

CHAPTER IV

Laws on Contempt, Compulsory Membership in a Professional Association, and Murder of Journalists

In this chapter, the Rapporteur will refer to the following three specific problems: legislation on contempt [*desacato*]; the requirement that journalists be affiliated with a professional association; and, the murder of journalists.

The Rapporteur has selected these three issues because murder of journalists is the most direct and brutal threat to or violation of freedom of expression. As for the legislation on contempt and compulsory membership in a professional association, the Rapporteur decided to take up these subjects to follow up on recommendations made by the Commission in its report on contempt laws [*leyes de desacato*] and on the Court's advisory opinion on compulsory membership in a professional association [*colegiación obligatoria*].

A. Contempt Laws [*Leyes de Desacato*]

The Commission took special care in analyzing the incompatibility of laws punishing offensive expressions directed at public officials, or the so-called "contempt laws," with the right to freedom of thought and expression.⁵⁹ The Commission concluded that these laws restrict freedom of expression as it is prescribed in the Convention.⁶⁰ On this point, it had the following to say:

In conclusion, the Commission finds that the use of such powers to limit the expression of ideas lends itself to abuse, as a method for silencing unpopular ideas and opinions, and thus it restricts the public debate which is fundamental to the effective functioning of democratic institutions. Laws that penalize the expression of ideas which does not incite lawless violence are incompatible with freedom of expression and thought, as established in Article 13, and with the basic purpose of the American Convention to protect and guarantee a pluralistic and democratic way of life.⁶¹

The Commission went on to state as follows in that study:

Application of contempt laws to protect the honor of public officials acting in an official capacity unjustifiably grants them the right to a protection that is not offered to other members of society. This distinction is in direct conflict with the fundamental principle of a democratic system, according to which the government is the object of controls, including the scrutiny of its citizens, so as to prevent or control any abuse of its coercive power. If public officials acting in an official capacity

⁵⁹ IACHR, Report on Compatibility between Contempt Laws and the American Convention on Human Rights, OAS/Ser/L/VIII.88, Doc.9 rev (1995), pages 210 to 223.

⁶⁰ At the same time, it is important to note that the Commission received a complaint from journalist Horacio Verbitsky against the Argentine government, which referred to restrictions on freedom of expression in the form of contempt laws. In this case, a friendly settlement was reached. In the report on the friendly settlement, it was pointed out that: "In accordance with Article 49 of the American Convention, the Commission analyzed the content of the friendly settlement in question to ascertain its conformity with the Convention. The Commission is of the opinion that annulment of the crime of contempt in the context of the case in point would bring Argentine law in conformity with the American Convention, since it would eliminate a legal basis for government restriction of freedom of expression, as established in the American Convention." See annex 3.

⁶¹ Op. Cit. at 60.

are regarded for all effects and purposes as the government, it is then precisely the right of individuals and the citizenry to criticize and scrutinize the action and attitudes of those officials in matters related to their public office.

In addition to direct restriction, contempt laws indirectly restrict freedom of expression because they carry with them the threat of imprisonment or fines for persons who insult or offend a public official. In this regard, the European Court argued that although the subsequent penalties of a fine and revocation of a published article do not prevent the petitioner from expressing himself, "they are nonetheless equivalent to censorship, which might deter that person from formulating criticism of that sort in the future." The fear of punishment and sanctions necessarily discourages citizens from expressing their opinions on issues of public concern, and especially when legislation fails to distinguish between value judgments and facts. Political criticism often involves value judgments.

The Commission further observes that the burden that contempt laws place on persons wishing to participate in the public debate over the proper functioning of the public administration is not lessened by the possibility of proving the truth as a defense. Even the laws that allow truth as a defense inevitably inhibit the free flow of ideas and opinions by shifting the burden of proof onto the person expressing his opinions. This is particularly the case in the political arena, where political criticism is often based on value judgments, rather than purely fact-based statements. Proving the veracity of these statements may be impossible, since value judgments do not allow for proof. Therefore, a rule that requires a critic of public officials to guarantee the factual content of his statements has disturbing implications for criticism of government conduct. Rules of this sort raise the possibility that persons who criticize the government in good faith may be penalized for that criticism. Moreover, the threat of criminal liability for dishonoring the reputation of a public official, even as an expression of a value judgment or an opinion, can be used as a method for suppressing criticism and political adversaries. By shielding officials from defamatory expression, contempt laws establish a structure that, in the final analysis, shields the government itself from criticism.

The Commission is of the opinion that an important distinction should be drawn between misconduct that disrupts or prevents public officials from performing their official functions and discourse that criticizes individual performance. Although it can be argued that contempt laws that require that the offensive discourse be pronounced in person are designed to prevent civil unrest and disturbances, in any event they punish freedom of expression to the extent that it is related to the honor of a public official.

Finally, and most importantly, the Commission notes that the rationale behind contempt laws reverses the principle that a properly functioning democracy is indeed the greatest guarantee of public order. These laws claim to preserve public order precisely by restricting a fundamental human right which is also internationally recognized as a cornerstone upon which democratic society rests. Contempt laws, when applied, have a direct impact on the open and rigorous debate about public policy which Article 13 guarantees and which is essential to the existence of a democratic society. In this respect, reference to the concept of 'public order' to justify contempt laws directly inverts the logic underlying the guarantee of freedom of expression and thought established in the Convention.

