

CHAPTER III

LEGISLATION AND FREEDOM OF EXPRESSION

OVERVIEW OF THE INTERNAL LEGISLATION OF THE MEMBER STATES

A. Legislation and Freedom of Expression

1. Access to Information

1. The Office of the Special Rapporteur for Freedom of Expression is currently preparing a special report on the right to access to information held by the State and the *habeas data* writ, which will be published in the year 2001. The Office of the Special Rapporteur considers that the right to access to information is one of the fundamental rights in the strengthening of democratic systems. The existence of procedures that guarantee this right to citizens contributes to accountability in administrative management by fostering greater individual involvement in matters of public interest.

2. At the end of May, the Office of the Special Rapporteur and Guatemala's Office of the Presidency jointly organized an international conference entitled "*The Right to Access to Information in Guatemala*" [*El derecho al acceso a la información en Guatemala*]. The purpose of the conference was to underscore the important role that the right to access to information held by the state and the *habeas data* writ play in a democratic society, and the need to appropriately adapt legislation in this area. Additionally, with the assistance of the Office of the Special Rapporteur, the Guatemalan government drafted a bill on access to information held by the State, a process that included the broad participation of Guatemalan civil society. This bill, and the organization of the conference, were the result of a cooperation

agreement entered into by the Office of the Special Rapporteur and the Guatemalan government following the Special Rapporteur's visit to Guatemala in April 2000. Both parties agreed to work together to promote far-reaching, lasting freedom of expression in the country. The Special Rapporteur hopes that the bill will be introduced as soon as possible and, after debate, that it will be enacted and incorporated into the domestic legislation of Guatemala.

3. During 1999, the Office of the Special Rapporteur sent a survey to OAS member States requesting information about the constitutional and legal standards and the regulatory system in place in each country related to enjoyment of the right to access to information and *habeas data*. Of the thirty-five member countries in the Organization of American States, only nine (25.7%) responded officially to the Office of the Special Rapporteur's request for information.

4. Based on the information obtained up to this moment, there are clear distinctions between countries that have already developed constitutional and legal standards and those that continue to rely on general standards such as the "right to *amparo*" (protection) or "freedom of expression and opinion" to safeguard the right to information. Without taking into consideration those countries that have not responded to the Special Rapporteur's request for information, it can be stated that few countries have specific and clear norms with respect to the right to access to information and *habeas data*.

2. *Desacato*, or Contempt, Laws

5. *Desacato*, or contempt laws, violate the human right to freedom of expression as it is expressed in numerous international instruments, including the American Convention on Human Rights and the Universal Declaration of Human Rights. International organizations, including the Commission and the Office of the Special Rapporteur for Freedom of Expression, and NGOs around the world have uniformly expressed the need to abolish such laws, which limit free speech by punishing speech that shows disrespect towards public officials. Such limitations restrict the public debate that is so fundamental for the effective functioning of a democracy. Despite the near-universal condemnation of these laws, they continue to exist in

one form or another in at least 17 states in the Americas. In addition, many of these and other states continue to have criminal libel, slander and defamation laws, which are frequently used in the same manner as *desacato* laws to silence governmental critics.

6. The Inter-American Commission on Human Rights undertook an analysis of the compatibility of *desacato* laws with the American Convention on Human Rights in a 1995 report.⁶⁷ The Commission found that such laws were not compatible with the Convention because they lend themselves “to abuse, as a means to silence unpopular ideas and opinions, thereby repressing the debate that is critical to the effective functioning of democratic institutions.”⁶⁸ The Commission further stated that *desacato* laws give a higher level of protection to public officials than is offered to private citizens. This is in direct contravention to the “fundamental principle in a democratic system that holds the government subject to controls, such as public scrutiny, in order to preclude or control abuse of its coercive powers.”⁶⁹ Citizens must, therefore, have the right “to criticize and scrutinize the officials’ actions and attitudes in so far as they relate to the public office.”⁷⁰ *Desacato* laws ultimately deter critical speech because individuals will not want to subject themselves to imprisonment or monetary sanctions. Even those laws providing a defense if the accused can prove that the statements were true improperly restrict speech because they do not allow for the fact that much criticism is opinion and therefore not susceptible to proof. *Desacato* laws cannot be justified by saying that their purpose is to protect “public order” (a permissible purpose for regulation of speech under Article 13), as this is in contravention of the principle that “a properly functioning democracy is indeed the greatest guarantee of public order.”⁷¹ Moreover, there are other, less-restrictive means besides criminal contempt laws by which governmental officials can defend their reputations from unwarranted attacks, such as replying through the media or bringing a civil action against individuals for libel or slander. For all of these reasons, the Commission concluded that *desacato* laws are incompatible with the Convention and called upon states to repeal these laws.

⁶⁷ IACHR, OAS/Ser. L/V/II.88, Doc. 9 rev., February 17, 1995, *supra* note 3, 197-212.

⁶⁸ *Id.* at 212.

⁶⁹ *Id.* at 207.

⁷⁰ *Id.*

⁷¹ *Id.* at 209.

7. The Commission's report also presents certain implications for the reform of criminal libel, slander and defamation laws. Recognition of the fact that public officials are subject to a lesser, rather than greater, degree of protection from public scrutiny and criticism means that the distinction between public and private persons must be made in the ordinary libel, slander and defamation laws as well. The possibility of abuse of such laws by public officials to silence critical opinions is as great with this type of law as with *desacato* laws. The Commission has stated:

[P]articularly in the political arena, the threshold of State intervention with respect to freedom of information is necessarily higher because of the critical role political dialogue plays in a democratic society. The Convention requires that this threshold be raised even higher when the State brings to bear the coercive power of its criminal justice system to curtail expression. Considering the consequences of criminal sanctions and the inevitable chilling effect they have on freedom of expression, criminalization of speech can only apply in those exceptional circumstances when there is an obvious and direct threat of lawless violence . . .

