

B. Domestic jurisprudence of the member states

1. Introduction

70. This section includes certain decisions by local tribunals that were handed down during 2002 and that reflect the importance of respecting freedom of expression as protected in the Convention. The Special Rapporteur for Freedom of Expression believes that publicizing comparative case law from countries of the hemisphere will be useful for judges who are called to decide similar cases in their own jurisdictions.

71. It is appropriate to note that States have the obligation to respect the rights and freedoms recognized in the Convention and to ensure their full and free exercise for all persons subject to their jurisdiction³¹². It has been mistakenly assumed at times that acts restricting freedom of expression, for example, acts of prior censorship, emanate solely from the executive or legislative branches. Yet under the inter-American system, judgments issued by the courts can also violate Article 13 of the Convention. On this point, the Inter-American Court has said:

This Court understands that the international responsibility of the State may be engaged by acts or omissions of any power or organ of the State, whatsoever its rank, that violate the American Convention³¹³

72. The Court has also declared that “the obligation to ensure the free and full exercise of Human Rights is not fulfilled by the existence of a legal system designed to make it possible to comply with this obligation—it also requires the government to conduct itself so as to effectively ensure the free and full exercise of Human Rights.”³¹⁴ In this sense, it is clear that judicial decisions take on a fundamental importance. If those decisions are not consistent with international standards protecting human rights, it matters little whether the legislation itself is consistent. States must avoid “a dialogue of the deaf between constituents and judges. While constituents will undoubtedly opt for the benefit of international pressure, judges on the contrary are limited to the strict framework of legislation of national origin.”³¹⁵

³¹² American Convention, Article 1(1).

³¹³ “The Last Temptation of Christ” case (Olmedos Bustos *et al.* vs. Chile), judgment of February 5, 2001. Moreover, case law in the Inter-American system is clear as to the obligation to enforce respect of all the rights enshrined in the Convention, by all organs of the State: “Whenever a State organ, official or public entity violates one of those rights, this constitutes a failure of the duty to respect the rights and freedoms set forth in the Convention...[A] State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law.” See Inter-American Court of Human Rights, Velásquez Rodríguez case, judgment of July 29, 1988, Series C., No. 4, para 170.

³¹⁴ See Inter-American Court of Human Rights, Velásquez Rodríguez case, judgment of July 29, 1988, Series C., No. 4, paras 167 and 168.

³¹⁵ Ariel E. Dulitzky, “La Aplicación de los Tratados sobre Derechos Humanos por los Tribunales Locales: un Estudio Comparado”, Various Author, Publication of the Centro de Estudios Comparados Legales y Sociales, Argentina. Editores Del Puerto, 1997. (Free translation).

73. The Commission has held that:

Among democratic institutions it is the role of the judiciary to look out for the proper enforcement of both the law and the administration of justice. Nothing can undermine respect for the courts and their authority more than their own indifference or impotence in the face of grave injustices, which may result from blind adherence to legal formulas. Democratic nations respectful of the human rights of their people commit themselves, both to their own citizens and to the international community at large, to guarantee respect for fundamental human rights.³¹⁶

74. It is for this reason that judicial decisions must ensure enforcement in the domestic sphere of international rules for the protection of human rights, especially in light of the subsidiary nature of international protection mechanisms.³¹⁷

75. This section highlights some court decisions that have expressly or implicitly taken account of international standards protecting freedom of expression. In other words, this section is not a critique of judicial decisions, but rather an attempt to show that in many cases those standards are indeed considered. The Rapporteur hopes that this attitude will prevail among other judges in the hemisphere.

76. As a final thought, it will be clear that not all arguments in the decisions quoted are shared by the Office of the Special Rapporteur for Freedom of Expression, but that Office agrees with the fundamentals of the decisions. As a second point, there is no doubt that there are many other cases that could have been summarized in this report. The selection has been somewhat arbitrary, both for reasons of space and for lack of sufficient information. The Rapporteur's Office urges States to provide it in the future with more judicial decisions enforcing the inter-American system of protection of freedom of expression, so that this section can be expanded in subsequent annual reports.

77. The organization of this section takes account, as it must, of the standards arising from interpretation of Article 13 of the Convention, which declares 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 health or morals.

³¹⁶ Report 74/90, Case 9850 (Argentina), Annual Report of the IACHR, 90-91.

³¹⁷ See Dulitsky, *op. cit.*

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.

