexico. Supreme Court of Justice. First Chamber. November 30, 2011. Amparo Appeal 168/2011. Consideración 3. Available at: http://www2.scjn.gob.mx/red2/Case fileon

[218] Republic of Panama. Supreme Court of Justice. June 5, 2012. Case file 748-11. Available at: http://bd.organojudicial.gob.pa/registro.html

Department of the Aquatic Resources Authority of Panama for access to a file that contained a request to research genetically modified salmon. The department's reply was outside the legal time limit, and it denied access to the information on the grounds that it was "restricted." The Court determined that "even when the public servant who receives a request for information does not possess it, or considers it to be restricted, that public servant has the obligation to communicate this to the petitioner, or specify where the petitioner can obtain the requested information in the event that it is an extensive or complicated request; for this, the public servant […] has a period of thirty (30) days." The Court also underscored the duty of government bodies to justify in detail every refusal to turn over information: "the institutions of the State that refuse to provide information on the grounds that it is confidential or restricted, must do so in a well-founded decision, establishing the reasons for the denial, as well as the legal basis for those reasons." In addition, the Supreme Court held that the government body must also explain in writing to the petitioner "the reasons for which it failed to respond to the request on time," in those cases in which the reply is not issued within the legally established time period.[219]

13. Case law on affirmative administrative silence

215. The Court of Civil Appeals of Uruguay (Third Rotation), in Judgment 354/11 of November 22, 2011,[220] found that failing to reply to a request for information from an individual triggered the government's obligation to turn over the requested information by virtue of the concept of affirmative administrative silence. On this point, it stated: "[t]he provision [Article 18 of Law 18.381] states that the interested party 'shall be able to access,' which, in conjunction with the aforementioned section (affirmative silence), leads to the conclusion that the absence of an express decision, unlike what is set forth in the Constitution of the Republic in relation to a common administrative petition, assumes that the petition is admitted—not denied." The Court concluded that: "the legal system prioritizes the right to information over the government's delay in rendering a decision." This is in the application of "a type of 'rule of admission' similar to that established under our procedural law when there is no effective challenge."[221]

14. Case law on the obligation to provide an appropriate and effective judicial remedy

216. In a May 28, 2010 decision, the Third Chamber of the Civil and Commercial Appeals Division of the Province of Salta, Argentina[222] ruled on a petition for

[219] Republic of Panama. Supreme Court of Justice. June 5, 2012. Case file 748-11. Available at: http://bd.organojudicial.gob.pa/registro.html

[220] Oriental Republic of Uruguay. Court of Civil Appeals (Third Rotation). November 22, 2011. *Sindicato de Policía del Uruguay v. Ministerio del Interior- Acceso a la Información Pública Art. 22 Ley 18.381*, i.u.e. 2-105220/2011. Available at: http://bjn.poderjudicial.gub.uy/BJNPUBLICA/hojaInsumo2.seam?cid=323

[221] Oriental Republic of Uruguay. Court of Civil Appeals (Third Rotation). November 22, 2011. *Sindicato de Policía del Uruguay v. Ministerio del Interior- Acceso a la Información Pública Art. 22 Ley 18.381,* i.u.e. 2-105220/2011. *Considerando III*. Available at: http://bjn.poderjudicial.gub.uy/BJNPUBLICA/hojaInsumo2.seam?cid=323

[222] Republic of Argentina. Chamber III of the Civil and Commercial Appeals Chamber of the Province of Salta. May 28, 2010. CORNEJO, Virginia v. *SECRETARÍA GENERAL DE LA GOBERNACIÓN DE LA PROVINCIA DE SALTA*

amparo stemming from a request for access to information detailing government advertising expenditures in the Province of Salta. Before ruling on the merits, the Court considered the admissibility of amparo to address violations of fundamental rights, including the right to access to information, while administrative proceedings (seeking access to information) are still pending. The Court opined that: "preliminarily, it is necessary to establish that—by constitutional mandate—the action of *amparo* is admissible with respect to any decision, act, or omission of public authorities, except judicial authorities, or individuals who currently or imminently will harm, restrict, alter, or threaten, clearly arbitrarily or unlawfully, the rights and guarantees explicitly or implicitly recognized in the national and provincial constitutions, for purposes of putting a stop to the harm committed or the threat of harm (art. 87 of the Constitution of Salta)."[223]