The Commission considers that the State's obligation to protect the rights of others is served by providing statutory protection against intentional infringement on honor and reputation through civil actions and by implementing laws that guarantee the right of reply. In this sense, the State guarantees protection of all individual's [sic] privacy without abusing its coercive powers to repress individual freedom to form opinions and express them.⁷²

8. In order to ensure that freedom of expression is properly defended, states should reform their criminal libel, slander and defamation laws so that only civil penalties may be applied in the case of offenses against public officials. In addition, liability for offenses against public officials should only occur in cases of "actual malice." "Actual malice" means that the author of the statement in question acted with the intention to cause harm, was aware that the statement was false or acted with reckless disregard for the truth or falsity of the statement.

⁷² *Id.* at 211.

9. These standards are enshrined in the Declaration of Principles on Freedom of Expression, promulgated by the Office of the Special Rapporteur for Freedom of Expression, and approved by the Commission at its October 2000 sessions. The Declaration is meant to be a definitive interpretation of Article 13 of the Convention. Principles 10 and 11 deal with offenses against reputation and honor, including *desacato* laws:

10. Privacy 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.

11. Public officials are subject to greater scrutiny by society. Laws that penalize offensive expressions directed at public officials, generally known as *desacato* laws, restrict freedom of expression and the right to information.

10. Other organizations in the international community have reached the same conclusion with regard to *desacato* laws and other laws that protect the honor and reputation of public officials. Abid Hussain, the UN Special Rapporteur on Freedom of Opinion and Expression, Freimut Duve, OSCE Representative on Freedom of the Media, and Santiago Canton, (hereinafter the Rapporteurs) met for the first time in London on November 26, 1999 under the auspices of Article XIX, the global nongovernmental organization which takes its name from the Universal Declaration of Human Rights' article protecting freedom of expression. The Rapporteurs issued a joint declaration that included the following statement: "In many countries laws are in place, such as criminal defamation laws, which unduly restrict the right to freedom of expression. We urge states to review these laws with a view to bringing them in line with their international obligations." At another joint meeting in November of 2000, the Rapporteurs adopted another joint declaration, which elaborated on the problem of

desacato and criminal defamation laws. In this Declaration, the Rapporteurs advocated the replacement of criminal defamation laws with civil laws and stated that the State, objects such as flags or symbols, government bodies and public authorities should be banned from bringing defamation actions. They went on to say that “defamation laws should reflect the importance of open debate about matters of public concern and the principle that public figures are required to accept a greater degree of criticism than private citizens; in particular, laws which provide special protection for public figures, such as *desacato* laws, should be repealed[.]”

11. In his January 2000 report, the UN Special Rapporteur on Freedom Opinion and Expression also spoke out against criminal defamation laws and, in particular, laws providing special protection for public officials.⁷³ He called upon countries to eliminate the power of governmental organs and public officials to bring charges for defamation on their own behalf. Only civil remedies should be available for defamation, he asserted, and offenses like “defamation of the state” should be abolished altogether. Moreover, any monetary damages must be reasonable and proportional, in order to ensure that the possibility of punishment does not have a “paralyzing effect” on freedom of expression.⁷⁴ Finally, he stated that the burden of proof in these cases should be on the alleged defamed party to prove falseness.

12. In March 1994, the Inter-American Press Association (IAPA) held a hemispheric conference on freedom of the press at Chapultepec Castle in Mexico City. The conference brought together political leaders, writers, academics, constitutional lawyers, editors and private citizens from around the hemisphere. The conference produced the Declaration of Chapultepec, a document containing ten principles that are necessary to provide the level of freedom of the press that is sufficient to ensure a true participatory democracy. This declaration has been signed by the Heads of State of 21 of the regions’ States and is widely regarded as a model standard for freedom of expression.⁷⁵ With respect to *desacato* laws, the Declaration states in Principle 10, “No news medium nor journalist may be punished for publishing the truth or criticizing or denouncing the government.” IAPA issued a document

⁷³ *Los Derechos Civiles y Políticos, en Particular Las Cuestiones Relacionadas con la Libertad de Expresión*, UN Doc. No. E/CN.4/2000/63, January 18, 2000 (also available in English under the same document number).

⁷⁴ *Id.* at para. 49.

⁷⁵ The Heads of State of the following governments have signed the Declaration of Chapultepec, pledging themselves to abide by its terms: Argentina, Bolivia, Belize, Brazil, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Grenada, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Puerto Rico, Uruguay, United States, Dominican Republic.

interpreting these principles, in which it stated that there should only be legal liability for defamation of “public officials, public figures or private individuals involved in matters of public interest” if the plaintiff can prove “the falsehood of the facts published and actual knowledge of its [sic] falsehood” and “direct malice by the journalist or communications outlet.” This is essentially the “actual malice” standard that is advocated by the Special Rapporteur.

13. Article XIX promulgated a set of Principles on Freedom of Expression and Protection of Reputation.⁷⁶ These principles, which were drafted by an international panel of experts on freedom of expression issues, “are based on international law and standards, evolving state practice (as reflected, *inter alia*, in national laws and judgments of national courts), and the general principles of law recognised by the community of nations.”⁷⁷ They are intended to serve as a guide to all States as to the extent to which the fundamental human right of freedom of expression can be limited in order to protect the legitimate interest of reputation. The conclusion made in the document is that such restrictions must be “narrowly drawn” and “necessary” to achieve that legitimate purpose. Principle 4(a) states that “all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.”⁷⁸ In no case should an individual be held criminally liable for defamation “unless it has been proven that the impugned statements are false, that they were made with actual knowledge of falsity, or recklessness as to whether or not they were false, and that they were made with a specific intention to cause harm to the party claiming to be defamed,”⁷⁹ according to Principle 4(b)(ii). In Principle 7, the requirements for proof of truth are set forth, stating that “on matters of public concern, the plaintiff should bear the burden of proving the falsity of any statements or imputations of fact alleged to be defamatory.”⁸⁰ Principle 8, regarding public officials, states that “Under no circumstances should defamation law provide any special protection for public officials, whatever their rank or status. This Principle embraces the manner in which complaints are lodged and processed, the standards which are

⁷⁶ Article XIX, *supra* note 49.