78. The standards referred to have been further developed by the jurisprudence of both the Commission and the Court. Many of those standards have been included in the Declaration of Principles on Freedom of Expression.³¹⁸ For these reasons, the categories described below are related to the various principles of that Declaration. In this report, the categories selected are: a) the protection of journalistic sources, in Principle 8; b) the importance of information in a democratic society, in Principle 2; and the incompatibility of subsequent criminal penalties in certain cases, in Principle 11.

79. This report covers case law from Argentina, Costa Rica, Colombia, Panama and Paraguay. In each of the categories, the relevant principle is quoted from the Declaration, followed by a short summary of the facts of the case, and extracts from the decision of the domestic court.

a. Protection of journalistic sources

80. Declaration of Principles on Freedom of Expression. Principle 8: “Every social communicator has the right to keep his/her source of information, notes, personal and professional archives confidential.”

81. Case decided by: Federal Court of Appeals in Criminal and Correctional Matters of the Federal Capital, Argentina, Buenos Aires, October 28, 2002. Chamber II. Registry No. 20,377.

82. The Facts of the Case. In September 2002, a Federal Judge ordered the State Intelligence Service (SIDE) to prepare a list of all incoming and outgoing telephone calls of the journalist Thomas Catan, a correspondent for the *Financial Times* in Argentina, as part of an investigation of corruption in the Senate. In August, the journalist had published an article mentioning a complaint that a group of foreign bankers had sent to the embassies of Great

318 See "IACHR Annual Report, 2000", Volume III, Report of the Special Rapporteur for Freedom of Expression, Chapter II (OAS/Ser.L/V/II.111 Doc 20 rev April 16, 2001).

Britain and the United States alleging demands for kickbacks by Argentine legislators. Upon being summoned to appear on September 17, the journalist testified before the court and provided the information requested, but he refused to identify his sources of information. As a result of the decision of the Federal Judge, the journalist brought an appeal for constitutional protection (*amparo*) before the Federal Chamber, to have that decision overturned. In his brief to the Court, the journalist argued that the order of the Judge violated the constitutional protection of information sources established in Articles 43 and 18 of the national Constitution, which guarantees the privacy of individuals' homes, correspondence and private papers. Finally, the Federal Chamber overturned the lower court decision and ordered that the telephone lists be destroyed in the presence of the journalist and his attorneys.

83. The Decision (pertinent paragraphs)

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III. We must remember, to begin with, the importance that this court has historically assigned to freedom of expression (see case No. 9373, Reg. No. 10,318 of November 8, 1993, case No. 12,439, Reg. No. 13,999 of March 4, 1997, and case No. 17,771, Reg. No. 18,835, of July 17, 2001, among others).

The Inter-American Court of Human Rights has observed that "when an individual's freedom of expression is unlawfully restricted, it is not only the right of that individual that is being violated, but also the right of all others to 'receive' information and ideas. The right protected by Article 13 consequently has a special scope and character, which are evidenced by the dual aspect of freedom of expression. It requires, on the one hand, that no one be arbitrarily limited or impeded in expressing his own thoughts. In that sense, it is a right that belongs to each individual. Its second aspect, on the other hand, implies a collective right to receive any information whatsoever and to have access to the thoughts expressed by others" (Advisory Opinion OC-5/85 of November 13, 1985, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, paragraph 30).

Among the fundamental aspects of freedom of expression is free access to sources of information, the ability to gather news, to transmit and disseminate it, and to maintain reasonable secrecy about the source of such news. (German J. Bidart Campos, "*Manual de la Constitución Reformada*," Ediar, Buenos Aires, 1996, Volume II, page 15).

In this respect, we also note that Article 4 of the American Declaration on the Rights and Duties of Man, Article 19 of the Universal Declaration of Human Rights, Article 13.1 of the American Convention on Human Rights, and Article 19.2 of the International Covenant on Civil and Political Rights, provide that freedom of expression includes the freedom to seek, receive and disseminate information.

In relation to this last aspect, we must note the role that information sources play in the investigative work of journalists, and its link to the effective exercise of freedom of the press. "It is frequently true that the ability of people of the press to obtain information legitimately is conditional on not disclosing the source of that information. This is one of the basic rules of the art of journalism, and any credibility that the journalist may have in the eyes of people supplying information will be conditional on observing that rule, as will be his ability to continue to count on a flow of significant and interesting new information" (Gregorio Badeni, "*Secreto profesional y fuentes de la información periodística*," LL 1990-E-43).

Similarly, this court has ruled that "it is precisely this ability of the press to dig up information that gives the public one of its means for exerting control over public officials, and for bringing their concerns and complaints to the judiciary, which alone is empowered to clarify the issues posed." (Case No. 11,585 "Gostanian," Reg. No. 12,677 of December 21, 1995).