217. The case discussed whether the amparo was admissible, inasmuch as the act of authority (of the Office of the Governor of Salta) that denied the access was not a final decision but rather a "mere opinion." In the Court's view, "the preclusion of the *amparo* because of the existence of other appeals cannot be founded on a merely procedural appraisal, since the purpose of *amparo* is to effectively protect rights rather than to arrange or protect spheres of jurisdiction. Indeed, in principle, opinions—including those of which the parties have been notified—are not the proper basis for an *amparo* petition, as they are not administrative acts in themselves, but rather mere preparatory acts." Nevertheless, the Court found that, "the argument in question is not worthy of consideration, given that the procedural position taken by the Office of the Governor on the record finds support in, and coincides with, the legal grounds of the opinion being challenged by the *amparo* petitioner. As such, referring the case to the conclusion of the pending administrative proceeding would amount to a solution that is merely procedural, and contrary to the proper service of justice." Thus, according to the Court, "it is not necessary to go through administrative proceedings prior to filing an *amparo* petition if, it being filed directly, the public authority objects to the petitioner's argument and upholds the legitimacy of the harmful act in the *amparo* proceedings; otherwise, the requirement of exhausting administrative proceedings would be transformed into a useless procedure." In this respect, "the position taken in the instant case is the one that is most consistent with the jurisprudence of the Inter-American Court of Human Rights, inasmuch as the State must guarantee the existence of a simple, rapid, and effective judicial remedy to challenge the denial of information in violation of the right of the requesting party and, if appropriate, to allow for the pertinent body to be ordered to turn it over (*Case of Claude Reyes et al. v. Chile*). On the contrary, sending the petitioner to conclude the administrative proceedings that resulted from his request for information would violate the principles of

– *ACCIÓN DE AMPARO*- Case files N° CAM 301.440/10. Available at: http://justicia.salta.gov.ar/nuevo/index.php?option=com_content&view=article&id=325:publicidad-oficial-sala-iii&catid=48:derecho-de-acceso-a-la-informacion-publica

[223] Republic of Argentina. Chamber III of the Civil and Commercial Appeals Chamber of the Province of Salta. May 28, 2010. CORNEJO, Virginia v. *SECRETARÍA GENERAL DE LA GOBERNACIÓN DE LA PROVINCIA DE SALTA – ACCIÓN DE AMPARO*- Case files N° CAM 301.440/10. Consideración I. Available at: http://justicia.salta.gov.ar/nuevo/index.php?option=com_content&view=article&id=325:publicidad-oficial-sala-iii&catid=48:derecho-de-acceso-a-la-informacion-publica

simplicity, expediency, and effectiveness of the judicial remedy upheld by the Inter-American Court."[224]

218. The Constitutional Court of Guatemala, in an August 24, 2010 decision[225] concerning the existence of an effective judicial mechanism for the protection of the right to access to information, held that "all government acts are public, with the exceptions contained in the Constitution. Interested parties have the right to obtain, at any time, the reports, copies, reproductions, and certifications they request, and to view the files they wish to consult, unless they pertain to military or diplomatic national security matters, or to information provided by individuals under a promise of confidentiality. Amparo as a guarantee against arbitrariness is viable in the prioritization of this constitutional right, which must be fully respected."[226]

219. In a decision handed down on September 5, 2010,[227] the Constitutional Court of Peru addressed the simplicity of the judicial proceeding of *habeas data* for purposes of guaranteeing access to public information. In its rejection of the lower court's arguments regarding the supposed existence of special admissibility requirements, the Court found that, "[i]n a *habeas data* case, the only prerequisite for filing the complaint is that provided in Article 62 [of the Code of Constitutional Procedure]. An unsatisfactory response, or silence on the part of the requested party, are reasons for the court to act in order to reestablish the exercise of the violated right." The Court also found that "in *habeas data* cases, the courts must adhere strictly to Article 62 of the Code of Constitutional Procedure, according to which the only prerequisite for filing the claim is the written, dated request and the respondent's refusal to turn over the information requested."[228]