⁷⁷ *Id.*, Introduction.

⁷⁸ *Id.*, Principle 4(a).

⁷⁹ *Id.*, Principle 4(b)(ii).

⁸⁰ *Id.*, Principle 7.

applied in determining whether a defendant is liable, and the penalties which may be imposed.”⁸¹

a. Desacato Laws in the Americas

14. The 1998 Annual Report of the Special Rapporteur for Freedom of Expression listed seventeen countries in the region which continued to have *desacato* laws. To date, none of these laws has been repealed.

Bolivia

Penal Code⁸²

Article 162. Persons who by any means slander, libel or insult a public official in the performance of his functions or by reason of them shall be punished by imprisonment ranging from one month to two years.

If the previous acts were directed against the President or Vice-President of the Republic, State Ministers, or members of the Supreme Court or of Congress, the punishment will be enhanced by half.

15. The Penal Code also provides for two-month to four-year prison sentences or labor sentences for libel, defamation, slander or offense to the memory of the deceased. Article 286 establishes a defense of truth to defamation or libel proceedings when the injured party is a public official and the offense relates to his or her duties.

⁸¹ *Id.*, Principle 8.

⁸² The Printing Law of January 19, 1925, provides for a different process for journalists than for regular citizens in cases of libel, slander and defamation. Article 28 states:

The printing violations of the law must be heard by a jury, without distinction of jurisdiction; however, the crimes of slander and libel against individuals shall go optionally before a jury or the common court. The public officials who are attacked by the press as a result of their functions can only file a complaint before a jury. However, if public officials are slandered, defamed or libeled personally with the purpose of combating their actions, they may file a criminal complaint before the ordinary court. When the ordinary court hears the crimes of press, it shall apply the penalties of the Penal Code. But, if the author or responsible person gives before the judge and via the media a complete and ample explanation or apology to the aggrieved party, and he accepts the terms of said explanation or apology, then the penalty shall be deemed fulfilled.

Article 15 provides that those offenses that go before the jury exclusively are punishable only by fines.

Brazil

Penal Code

Article 331. Showing contempt for a public official in the performance of his functions or by reason of them is punished by imprisonment of 6 months to two years, or a fine.

Chile

Penal Code

Article 263. Anyone who by word or action commits aggravated slander against the President of the Republic, or a member of one of his governing bodies or their assignments, whether it be in the public acts where they are represented, or in the performance of their specific duties, or the superior courts of justice, shall be sanctioned with lesser incarceration of medium to maximum degree and a fine of eleven to twenty minimum wages.

When the insulting statements are slight, the penalties shall be lesser incarceration of minimum degree and a fine of six to ten minimum wages, or simply the latter.

Article 264. Persons who commit the following acts are considered to be acting in contempt against security:

1. Those who cause serious disruption of the sessions of the governing bodies or those who threaten or defame an accused person or a senator during the sessions;

2. Those who cause serious disruptions of the court hearings and those who defame or threaten a member of said court in such hearings.

3. Those who defame or threaten: first, a senator or representative for opinions expressed during a Congress; second, a member of a court of justice for a sentence he has dictated; third, State ministers or such authorities in the performance of their official duties and fourth, a superior officer in the performance of his/her duties.

Article 265. If the accusation of insult consisting of disturbing the peace, or slander or threat, referred to in the previous article, is deemed grave, the guilty party shall be punished by lesser incarceration of any degree and a fine of eleven to twenty minimum wages. If the crime is deemed slight, the penalties shall be lesser incarceration of minimum degree and a fine of six to ten minimum wages.

Article 266. For purposes of the preceding provisions, it is understood that the ministers of government and other authorities with permanent duties or those who are called upon to exercise such duties in any case and in all circumstances exercise that authority continuously.

It is also understood that an authority is offended in the performance of his functions when the threat or insult takes place as a result of the performance of the duties or as a result of his office.

State Security Law

Article 6. Crimes against the public order are committed by:

...

b) Those who publicly insult the flag, the national coat of arms, the national anthem and those who libel, offend or slander the President of the Republic, Ministers of State, Senators or Representatives, Members of Superior Courts of Law, the Attorney General of the republic, the commander in chief of the armed

forces or the director general of the Carabineros, whether or not the libel, offense or slander is related to the official duties of the offended party[.]

Code of Military Justice

Article 284. One who threatens in the terms of Article 296 [threats against persons or property] of the Penal Code, offends or defames, verbally, in writing or using any other means, the Armed Forces, one of its members, units, divisions, or specific class or corps, shall be sanctioned with lesser incarceration, in its minimum to medium degree.

16. Provisions in the Penal Code allow for a defense of truth in the case of libel or slander against a government employee with regard to facts related to his or her post.

17. The Law of Advertising Abuses, in Article 12, also provides that the director of a news medium “will be punished as the author of the crime of contempt (*desacato*)” if he or she disobeys an order to publish a retraction of a statement. The penalties include lesser incarceration, fines and suspension of publication or transmission.

18. In April 2001, the House of Representatives approved a law called the “Ley sobre Libertades de Opinión e Información y Ejercicio del Periodismo” (“Law on Freedom of Opinion and Information and the Practice of Journalism”), which among other provisions, modifies Article 6(b) of the State Security Act.⁸³

Costa Rica

Penal Code

Article 307. Any person who offends the honor or decorum of a public official or threatens him by reason of his functions, addressing him personally or publicly or

⁸³ For more information, see Chapter IV, section corresponding to the situation of freedom of expression in Chile.

by written, cable or telephone communication, or by line of authority, shall be punished by imprisonment of one month to two years.

The penalty shall be six months to three years, if the offended party is the President of the Nation, a member of the supreme powers, a judge, a magistrate of the Supreme Election Board, or the Comptroller or Assistant Comptroller-General of the Republic.