In conclusion, there is no need here to compromise the secrecy of Mr. Catan's sources of information in order to compile evidence for the case, because there are alternative routes to the same end. In this situation, the challenged judgment constitutes an unreasonable and therefore illegitimate restriction on the freedom of expression, for which reason this court declares that judgment null and void, as violating the constitutional guarantees indicated (Article 14 of the National Constitution, Article 4 of the American Declaration on the Rights and Duties of Man, Article 19 of the Universal Declaration of Human Rights, Article 13.1 of the American Convention on Human Rights, Article 19.2 of the International Covenant on Civil and Political Rights, and Articles 168 (2) and 172 of the Code of Criminal Procedure of Argentina).

Moreover, in order to terminate the effects of that judgment, the judge must retrieve the files with the lists of phone calls in question, which are currently in the power of the Directorate of Judicial Observations of the State Intelligence Service, and must proceed to destroy them in the presence of the plaintiff and his attorneys, together with any other element relating to this measure that is still held by that service or by that court.

b. The importance of information in a democratic society

84. Declaration of Principles on Freedom of Expression. Principle 2. "Every person has the right to seek, receive and impart information and opinions freely under terms set forth in Article 13 of the American Convention on Human Rights."

85. Case decided by: Full Chamber of the Constitutional Court of Colombia, Judgment C-1024/02, Reference RE 123, Control of Constitutionality Legislative Decree No. 2002 of 2002, "adopting measures for the control of public order and defining rehabilitation and consolidation zones," presiding magistrate: Dr. Alfredo Beltran Sierra, Bogota, November 26, 2002.

86. Facts of the case. The Colombian Court examined the constitutionality of Article 22 of Legislative Decree 2002 of September 9, 2002. That decree contains many provisions relating to the struggle against terrorism. With respect to the freedom of expression, the court examined that article because it could be interpreted as meaning that there were zones where foreign journalists were not allowed to enter. The article on "Travel and Stay of Foreigners" says that "before entering a rehabilitation and consolidation zone, foreigners must inform the Governor of their intention to travel or remain in this zone. The Governor, within eight days, and with due regard to the special conditions of public order, may refuse or authorize the requested travel or stay. Foreigners who are now in a rehabilitation and consolidation zone, and who wish to stay or travel there, must inform the Governor of their intention within eight days after Declaration of the rehabilitation and consolidation zone. Foreigners who violate the provisions of this Article may be expelled from the country in accordance with existing legal procedures."

87. Decision (pertinent paragraphs)

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This rule requires foreigners to provide advance notification to the Governor of their intention to travel or remain in those areas, and the Governor may refuse or authorize such travel or stay within eight days, taking into account special conditions of public order. Moreover, it provides that foreigners already in such zones and seeking to remain there or travel through them, must advise the Governor of their intention within eight days after Declaration of a rehabilitation and

consolidation zone. In its final paragraph, it allows for the expulsion of foreigners who violate the foregoing provisions, in accordance with existing legal procedures.

Having examined this rule, the court finds that the national Constitution guarantees the right to report and receive truthful and impartial information as one form of freedom of expression, for which reason it also provides that there shall be no censorship and that the mass communications media are free, with social responsibility.

It is clear that a democracy requires freedom of the press as a means for keeping it informed of events and of the work of its authorities, and the acts and omissions of persons in public office, thereby opening the way for the citizens to exert control over political power and at the same time guaranteeing that their fundamental rights will be respected, and any violations of those rights will be publicized, precisely in order to prevent the cover-up of such violations. It is axiomatic in the civilized world today that when freedom of expression is threatened, all other liberties are threatened.

In this order of ideas, Article 25 of the Charter bears closely on Article 73 thereof, which provides that "journalists shall enjoy protection for their freedom and their professional independence," while Article 74 adds that professional secrecy may not be violated.

There is no doubt that limitations on freedom of the press, whether to restrict or impede access to information or to the scene of events that might be of interest to journalistic investigation and publication, either domestic or international, cannot be established by law under normal conditions, since to do so would violate the above-mentioned constitutional guarantees.

While it is true that Article 22 of the decree in question does not impose direct restrictions on freedom of the press, it is no less true that in the case of foreign journalists this rule could be used to require them to provide notice of their intent to travel or remain in the rehabilitation or consolidation zones to be established, and to obtain a permit to enter such zones, which may be issued within eight days: this clearly constitutes a restriction on that freedom, which is inadmissible according to the Constitution.