15. Case law on active transparency

220. The Constitutional Division of the Supreme Court of Costa Rica, in a March 18, 2011 decision,[229] reiterated "the duty of public entities to provide information,

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[224] Republic of Argentina. Chamber III of the Civil and Commercial Appeals Chamber of the Province of Salta. May 28, 2010. *CORNEJO, Virginia v. SECRETARÍA GENERAL DE LA GOBERNACIÓN DE LA PROVINCIA DE SALTA – ACCIÓN DE AMPARO*- Case files N° CAM 301.440/10. Consideración II. Available at: http://justicia.salta.gov.ar/nuevo/index.php?option=com_content&view=article&id=325:publicidad-oficial-sala-iii&catid=48:derecho-de-acceso-a-la-informacion-publica

[225] Republic of Guatemala. Court of Constitutionality. August 24, 2010. Case file 1828-2010. Available at: http://www.cc.gob.gt/siged2009/mdlWeb/frmConsultaWebVerDocumento.aspx?St_DocumentoId=815140.html&St_RegistrarConsulta=no

[226] Republic of Guatemala. Court of Constitutionality. August 24, 2010. Case file 1828-2010. Considerando I. Available at: http://www.cc.gob.gt/siged2009/mdlWeb/frmConsultaWebVerDocumento.aspx?St_DocumentoId=815140.html&St_RegistrarConsulta=no

[227] Republic of Peru. Constitutional Tribunal. First Chamber. Exp. N° 00565-2010-PHD/TC. September 5, 2010. Available at: http://www.tc.gob.pe/jurisprudencia/2010/00565-2010-HD.html

[228] Republic of Peru. Constitutional Tribunal. First Chamber. Exp. N° 00565-2010-PHD/TC. September 5, 2010. Fundamento §2.4. Available at: http://www.tc.gob.pe/jurisprudencia/2010/00565-2010-HD.html

[229] Republic of Costa Rica. Constitutional Chamber of the Supreme Court of Justice. March 18, 2011. Judgment 2011-003320. Available at:

[in view of which they] must provide facilities and eliminate existing obstacles. News professionals are intermediaries between public entities and the recipients of the information, and therefore they also have the right to obtain information and the duty to convey it as accurately as possible. The subject matter of the right to information is news, and therefore those events that may be of public significance must be understood as such."[230]

221. In Judgment 48 of September 11, 2009, the Trial Court of Mercedes, Uruguay (Second Rotation)[231] ruled on a *habeas data* petition filed against the Departmental Board of Soriano, seeking the disclosure of information on the procurement of government advertising. In relation to the principle of active transparency, the Court found that the information on the procurement of government advertising should have been disclosed by the respective agency, not only upon request but also on its own initiative—to the extent that such information is not "turned over to the Board, but rather produced by the Board, and is public information from the moment it is [included] in the Board's five-year budget." Furthermore, according to Article 5 of the Access to Information Act, such information must be disseminated "on an ongoing basis" because it is "information about an allocated budget and its execution."

16. Case law on the duty to disseminate truthful information on sexual and reproductive rights

222. In decision T-627 of 2012, handed down on August 10, 2012,[232] the Constitutional Court of Colombia ruled on a special petition for a constitutional remedy (*tutela*) filed by a group of 1279 women against employees of the Office of the Attorney General of the Nation. In this case, the women stated that employees of the Attorney General's Office, in various contexts and by various means, had failed to recognize their right to accurate information on sexual and reproductive rights. The women alleged that the Attorney General's Office had misinterpreted decisions of the Constitutional Court relating to several of these rights, such as the voluntary termination of pregnancy under legally permissible circumstances, the mandatory nature of campaigns to promote those rights, the absence of institutional conscientious objection in such contexts, and others. The Constitutional Court found that the appropriate framework for examining the case was, in principle, sexual and reproductive rights, which include "reproductive self-

http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&cmbDespacho=0007&txtAnno=2011&strNomDespacho=Sala%20Constitucional&nValor2=506651&lResultado=&lVolverIndice=&param01=Judgments%20por%20Despacho&param2=3&strTipM=T&