The special protection contempt laws afford public functionaries from insulting or offensive language is not congruent with the objective of a democratic society to foster public debate. This is particularly so in light of a government's dominant role in society, and especially where other means are available to reply to unjustified attacks, through government access to the media or civil action against individuals for libel or slander. Any criticism that is not related to the officials' position may, as is the case for all private individuals, be subject to ordinary libel, slander, and defamation actions. In this sense, the government's prosecution of a person who criticizes a public official acting in an official capacity does not comply with the requirements of Article 13(2), because the protection of honor in this context is conceivable without restricting criticism of the government administration. As such, these laws are also an unjustified means of limiting speech that is already restricted by laws that all persons may invoke, regardless of their status.

Moreover, the Commission notes that, contrary to the rationale underlying contempt laws, in democratic societies, political and public figures must be more, not less, open to public scrutiny and criticism. The open and wide-ranging public debate, which is at the core of a democratic society, necessarily includes those persons who are involved in devising and implementing public policy. Since these persons are at the center of public debate, they knowingly expose themselves to public scrutiny and thus must display a greater degree of tolerance to criticism.

Articles 13(2) and (3) recognize that the zone of legitimate state intervention begins at the point where the expression of an opinion or idea directly interferes with the rights of others or constitutes a direct and obvious threat to life in society. However, particularly in the political arena, the threshold of state intervention with respect to freedom of expression 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 freedom of 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. Article 13(5) stipulates that:

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.'

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 or correction. In this sense, the state guarantees protection of the privacy of all individuals without abusing its coercive powers to repress individual freedom to form opinions and express them.

The Rapporteur sets out below which States and which laws have contempt provisions and are therefore not compatible with the terms of the American Convention and should be revoked. This list does not cover all existing legislation on the subject. Many States have other laws that criminalize contempt and that should also be revoked. Some Penal Codes provide as follows:

BOLIVIA

Article 162: Persons who by any means slander, insult, or libel 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 the Vice President of the Republic, State Ministers, or members of the Supreme Court or of Congress, the punishment will be enhanced by half.

BRAZIL

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 ⁶²

Article 263: Any person who by deed or by speech gravely offends the President of the Republic or any of the legislative bodies or committees of those bodies, either in the public acts representing them or in the performance of their individual functions, or the high courts of justice, shall be punished by an average to maximum sentence to medium-term imprisonment [*reclusión menor*] and a fine ranging from eleven to twenty minimum wages.

Article 264: Persons who commit the following acts are considered to be acting in contempt of authority:

1. Persons who seriously breach the order of sessions of the legislative bodies and persons who insult or threaten a deputy or senator during any such sessions;
2. Persons who seriously breach the order of hearings in the courts of justice and persons who insult or threaten a member of those courts during any such hearings;
3. Persons who insult or threaten: First: A senator or deputy for the opinions expressed in Congress. Second: Members of the court for rulings they may have issued. Third: State ministers or another authority in the performance of their official duties. Fourth: A superior officer in the performance of their functions.

COSTA RICA

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

A sentence of six months to three years shall apply if the injured party is the President of the Nation, a member of the supreme powers, or a judge, magistrate of the Supreme Election Board, or the Comptroller or Assistant Comptroller-General of the Republic.

CUBA

Article 144. Any person who threatens, slanders, libels, defames, insults, or in any way offends or affronts, by 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* or both.

ECUADOR

Article 231. Any person who uses threats, insults, intimidation, or violence to offend any of the public officials listed in Article 225 while these officials are performing their official functions, or by reason of those functions, shall be punished by imprisonment ranging from fifteen days to three months and a fine of fifty to three hundred sucres. Persons who commit the violations listed in the previous clause against another official who is not performing official duties shall be punished by imprisonment ranging from eight days to one month.

⁶² In Chile, Article 6(b) of the State's Internal Security Law is also often used as a contempt [*desacato*] law.

EI SALVADOR

Article 339. Persons who offend the honor or decorum of a public official in the performance of his official duties or by reason of those duties, in action or by speech while in his presence, or in a written communication addressed to him, shall be sanctioned by imprisonment ranging from 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

Article 411. Any persons who offend the dignity or decorum, or threaten, insult, or slander any of the presidents of state organs shall be punished with a prison term of one to three years.

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 the occasion of them shall be punished with a prison term of six months to two years.⁶³

HAITI

183. When one or several administrative or judicial magistrates or communal chiefs should, in the performance of their functions or on the occasion of said performance, be offended orally or in writing in a way that is injurious to their honor or sensitivity, the offender shall be punished by imprisonment of three months to one year.

184. Any offense committed by means of gestures or threats to magistrates or communal chiefs in the performance of their functions or on the occasion of said performance shall be punished by imprisonment of one month to one year.

185. Any offense committed by gestures, words, or threats against any ministerial official or member of the law enforcement forces, while performing their functions or on the occasion of said performance, shall be punished by a fine ranging from 16 gourdes to 40 gourdes.