19. On February 1, 2001, Costa Rican President Miguel Angel Rodríguez announced his commitment to work for the repeal of Costa Rica's *desacato* law. This announcement came at the end of a four-day mission to Costa Rica of the World Press Freedom Committee. The president also said that he would support the reform of Costa Rica's defamation laws. A committee of journalists and judges has been created to begin considering how this may be accomplished. The Special Rapporteur expresses his approval of these pledges and offers his support of the Costa Rican endeavors.

Cuba

Penal Code

Article 144.1. Any person who threatens, slanders, libels, defames, insults, or in any way offends or affronts, in speech or in writing, the dignity or decorum of an authority or public official, or their agents or aides, in the performance of their functions or on the occasion or by reason of them, shall be punished by deprivation of freedom for a term ranging from three months to one year or a fine of one hundred to three hundred cuotas (daily wages) or both.

2. If the act referred to in the previous section is committed against the President of the Council of State, the President of the National Assembly of Popular Power, the members of the Council of State or the Council of Ministers or the Delegates to the National Assembly of Popular Power, the punishment is deprivation of freedom of one to three years.

Article 204. One who publicly defames, denigrates or slights the institutions of the Republic, the political organizations, the social groups of the country, or the heroes and martyrs of the Fatherland, shall incur a sanction of deprivation of liberty for three months to one year or a fine of one hundred to three hundred cuotas.

Ecuador

Penal Code

Article 230. Whoever offends the president of the Republic or the person acting as chief executive with threats, menaces or slander is subject to six months to two years of prison and fines of 100 to 500 sucres.

Article 231. Whoever resorts to threat, slander, violence or similar actions against civil servants listed in article 225 when the latter exercise their functions, or as result of said exercise, shall be penalized with imprisonment from 15 days to 3 months and a fine from 50 to 300 sucres. Those who commit offenses included in the previous clause against another public official lacking jurisdiction shall be punished with imprisonment from eight days to one month.

Article 232. One who fails to show respect to any court, corporation or public official when he is exercising his duties, with contemptuous words, gestures or actions, or who disturbs him or interrupts him when he is acting shall be punished with eight days to one month imprisonment.

Article 233. The same penalties apply to one who insults or offends any person who is appearing before or in the presence of the courts or public officials.

El Salvador

Penal Code

Article 339. Whoever offends the honor or decorum, by deed or word, of a public official in the performance of his duties, or threatens such an official verbally or in writing, shall be punished with a prison term of six months to three years.

If the injured party is the President or Vice President of the Republic, a Deputy to the Legislative Assembly, a Minister or the Assistant State Secretary, a magistrate of the Supreme Court of Justice or Court of Appeals, a lower court judge, or a justice of the peace, the sanction may be enhanced by one-third of the maximum sentence.

Guatemala

Penal Code

Article 411. Whoever offends the dignity or honor of, or threatens, insults or defames any of the presidents of state organs shall be punished with one to three years in prison.

Article 412. Any persons who threaten, insult, or slander or in any other way offend the dignity or decorum of a public official or authority in the performance of his functions or on occasion of them shall be punished with a prison term of six months to two years.

Article 413. The accused of slander against officials or public authorities shall be allowed to submit proof of his imputation if it refers to acts performed in the exercise of their duties. In this case, if the imputation is proven correct, he shall be absolved.

20. These laws contradict Guatemala's own Political Constitution. Article 35 of the Constitution, which governs the right to freedom of expression, states the following with respect to *desacato*:

Article 35. The publications that contain denunciations, criticisms or accusations against officials or public servants for acts done in the exercise of their duties do not constitute a violation of law or offense.

Officials and public servants may demand that a non-judicial court made up in the form determined by law, declare that the publication which affects them is based on inexact facts or that the charges against them are unfounded. The verdict that vindicates the offended party shall be published in the same media that published the accusation.

21. This Article also provides that the right to freedom of expression shall be governed by the Constitutional Law on Expression. The law's status as a constitutional law means that it also supercedes the Penal Code. The Constitutional Law on Expression states in Article 35:

Criticism of public employees or officials for purely official acts performed as part of their official position shall not constitute the crime of slander or libel, even if they have left those public offices at the time that the accusations are made.

Haiti

Penal Code

Article 183. Whenever one or several administrative or other judges or a commander of a commune, in the performance of their duties or on the occasion of such performance, have been subjected to insults, whether verbally or in writing, which tend to jeopardize their honor or their sensitivities, the person who has insulted them shall be punished by imprisonment for no less than three months and no more than one year.

Article 184. Insults by way of gestures or threats against a judge or a commune commander while in the performance of their duties shall be punished by imprisonment for no less than three months and no more than one year.

Article 185. Insults by way of words, gestures or threats, to any ministerial officer or agent in charge of law and order, while in the performance of their duties or on the occasion of such performance, shall be punished by a fine of no less than sixteen and no more than forty gourdes.

Article 390-10. They shall be punished by a fine of from two to up to and including four piasters who without provocation proffer insults against any individual other than those provided in Articles 313 through 323.

Article 393. The persons covered by Article 390 shall in all cases be sentenced to imprisonment for three days.

Honduras

Penal Code

Article 323. Anyone who offends the President of the Republic in his physical integrity or in his liberty shall be sanctioned with incarceration of eight to twelve years.

Article 325. The crimes addressed in the three prior articles committed against the Secretaries of State, Delegates of the National Congress and Magistrates of the Supreme Court of Justice, shall be sanctioned respectively with the penalties stated in said articles, reduced by one fifth.

Article 345. The penalty of two (2) to four (4) years of incarceration shall be applied to anyone who threatens, defames, slanders, insults or in any way offends the dignity of a public authority as a result of his functions, whether it is done verbally or in writing.

If the offended person is the President of the Republic or a senior official stated in Article 325 above, the period of incarceration shall be three (3) to six (6) years.

Article 158. The person accused of slander may not present evidence of the truth of the imputation, unless the offended party is a public official or employee and it relates to facts about the offended party's duties. In this case the accused person shall be exonerated if he proves the truth of the imputation.