[230] Republic of Costa Rica. Constitutional Chamber of the Supreme Court of Justice. March 18, 2011. Judgment 2011-003320. *Consideración* IV. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&cmbDespacho=0007&txtAnno=2011&strNomDespacho=Sala%20Constitucional&nValor2=506651&lResultado=&lVolverIndice=&param01=Judgments%20por%20Despacho&param2=3&strTipM=T&

[231] Oriental Republic of Uruguay. Trial Court of Mercedes (Second Rotation). September 11, 2009. *AA v. Junta Depatamental de Soriano- Acción de Amaparo. I.u.e. 381-545/2009.* Available at: http://www.uaip.gub.uy/wponwcm/connect/60fff8804ad59ad8a98beb5619f13f97/Judgment-juzgado-letrado-de-2do-turno-de-mercedes.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=60fff8804ad59ad8a98beb5619f13f97

[232] Republic of Colombia. Constitutional Court. August 10, 2012. Judgment T-627 of 2012. Available at: http://www.corteconstitucional.gov.co/relatoria/2012/t-627-12.htm

determination, access to reproductive health services, and the right to information on reproductive matters."

223. With respect to the right to access to information on reproductive issues, the Court found, consistent with the inter-American standards, that: "both Article 20 of the [Colombian] Constitution and Article 13 of the ACHR on the right to information, by not having any limitation in terms of subject matter, protect information on reproductive issues and, consequently, all of the rules on its content that were summarized in paragraphs 4 to 6 are also applicable here. Nevertheless, in the aforementioned thematic report [*Access to Information on Reproductive Issues from a Human Rights Perspective*][233], the IACHR identifies some of the international standards that are especially important on this issue and that the Court finds worth mentioning: (i) the obligation of active transparency, (ii) access to information, and (iii) the obligation to disclose timely, complete, accessible, and reliable information."[234]

224. Later, the Court acknowledged the fundamental importance of the right to access to information in the context of sexual and reproductive rights. It held, in the following terms, that it was essential to the exercise of individual autonomy and to the eradication of discrimination against women: "if information is important for the exercise of all fundamental rights, insofar as it makes it possible to know their content and the mechanisms for asserting them, it becomes vital when it concerns reproductive rights, especially in the case of women. There are two reasons for this. First, […] this category of rights makes it easier […] to make decisions freely on different aspects of reproduction, and without information on the available options and the ways in which to make use of them, it is impossible to do so. The second reason is that one of the mechanisms for perpetuating the discrimination historically experienced by women has been—and continues to be—precisely to deny or hinder access to accurate and impartial information in this area, with the objective of denying them control over this type of decision. In its recent report on the issue, the IACHR recognized this, and thus noted that the States parties to the ACHR must permit access to information on those issues, and furthermore, must provide them on their own initiative (duty of active transparency)."[235]

225. The Court found that when the employees of the Attorney General's Office express themselves—like all public servants acting in their official capacity—they do not do so in the exercise of their freedoms, but rather in the exercise of an authority governed by and subject to the principle of legality in government. The expressions of public servants are then, according to the Court, manifestations of the exercise of the "power/duty of communication with the public." This power/duty is subject to certain limits, which, according to the Court, are as follows: "(i) accuracy and impartiality in conveying information; (ii) minimally sufficient factual justification and reasonableness of its opinions and, in all cases, (iii) respect for fundamental rights, especially of those subject

[233] IACHR. *Access to Information on Reproductive Health from a Human Rights Perspective*. OEA/Ser.L/V/II. Doc. 61. November 22, 2011. Available at: http://www.oas.org/en/iachr/women/docs/pdf/ACCESS%20TO%20INFORMATION%20WOMEN.pdf

[234] Republic of Colombia. Constitutional Court. August 10, 2012. Judgment T-627 of 2012. Consideración 46. Available at: http://www.corteconstitucional.gov.co/relatoria/2012/t-627-12.htm