Articles 390 and 393 of the Criminal Code

390-10. Any persons who have proffered insults other than those covered by Article 313-323 shall be punished with a fine ranging from 2 – 4 *piastres*.

⁶³ Articles 411 and 412 of the Criminal Code should be considered together with Article 35 of the Political Constitution and Article 35 of the *Ley Constitucional de Emisión del Pensamiento* [Constitutional Law on Expression]. Article 35 of the Constitution states as follows: "Publications that contain reports, criticism, or accusations against public employees or officials for acts performed while exercising their duties shall not constitute crimes or offenses...."

Public employees and officials may demand that a court of honor, formed as determined by law, declares that the publication affecting them is based on inaccurate facts or that the charges against them are unfounded. A court decision vindicating the injured party must be published in the same information medium where the accusation or offending statement appeared.

Article 35 of the Constitutional Law on Expression states: "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."

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

HONDURAS

Article 345. Any persons who threaten, slander, libel, insult, or any other way offend the dignity of a public authority on the occasion of the performance of those functions, either in deed, in speech, or in writing, shall be punished by imprisonment of two to four years. If the injured party is the President of the Republic or any of the high officials referred to in Article 325 above, the prison term shall be three to six years.

MEXICO

Article 189. Any persons who commit a crime against public servants or agents of the government while such persons are legitimately fulfilling their functions or by reason of said functions, shall be sentenced to one to six years in prison, in addition to any sentence applicable in the case of the crime committed.⁶⁴

NICARAGUA

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

1. Persons who provoke to a duel, slander, defame, or insult, in action or in speech, or threaten public officials in the performance of their duties or on the occasion of said duties, in their presence or by notification or in writing addressed to them;
2. Persons who cause a serious breach of order in the courts and tribunals and in any other place where public officials or authorities are performing their functions;
3. Persons who, while armed and without being authorized by law, either openly or clandestinely enter Congress while it is in session, or any of the legislative chambers, or any court or tribunal;
4. Persons who prevent a public official or representative from gaining access to his chamber or office;
5. Persons who openly disobey authority.

PANAMA

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 six months to one year and a 50- to 100-days' fine.

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

PERU

At the same time, the 1917 press law establishes in its Article 3: "[...] causes injury to the authorities of the country for the purposes of causing hatred or scorn or ridicule of them, or for the same purposes attacks professional public bodies, the Army or the National Guard, or the members of those groups, by reason of their functions;"

Article 374. Persons who threaten, insult, or in any other way offend the dignity or decorum of a public official by reason of the performance of his duties or at the time of performing them shall be punished with imprisonment of no more than three years.

If the injured party is the President of one of the government branches, the sentence shall be no less than two or more than four years.

DOMINICAN REPUBLIC

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, and complete disqualification and suspension of the civil and political rights set forth in Article 42.

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

Article 173. Contempt is committed by discrediting the authority of officials in one of the following ways:

1. By actual, written or verbal offenses, committed in the presence of the official or in the place where he performs his functions, or outside the place and the presence of that official, but, in the latter two cases, by reason of or on the occasion of those functions.
2. By open disobedience of the orders or instructions of said officials.

Actual offenses are considered as entering with arms the place where the officials perform their functions, physical violence, offensive gestures and shouts, even if they are not directed against said officials.

The crime is punished by a prison term of three to eighteen months.

VENEZUELA

Article 223. Any person who in any way, by speech or by act, offends the honor, reputation, or decorum of a member of Congress, or of any public official, shall be punished as follows, provided the act took place in the presence of said official or on the occasion of his functions:

1. If the offense was directed against a law enforcement officer, the offender is sentenced to a prison term of one to three months;
2. If the offense was directed against a member of Congress or any public official, the offender is sentenced to a prison term of one month to one year, depending on the rank of the persons in question.

Article 226. Any person who in any way, by speech or by act, offends the honor, reputation, decorum, or dignity of any judicial, political, or administrative body shall be punished with imprisonment of three months to two years, if the crime was committed while said body was in session, or while a judicial hearing was being held.

If the offender used violence or threats, the prison term shall be six months to three years.

Action shall be brought only at the request of the offended party. If the crime was committed against bodies not in session, legal action shall be brought only at the petition of the presiding members.

Said petition shall be addressed to the representative of the Office of the Public Prosecutor, to initiate the appropriate proceedings.

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 proceeding 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.

The Rapporteur wishes to note that a pluralistic and tolerant democracy is one in which a fluid movement of ideas, opinions, and open public debate are permitted. It is within this context so crucial to democracy that civil servant designing and applying public policy including the administration of justice are exposed to public opinion and scrutiny. The contempt laws seek to avoid debate as well as the scrutiny or criticism of state officials. Thus, contempt laws, instead of protecting freedom of expression or civil servants limit freedom of expression and weaken the democratic system.

Likewise, the Rapporteur points out that many States of the Continent still have rules on contempt of public authority that continue to be invoked by the authorities to silence their critics and thus restrain freedom of expression. This situation debilitates the democratic system.