Mexico

Penal Code⁸⁴

Article 189. Anyone committing an offense against a public servant or agent of authority in the act of lawfully carrying out his duties or by reason of them shall be subject to one to six years' imprisonment in addition to that which corresponds to the crime committed.

22. Although this section does not refer specifically to crimes of disrespect, or *desacato*, against public officials, but rather to any crime when it is committed against a public official, the effect is to make the penalties greater for criminal defamation, libel and slander when these are committed against public officials. Articles 350 through 363 of the Penal Code

⁸⁴ In a letter to the Office of the Special Rapporteur dated January 12, 2000, the Government of Mexico stated that "there do not exist any so-called *desacato* laws in Mexico." It stated that Mexico's Constitution strongly protects freedom in numerous articles. Article 6 establishes that "the manifestation of ideas cannot be the object of a judicial or administrative inquiry, except in the cases of an attack against morals, the rights of a third party, a provocation to commit a crime, or the public order." Article 7 establishes that "the right to write and publish on any topic is inviolable." Again, according to this article, the only possible limitations on this right are those that ensure respect for privacy and protection of morals or public order. Article 70 "provides mechanisms to protect free expression from the ideological currents of the Chamber of Deputies." Article 109 states that "there can be no political trial (juicio político) for the mere expression of ideas." The government also noted some examples from the jurisprudence of the Supreme Court that strongly support the right to freedom of expression. In one statement, the Court asserted that "[a]mong the rights of man is the power to judge public officials[.]" (*Pleno, Quinta Época Seminario Judicial de la Federación, Tomo X, página 452, Martínez H. Alberto.-21 de febrero de 1922.-Seis votos*). The Court later stated that public officials "carrying out a function in the interest of society, are subject to the criticism of the governed, who have the right in accordance with Articles 6 and 7 of the constitution that the free expression of their ideas will not be the subject of any judicial or administrative inquiry, except in the limited cases which constitute attacks against morals, the right of a third person or disturb the public order[.]" (*Primera Sala, Quinta Época, Seminario Judicial de la Federación, Tomo XLV, página 3810, Arriola Valadez Agustín.-28 de agosto de 1935.-Cuatro votos*). The government asserts that the provisions of Article 189 of the Penal Code and Article 3 of the Ley sobre Delito de Imprenta (Law on Press Crimes) are secondary legislation that must be interpreted within the context of the constitution. These provisions, the government asserts, are subject to the principles of the Constitution and the interpretation given to them by the judiciary, which applies jurisprudential tests described above that "in the spirit of the Magna Carta" assure the governed the full exercise of individual rights in the area of freedom of expression.

deal with libel, defamation and slander. The defense of truth is available in cases of defamation in which the allegedly defamed party is a public official or person acting in a “public character,” if the imputation was related to the exercise of his or her functions.⁸⁵

Article 361. Slander, defamation and libel of Congress, either of the legislative chambers, the courts or any other official corporate body or institution shall be punishable under terms of the provisions set out herein, without prejudice to those in Article 190 of this Code.

Press Law of 1917

Article 3. It shall constitute an attack against public order o peace:

. . .

II. Any manifestation or expression made publicly by any of the means listed in the previous section, with which . . . one insults the authorities of the country for the purposes of causing hatred, scorn or ridicule of them; or for the same purpose, attacks professional public bodies, the Army or the National Guard, or the members of those groups by reason of their functions; insults friendly nations, their sovereigns, their leaders or their legitimate representatives in the country . . .
. [.]

23. Article 33, Sections IV through VIII establish the penalties for violations of Article 3. Depending on the position of the person insulted, penalties range from a maximum of one year-and-a-half in prison for insults to the president to a maximum of three months and a fine for insults minor public officials.

Article 34. Whenever the slander of an individual or a public official is perpetrated in a covert or unclear manner and the defendant refuses to give a satisfactory explanation in the view of the judge, he shall be subject to the penalty

⁸⁵ Article 351 (I) of the Penal Code of Mexico.

corresponding to the offense having not been committed in such circumstances. If a satisfactory explanation is given, there shall be no penalty whatsoever.

Nicaragua

Penal Code

Article 347. The following persons shall be in contempt of authority:

1. Those who . . . libel, slander or insult by word or deed, threaten a public official in the course of his duties or as a result of them, in his presence or in a notification or message they send him.⁸⁶

24. Article 348 states that violations of Article 347 carry a penalty of six-months' to four-years' imprisonment.

Panama

25. The legality of *desacato* laws and other forms of enhanced protection for public officials is established in Panama's Political Constitution. Article 33 provides:

The following can impose punishment without a prior trial, in the cases and within the precise terms of the law:

1. Public servants who exercise command and jurisdiction, who may impose fines on or arrest whoever offends or disrespects them in the carrying out of their duties or in attempting to carry out these duties. . . .⁸⁷

⁸⁶ It should be noted that Article 176 of the Penal Code states: "Criticism of issues of a political nature, of acts of the Government, of its institutions or organs, or of the philosophy of laws or the actions of public officials does not constitute injury (injuria)."

⁸⁷ According to the Human Rights Ombudsman of Panama (*Defensor del Pueblo de la República de Panamá*), this section of the Constitution would have no effect if the *desacato* laws were to be repealed because the language of the section with regard to "the precise terms of the law" implies the need for supporting legislation. However, the section is still cause for concern as it provides a legal basis for *desacato* laws.

The Penal Code contains the following provisions relating to *desacato*:⁸⁸

Article 307. Persons who publicly offend or insult the President of the Republic or the person replacing him in his functions shall be punished by imprisonment of 6 months to 10 months and a 20 to 50 days' fine.

Article 308. Persons who publicly denigrate a government body shall be punished with a prison term of 6 months to one year, and a 50 to 100 days' fine.

26. In addition to the Penal Code, *desacato* provisions appear in several other codes. Article 202 of the Judicial Code allows magistrates and judges to arrest someone who offends or disrespects them for up to five days. Article 386 of the Judicial Code provides that agents of the Public Ministry can arrest those who disobey or disrespect them. This section also allows the Attorney General and the Solicitor General to fine individuals up to 50 balboas or put them in jail for up to eight days for disobedience or disrespect.