[235] Republic of Colombia. Constitutional Court. August 10, 2012. Judgment T-627 of 2012. Consideración 46. Available at: http://www.corteconstitucional.gov.co/relatoria/2012/t-627-12.htm

to special constitutional protection."[236] In addition to these limits, the Court found that the abuse of the power/duty of communication or of a public servant's authority should be held to strict standards in light of the "prominent status [of the public servant] vis-à-vis the public," especially "when the mass media are used."[237]

226. In this specific case, the Court evaluated three circumstances pertinent to the right to access to information. First, it considered that the Attorney General, by changing the meaning of an order of the Constitutional Court related to sexual and reproductive rights in an official statement "violated the public's right to receive information or to be accurately informed of a matter of public interest." Indeed, the Court affirmed that "this public servant changed the meaning of the order in the aforementioned judgment by referring to 'the order […] to design and implement mass campaigns to promote abortion as a right,' when in reality the operative part of the judgment ordered 'mass campaigns to promote sexual and reproductive rights to help ensure that women throughout the country can freely and effectively exercise these rights.' It is clear that the Court did not order the promotion of abortion, as the Attorney General asserted in the statement […]. The Attorney General exceeded one of the limits that this Court has imposed on the exercise of his power/duty of communication with the public, which is the accuracy of information."[238] Second, the Court found that one of the employees of the Attorney General's Office, by publicly asserting the supposed unenforceability of Judgment T-388 of 2009 (in which the Court ordered campaigns to promote sexual and reproductive rights), and suggesting the need to wait for the decision on a motion to vacate that judgment, had "violated the fundamental right of the country's women to information on reproductive matters," by delaying the execution of the campaigns to promote sexual and reproductive rights. Finally, in relation to the scientific nature of emergency oral contraception, staff members of the Attorney General's Office stated in the mass media that it was an "abortifacient." After evaluating the scientific evidence in the case, the Court found that the official position of the Attorney General's Office was inconsistent with the expert science, and therefore disregarded the limits of the "power/duty of government employees to communicate with the public," and threatened the sexual and reproductive rights of women. With respect to this issue, the Court ordered "the modification of the official position of the Office of the Attorney General inasmuch as, in Colombia: (i) emergency oral contraception prevents conception and does not cause abortion, (ii) its use is not restricted to the situations in which abortion is decriminalized, (iii) women who avail themselves of it outside the decriminalized grounds for abortion do not, in any case, commit the offense of abortion, and (iv) it is part of the reproductive health services that Colombian women are free to choose. Furthermore, said modification must be made (i) by

[236] Similarly, see IACHR, Office of the Special Rapporteur for Freedom of Expression. *Inter-American Legal Framework of the Right to Freedom of Expression*. OEA/Ser.L/V/II CIDH/RELE/INF. 2/09. December 30, 2009. Paras. 200-206. Available at: http://www.oas.org/en/iachr/expression/doconpublicationonINTER-AMERICAN%20LEGAL%20FRAMEWORK%20OF%20THE%20RIGHT%20TO%20FREEDOM%20OF%20EXPRESSION%20FINAL%20PORTADA.pdf

[237] Republic of Colombia. Constitutional Court. August 10, 2012. Judgment T-627 of 2012. Consideración 13. Available at: http://www.corteconstitucional.gov.co/relatoria/2012/t-627-12.htm

[238] Republic of Colombia. Constitutional Court. August 10, 2012. Judgment T-627 of 2012. Consideración 56. Available at: http://www.corteconstitucional.gov.co/relatoria/2012/t-627-12.htm

the Attorney General, (ii) publicly, and (iii) as widely and with the same relevance as the statements given to the newspaper *El Espectador* on December 7, 2009."[239]