27. Article 45 of the Administrative Code allows mayors to arrest those who disobey or disrespect them. Article 827 of the same code permits the President of the Republic, the Provincial Governors or the District Mayors to punish those who disobey or disrespect them with detention for five days to two months. Finally, Article 922 establishes that anyone who injures or mocks a government Minister, although the act may not constitute a crime, shall be punished with six to eighteen days in jail.

28. At the outset of the administration of President Mireya Moscoso, there were great hopes that these laws would be reformed; however, a year and a half later, these hopes have not materialized. On December 20, 1999, Laws 11 and 68, known as the "gag laws," were repealed by Law 55. At the same time, the government announced prompt reform of laws which restrict press freedom. Law 55 included a requirement that the government submit a comprehensive press-law reform bill by June 2000. Bill 56 was submitted to the Commission on Human Rights of the Legislative Assembly in June of 2000, by the Human Rights

⁸⁸ In criminal provisions for ordinary libel, slander and defamation, the truth is accepted as absolute defense in cases of libel, however, for slander, proof of truth is only accepted in cases involving public officials and public or private corporations (Article 176). Article 178 provides that "no crime against good reputation is committed through discussion, criticism and opinion about actions or omissions by civil servants."

Ombudsman. The bill would have repealed Articles 307 and 308 of the Penal Code, Articles 202(2) and 386 of the Judicial Code and Articles 45(12) and 827 of the Administrative Code. The bill was presented to the full legislature and the Commission on Government, Justice and Constitutional Issues accepted it for the first of three debates, as required under Panamanian law. After a debate of less than 24 hours, however, the bill was rejected by this Commission by an overwhelming majority. The Special Rapporteur is concerned to hear of this failed effort to repeal these laws, commends the Human Rights Ombudsman for his commitment to their repeal in the face of such adversity and urges continued efforts to reintroduce bills similar to Bill 56.

Peru

Penal Code

Article 374. Anyone who threatens, insults or in any way offends the dignity and decorum of a public official as a result of the exercise of his functions or when he is performing them, shall be subject to incarceration of no more than three (3) years.

If the offended party is the President of one of the Branches of Government, the penalty shall be no less than two and no more than four years.⁸⁹

29. With reference to the crime of defamation, set forth in Article 132 of the Penal Code, the Penal Code allows for a defense of truth when the defamed individual is a public official.⁹⁰

Dominican Republic

⁸⁹ But see Penal Code, Article 133, which states that slander or defamation is not committed in the case of commentaries or information that contain unfavorable opinions about a public official in the performance of his obligations.

⁹⁰ See Penal Code, Article 134.

30. The Law on Expression and Propagation of Ideas regulates contempt and other offenses that are committed through the use of the media. If the offense is not perpetrated through the media, the Penal Code governs.

Law on Expression and Propagation of Ideas

Article 26. An offense directed at the President of the Republic by any of the media listed in Article 23 shall be punishable by a prison term of three months to one year, plus a fine of RD\$100 to RD\$1,000, or with only one of the two sanctions.

The sanctions established in this same article apply to offenses directed at the person who exercises all or part of the prerogatives of the President of the Republic.

31. Article 30 provides that defamation of the courts, armed forces, national police, legislative chambers, city halls and other institutions are punishable with prison terms of one month to one year, plus fines of RD\$50 to RD\$500. Article 34 punishes defamation against cabinet members, members of the legislative chambers, public officials, law enforcement agents, private individuals charged with public duties or witnesses, who testify with six days to three months in prison and a fine of RD\$6.00 to RD\$60. The defense of truth is available when the aggrieved person is in the public sector.⁹¹

Penal Code

Article 368. Public defamation or libel against the Head of State shall be punished by a sentence ranging from three months to one year in prison, and a fine of ten to one hundred pesos and accessory or additional punishment during a period of time equal to the sentence, complete suspension of the civil and political rights set forth in Article 42.

⁹¹ Article 37 of the Law of Expression and Propagation of Ideas.

Article 369. Acts of defamation or libel against deputies or representatives to Congress, State Secretaries, magistrates of the Supreme Court or trial courts, or heads or sovereigns of friendly countries shall be punished by imprisonment of one to six months and a fine of fifty pesos.

Uruguay

Penal Code

Article 138. (Attacks against life, physical integrity, freedom or honor of foreign Heads of State or Diplomatic Representatives)

One who, within the territory of the State, by direct acts, attacks the life, personal integrity, freedom or honor of a foreign head of state or a diplomatic representative will be punished with four to 10 years imprisonment in case of an attempt on life and two to nine years imprisonment for other offenses.

If death results from the event, the punishment will be 15 to 30 years imprisonment.

Article 173. (Desacato)

Insult, impairing the authority of officials, is committed in any of the following ways: 1. By means of real written or verbal offenses carried out in the presence of the official or in the place where the latter carries out his duties, or outside his location and presence, but in these two latter cases with regard to or by reason of his duties. 2. By means of open disobedience to the orders of the official. Regarded as real offenses are armed entry into the place where the officials carry out their duties, violent behavior, and offensive words and gestures, even

when not directed against them. The offense is punishable by three to 18 months' imprisonment.

Article 174. (Aggravating circumstances)

The aggravating factors listed in paragraphs 2, 4 and 5 of Article 172 of this code are applicable to this crime.

Article 175. (Definition of Public Official)

For purposes of this Code, officials consist of all who exercise a duty or perform a function, paid or unpaid, permanent or temporary, of a legislative, administrative or judicial character, in the State, in a municipality or in any public entity.

32. Article 366 allows for a defense of truth or the notoriety of the alleged facts when the offended person is a public official and the facts or characteristics attributed to him refer to the carrying out of his duties and which are such that they could give rise to legal or disciplinary proceedings against him.