17. Case law on access to information consisting of personal data

227. In a decision of March 14, 2007, the Superior Court of Justice of Brazil[240] ruled on a *habeas data* petition, ordering the Commander of the Air Force to provide a Chief Petty Officer with copies and certifications of all of the documents used to support the Air Force's decision to deny him the right to enroll in a course for a promotion. The Court concluded that such information was not confidential, notwithstanding the existence of laws that established it as such. It found that the disclosure of the information requested did not entail a risk "to the security of the State or society." On this point, the Court cited the opinion of the Prosecutor, who considered that the disclosure of the information did not affect national security: "the concept of national security […] is not elastic; it should not be interpreted so broadly that it favors and promotes secrecy and authoritarianism, directly opposing the principle of democracy. […] The information contained [in the documents] is eminently private material that is unrelated to the concept of national security, which includes specific situations involving the defense of national borders, the keeping of the peace at home and abroad, and the preservation of democratic institutions."[241]

228. Decision T-1037 of 2008, handed down by the Constitutional Court of Colombia on October 23, 2008, dealt with the case of a journalist to whom a security team had been assigned—because of threats she had received—and then withdrawn. During the *tutela (amparo)* case, it was learned that the assigned bodyguard had been conducting intelligence activities unlawfully and without the journalist's knowledge. On the issue of *tutela*, initially meant to address the reestablishment of the security team, the Court also observed the violation of the journalist's right to know and control her personal data or *habeas data*. In this context, the Court recognized the right of access to one's own personal information in State intelligence records, and ordered the State security agency to provide all personal information it had on the journalist. The Court stated, "in principle, and unless there is a law that establishes otherwise, the information contained in State records is public. However, if this information concerns the private, personal, or confidential data of an individual, and those data are not of public relevance, in principle, they can neither be captured and filed away nor disclosed, as they are protected by the right to privacy. Nonetheless, if the information is contained in an official record—unless it is expressly

[239] Republic of Colombia. Constitutional Court. August 10, 2012. Judgment T-627 of 2012. Consideración 72. Available at: http://www.corteconstitucional.gov.co/relatoria/2012/t-627-12.htm

[240] Federative Republic of Brazil. Superior Court of Justice. Third Session. March 14, 2007. *Habeas data* No. 91-DF. Case file 2003/0235568-0. Available at: https://ww2.stj.jus.br/revistaeletronica/Abre_Documento.asp?sSeq=669609&sReg=200302355680&sData=20070416&formato=PDF

[241] Federative Republic of Brazil. Superior Court of Justice. Third Session. March 14, 2007. *Habeas data* No. 91-DF. Case file 2003/0235568-0. Available at: https://ww2.stj.jus.br/revistaeletronica/Abre_Documento.asp?sSeq=669609&sReg=200302355680&sData=20070416&formato=PDF

classified—the individual owner of that data has the fundamental right to access it."[242] Later, the Court concluded: "indeed, a person who has requested and obtained the protection of the State because she is at extraordinary risk has a fundamental constitutional right to know all of the information about her contained in intelligence records and all of the reports prepared by the persons in charge of protecting her, with the exception of information that is part of a judicial investigation and is subject to confidentiality on that basis."[243]

18. Case law on the general system of limits to the right to access to information

229. The Constitutional Division of the Supreme Court of El Salvador, in a decision of December 5, 2012,[244] held that the Regulations to the Public Information Access Act that introduced additional criteria to those established in the Act itself for the classification of confidential information constituted an excess of jurisdiction. On this point, the Court held that the regulations had failed to recognize the legal status of the right to access to information as a fundamental right. Indeed, the Court opined that, "one of the things regulations cannot do is *to limit* fundamental rights, and therefore it has been made clear that regulations only have the authority *to regulate* fundamental rights, while a limitation or restriction of rights can only be made by statute" (italics in the original). The Court continued, "Art. 29 RELAI [the challenged article] in fact adds other 'grounds of confidentiality' to the ones provided for in Art. 19 LAI [Access to Information Act], to wit: hindrance to the performance of the requested body's duties, national security, political security, and national interest." According to the Court, "the assumptions of confidential information operate as reasons to prevent individuals from accessing public information or, in other words, *to limit* the exercise of this fundamental right. This characterization of the reasons for confidentiality, which are added by the regulations, is the key to ruling on the alleged unconstitutionality, as (…) limitations to fundamental rights are typically the subject of the regulatory activity of the Legislative Assembly by statute." The Court thus concluded that, "no regulation or regulatory instrument other than a statute can create or impose limitations to the right to access to information."

230. Also regarding the limits to the right to access to information, the March 18, 2011 decision of the Constitutional Division of the Supreme Court of Costa Rica[245] reiterated the following: "(1) The subject matter of the right is 'information on matters of

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[242] Republic of Colombia. Constitutional Court. October 23, 2008. Judgment T-1037 of 2008. Consideración 26. (citations omitted) Available at: http://www.corteconstitucional.gov.co/Judgmenton2008/T-1037-08.rtf

[243] Republic of Colombia. Constitutional Court. October 23, 2008. Judgment T-1037 of 2008. Consideración 31. Available at: http://www.corteconstitucional.gov.co/Judgmenton2008/T-1037-08.rtf

[244] Republic of El Salvador. Constitutional Chamber of the Supreme Court of Justice. Judgment 13-2012 (Unconstitutionality). December 5, 2012. Available at: http://www.jurisprudencia.gob.sv/visormlx/pdf/13-2012.pdf

[245] Republic of Costa Rica. Constitutional Chamber of the Supreme Court of Justice. March 18, 2011. Judgment 2011-003320. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&cmbDespacho=0007&txtAnno=2011&strNomDespacho=Sala%20Constitucional&nValor2=506651&lResultado=&lVolverIndice=&param01=Judgments%20por%20Despacho&param2=3&strTipM=T&

public interest,' so that when the government information that is sought is not about such a matter, the right is diminished and the information cannot be accessed. (2) The second limit is established in Article 30(2) of the Constitution, which stipulates that, 'State secrets are exempt.'" In the Court's opinion, "the handling of State secrets, insofar as they are an exception to the constitutional principles or values of transparency and disclosure in government, must be interpreted and applied, at all times, restrictively. […] As far as the restrictions or extrinsic limits to the right to access to government information are concerned, there are the following: (1) […] public morals and public order; (2) the sphere of privacy that is inviolable by all other legal persons, so that the private, sensitive, or nominative information that a public entity or body has gathered, processed, and stored, and has in its physical or digital archives, records, and files, cannot be accessed by any person […]; and (3) the investigation of crimes."[246]

231. Finally, in decision T-1037 of 2008, handed down on October 23, 2008, the Colombian Constitutional Court ruled on the right to access one's own personal information contained in government files, and on the application of the so-called principles of *habeas data* recognized in Colombian case law. It held "that the information contained in State databases—including intelligence reports—cannot be kept confidential from the individual owner of the information, at least until and unless a statute consistent with the Constitution is passed. The exception to this is if there is express legal authorization for it—for example, if the information is part of a criminal investigation that, consequently, despite being confidential, is reviewed by a court. Indeed, at least for now, only this type of information can legally be kept confidential from its owner."

232. The Court later concluded, "given that intelligence data can only be kept confidential from its owner if so established by a law that is specific, clear, and compatible with the Constitution, and that the existing provisions support only the confidentiality of information that is part of a judicial investigation, only this information may be withheld from its owner."[247] Based on these arguments, the Constitutional Court ordered the security agency of the Colombian State to turn over all of the petitioner's personal information that had been unlawfully obtained.

[246] Republic of Costa Rica. Constitutional Chamber of the Supreme Court of Justice. March 18, 2011. Judgment 2011-003320. *Consideración IV*. Available at: http://200.91.68.20/pj/scij/busqueda/jurisprudencia/jur_repartidor.asp?param1=TSS&nValor1=1&cmbDespacho=0007&txtAnno=2011&strNomDespacho=Sala%20Constitucional&nValor2=506651&lResultado=&lVolverIndice=&param01=Judgments%20por%20Despacho&param2=3&strTipM=T&

[247] Republic of Colombia. Constitutional Court. October 23, 2008. Judgment T-1037 of 2008. Consideración 29. Available at: http://www.corteconstitucional.gov.co/Judgmenton2008/T-1037-08.rtf