Venezuela

Penal Code

Article 223. Whoever offends in any way, by word or deed, the honor, reputation or decorum of a member of Congress or other public official shall be punished as follows, provided the offense took place in the presence of the offended and was motivated by his position:

1. For an offense against a law enforcement officer, one to three months in prison;
2. For an offense against a member of Congress or a public official, one month to one year in prison, determined by the rank of the offended party.

Article 225. If an offense is committed against a public official not because of his functions but while he is performing them, the same penalties, reduced by one-third to one-half, apply.

Article 226. Whoever offends in any way, by word or deed, the honor, reputation, decorum or dignity of any judicial body, political or administrative, shall be liable to punishment. If the offense is committed while the body is in session or against a magistrate during hearings, the sentence will be three months to two years in prison....

Article 227. In the cases stipulated in the preceding articles, the offending party may not present any proof as to the truth or the notoriety of the acts or errors with which the party is charged.

Article 228. The provisions established in the preceding articles shall not apply if the public official has given cause for the act by arbitrarily exceeding the confines of his powers.

Article 229. In all other cases not covered by a special provision of the law, persons who commit any crime against a member of Congress or any public official by reason of his functions shall be liable for the punishment established for the crime committed, plus an enhancement of one-sixth to one-third.

Code of Military Justice⁹²

Article 502. One who threatens or offends with words or gestures a sentinel, shall be punished with detention of six months to one year. If the act occurs during a military campaign, the penalty shall be one to two years in prison.

⁹² Civilians who violate this law are subject to prosecution in a military tribunal.

Article 505. One who in any form insults, offends or shows contempt for the National Armed Forces or one of its units shall incur a penalty of three to eight years in prison.

b. Violations of the Right to Freedom of Expression through the Use of *Desacato* and Criminal Defamation Laws

33. Throughout the region in 2000, *desacato* and criminal defamation laws were used to protect public officials and deter speech critical of governments. While each violation of the right to freedom of expression is problematic in and of itself, the more serious problem is the effect that these incidents may have on public discourse. Each incident sends the message that those who exercise their right to criticize the government will be punished, causing many potential critics to remain silent. The following pages make note of a number of prominent examples from the region.

34. In **Chile**, journalist José Ale Arevena, of the daily *La Tercera*, was convicted in February 2000 of “insulting” the former president of the Supreme Court of Chile, Servando Jordán. The charges stemmed from a 1998 article in which Ale commented on the reasons that Jordán had left his former position. Ale was convicted under Article 6(b) of the State Security Law and received a suspended sentence of 541 days in prison, which requires him to report to the authorities regularly. Charges were also brought against Fernando Paulsen, the director of *La Tercera*, but he was later acquitted by the Supreme Court.

35. Another ongoing case is that of Alejandra Matus, who left Chile in April 1999 in order to avoid being arrested for the publication of her book, *The Black Book of Chilean Justice*. Matus continues to live in exile in the United States, where she has been granted political asylum. The book criticized the Chilean judiciary for its lack of independence and for the corruption of judges during the regime of General Augusto Pinochet. Charges were filed against Matus under Article 6(b) of the State Security Law by Supreme Court Judge Servando Jordán because of accusations directed at him. On December 19, 2000, a ruling by Santiago Appeals Court Judge Jaime Rodríguez “temporarily halted legal proceedings . . .”, thus upholding an order for Matus’ arrest issued in November, which implies that with no further

recourse to appeal she may not return to her homeland until a statute of limitations expires in 13 years' time."⁹³

36. On January 24, 2001, the Third Chamber of the **Costa Rican** Supreme Court upheld a lower court ruling against journalist Mauricio Herrera Ulloa and the daily *La Nación* for defamation. The charges were filed by the former Costa Rican Honorary Ambassador to the International Atomic Energy Organization, whom Herrera had linked to financial scandals in articles he wrote for *La Nación*. These allegations had been previously printed in a number of well-known and respected European publications, but the court held against Herrera because the reports were not adequately verified. The Inter-American Press Association denounced this ruling, calling it "a form of insult or contempt law seeking to protect public servants in an unprecedented fashion through punishment. . . . Rather than reparation, the sentence seeks to set a deterrent penalty aimed at intimidating and promoting self-censorship."⁹⁴

37. In **Cuba**, Angel Moya Acosta, a member of the *Movimiento Opción Alternativa*, and Julia Cecilia Delgado, director of the Gertrudis Gomez de Arellaneda Library and president of the *Asociación por la Reconciliación Nacional y el Rescate de los Valores Humanos*, were tried for "disrespect" and both were sentenced to a year in prison. Angel Moya Acosta was also banned from travelling to Havana, where his wife and children live, for ten years. They were arrested in connection with the mass detentions of dissidents that took place leading up to December 10, 2000, Human Rights Day, in order to prevent them from organizing peaceful protests.

38. In July 2000, Nestor Rodríguez Lobaina, president of the *Movimiento de Jóvenes Cubanos por la Democracia* (Cuban Youth Movement for Democracy), was convicted of *descato*, public disorder and damages and sentenced to 6 years and 2 months in prison. Eddy Alfredo Mena y González, a member of the same movement, was convicted on the same counts for 5 years and 1 month.

⁹³ Inter-American Press Association, "IAPA Reiterates Call for Repeal of Insult Laws, Court Upholds Journalist's Conviction on Contempt Charges," December 27, 2000.

⁹⁴ Inter-American Press Association, "IAPA Condemns Ruling Against Journalist and Daily "La Nación," January 29, 2001.

39. In addition to the convictions of the past year, two journalists remained in prison throughout 2000, serving prison sentences for *descato*. Journalist Manuel Antonio González Castellanos, a correspondent for the independent news agency *Cuba Press*, is currently serving two years and seven months in prison for showing “disrespect” to President Fidel Castro. He was arrested on October 1, 1998 for criticizing Castro to State Security Agents who had stopped him and insulted him on the street. Bernardo Arévalo Padrón, founder of the independent news agency *Línea Sur Press*, is currently serving a six-year prison sentence for “disrespect” to Fidel Castro and Carlos Lage, a Cuban State Council member. He was convicted on October 31, 1997, after publishing an article on the privileges granted to Cuba’s political leaders.

40. On September 19, Jesús Antonio Pinedo Cornejo, editor of the magazine *Seminario* in Ciudad Juárez, **Mexico**, was arrested on charges of defamation. A complaint was filed by then-Commissioner of Public Security, Javier Benavides González, against Pinedo and journalist Luis Villagrana. The complaint arose out of an article written by Villagrana and published in *Seminario* that alleged that Benavides and other local police chiefs had helped to protect drug traffickers. Pinedo stayed in prison for one night and was released on a 15,000 peso (US\$1.590) bond. Villagrana appeared voluntarily before the court and was also ordered to pay a 15,000 peso bond. Benavides withdrew the petition on October 2. Had the case gone forward, the two journalists would have faced possible sentences of two years in prison.

41. In November 2000, the Special Rapporteur received word that Juan Manuel Handal, director of *La Carta de Panama* had been sentenced to 18 months in prison for “libel and slander.” The complaint was brought against him by the mayor of Panama, because of an opinion article Handal had written about him during his campaign. The sentence was later replaced with a fine of 400 balboas.

42. On August 8, Gustavo Gorriti, the associate director of *La Prensa*, and three journalists from the newspaper, Miren Gutiérrez, Mónica Palm and Rolando Rodríguez received a summons to testify in the case against them for “libel and slander.” The complaint was brought against them by Attorney General José Antonio Sossa, because of articles they had published in *La Prensa* in which they alleged that Sossa had protected a US businessman who was suspected of drug trafficking. The complaint is brought under Article 175 of the Penal

Code, which provides, “Any person who publishes or reproduces information harmful to an individual’s reputation in any media may be sentenced to 18 to 24 months in prison.” The trial was set for November 2000.

43. Jean Marcel Chéry, a journalist with the newspaper *El Panamá América*, was sentenced to 18 months in prison on July 14, 2000 for the crime of “libel and slander”. The charges stemmed from an article he published in 1996 in *El Siglo*. The sentence is currently being appealed to the Second Superior Court of Justice.

44. On June 22, 2000, Carlos Singares, director of the daily newspaper *El Siglo*, was sentenced to eight days in prison for *desacato* by Attorney General José Antonio Sossa, under Article 386 of the Judicial Code. Singares had published an article containing sexual allegations against Sossa. Article 386 gives the Attorney General summary power to jail anyone who offends him for up to eight days, without allowing an opportunity for defense. Singares appealed this conviction by writ of *habeas corpus* to the Supreme Court, which found that Article 386 was constitutional, according to Article 33 of the Constitution. Singares was imprisoned from July 28 through August 4. Additionally, on August 2, the Second Superior Tribunal of Justice upheld a 20-month sentence against Singares in a case against him for allegedly defaming former president Pérez Balladares. The sentence was commuted to a fine of US \$ 1,875 and is currently on appeal before the Supreme Court.

45. In addition to these cases, according to one report published by the non-governmental organization Reporters Without Borders, there are currently as many as 40 journalists who are being prosecuted in **Panama** for “insults” or “defamation.”⁹⁵

46. In December 2000, James Beuzeville Zumaeta, the director of the radio program *La Razón* in **Peru**, was sentenced to a one-year suspended prison term and civil damages in the amount of 8,000 new soles (approximately US \$2,300) for insult and aggravated defamation against José Tomás Gonzales Reátegui, former president of the Consejo Transitorio de Administración Regional (CTAR) (Provisional Council of Regional Administration) of Loreto and former minister of the Presidency. Beuzeville had made allegations on his

⁹⁵ Reporters Sans Frontières (Reporters without Borders) (RSF).

program of irregularities and acts of corruption committed by Gonzales during his leadership of CTAR.

47. On October 31, 2000, Adrián Aguilar Reyes, director of the radio program *Huandoy Noticias*, received a one-year conditional prison sentence and was ordered to pay monetary damages of 1500 soles (about US \$430). Aguilar was convicted of defamation of Mayor Pedro Crisólogo Castillo Flores as a result of a report in which he told of some serious irregularities during an election on April 9. After these statements, the signal was suddenly cut, and Aguilar accused Mayor Castillo of having done this in order to prevent more information about election irregularities from reaching the public.

48. On August 9, 2000, a defamation complaint was filed against Alfredo del Carpio Linares, director of a radio program entitled *Veredicto: La Voz del Pueblo* (Verdict: The Voice of the People). The provincial mayor of Camaná, Enrique Gutiérrez Sousa, brought the complaint based on an interview of Oficialista Party Congressman Rubén Terán Adriazola, in which del Carpio asked about some irregularities in the public expenditures of the municipality of Camaná. At last report, the mayor was seeking a sentence of three years in prison and the maximum fine allowable by law, approximately US \$28,000. In August 2000, proceedings were launched against the newspaper *Liberación* for the alleged aggravated defamation of Juan Miguel Ramos Lorenzo, a member of the Superior Court of Lima.

49. In **Venezuela**, attorney and university professor Pablo Aure was detained by the military authorities on January 8, 2001, because of the publication of an article in which he made fun of the supposedly submissive attitude of the military towards president Hugo Chávez. He was released on January 10, but he continues to face charges under the military's jurisdiction for violating Article 505 of the Code of Military Justice.

Conclusion

50. As the cases above indicate, *desacato* laws and criminal defamation laws are used throughout the region in order to punish journalists and others for reporting on information that the public has a legitimate right to know in a democratic society.

51. Regardless of the frequency with which these are invoked or enforced, their existence produces a chilling effect on speech that is critical of the government. For this reason, the Special Rapporteur urges the immediate repeal of all the *desacato* laws cited in this report. For the same reason, states should take steps to eliminate criminal defamation, libel and slander laws, particularly in cases in which the offended party is a public official, and to incorporate the doctrine of actual malice into their laws regarding offenses against honor and reputation.