We must conclude, then, that in the case of foreign or national journalists working for duly accredited foreign media and those who pursue journalism for any of the communications media in Colombia, the rule contained in Article 22 of Legislative Decree 2002 of 2002 cannot be applied to them as a prerequisite for entering, traveling through or remaining in any portion of the country in the course of their work. The only thing that can be required of them is to demonstrate their quality as journalists, and nothing more.

Similarly, permission to enter, travel through or remain in the so-called rehabilitation and consolidation zones cannot be limited in the case of foreigners engaged or intending to engage in humanitarian, health or religious work in those zones, since any such limitation would violate the rules of international humanitarian law which are binding on Colombia.

c. Incompatibility of criminal penalties

88. Declaration of Principles on Freedom of Expression. Principle 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."

89. Case decided by: Second High Court of the First Judicial District, appeals judgment No. 227, Panama, Oct. 25, 2002.

90. Facts of the case. The Tenth Criminal Court of the First Judicial Circuit of the Province of Panama acquitted Mr. Miguel Antonio Bernal of charges of alleged crimes of insults

and slander against Mr. Jose Luis Sosa, who served as Director General of the National Police. According to the decision, TVN Channel 2 carried a report on the national police, which was neither clarified nor retracted in a story in the newspaper La Prensa, where Dr. Miguel Antonio Bernal said "it was the police or the guards who decapitated the prisoners in Coiba. We all know that the authorities break the law by act or omission." Nevertheless, the defendant confirmed in that same column, "I have said, and I stand by this, that the only ones who have decapitated people in this country are the gentlemen of the National Police, the National Guard, the defense forces, and many of those who participated, by act or omission, occupy very high positions." The representative of the Attorney General's Office appealed the acquittal ruling.

91. Decision (pertinent paragraphs)

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The foregoing means that the authorities have responsibilities in the exercise of their functions, and these may arise through act or omission.

This principal in turn is related to the indirect and immediate effects of the crimes: the first are indicators of the way the crime affects the community in general, as a violation of the common good, solidarity, subsidiary, human dignity, normal coexistence, and breakdown of public order (this means violation of the laws and disrespect of the authorities), while the second represents the psychological, moral, economic and social effects on the victim, his relatives and friends.

For these reasons, when crimes are committed, and especially when these are significant or a cause of public concern, society will ask questions and will demand that security be enforced. For the public, it is as if the ordinary citizen were demanding enforcement of the principle of legal security, and this will bring with it criticism, suggestions, questions about the conduct of public officials, in various forums, meetings, demonstrations or through the social communication media, since these are information vehicles that provide academic, cultural, social and political guidance to the community in general.

...

5. Starting from this context, the comments made by Dr. Miguel Antonio Bernal are consistent with the criticism allowed by Article 178 of the criminal code, which does not apply the definition of offenses against honor to any discussion, criticism or opinion about the acts or omissions of public officials in the exercise of their duties, or to literary, artistic, scientific or professional criticisms. As the defendant's attorney has demonstrated, this thesis is unquestionable and leads to the conclusion that there was no criminal intent; therefore, one of the elements of crime is missing, i.e., culpability, and consequently there can be no question of the rationale of the challenged decision, in asserting that there is no punishable act. The issuing of a judgment does not constitute a declaration of culpability. That is inadmissible, because that aspect has to be debated by the court in full.

6. There is no doubt that the honor of an individual must be respected, and this includes his moral condition, his ideas, his family, his dignity, his prestige, his condition as an exemplary citizen, the exercise of his profession, but it does not exclude the right of the general public to question those who are entrusted, directly or indirectly, with the management of public affairs, because public officials are the servants of the nation and we are subject to questioning by members of the general public about our suitability in the exercise of our respective functions.

7. These arguments also apply to the crime of slander, since there is no criminal intent, which means that culpability has not been demonstrated. This crime represents conduct that is premeditated, at least momentarily, involving intent, willingness and the commission of acts designed to offend the dignity, honor or prestige of a person, either in writing or through any of the media that civilized people use to communicate.

We maintain the foregoing, as we have explained that the opinions published by Dr. Miguel Antonio Bernal represent criticisms about opinions on official acts or omissions of public servants, about a concrete fact that cannot be evaded, for which criminal proceedings were launched in one of the Republic's jurisdictions, although only with respect to the acts, while the omissions were not discussed, but this latter aspect is immaterial to the motive of the appeal submitted.

92. Case decided by: Supreme Court of Justice of Paraguay, Judgment No. 1360, Asuncion, December 11, 2002

93. Facts of the case. On March 22, 1994, the criminal court of first instance convicted Ricardo Canese of the crimes of defamation and slander and sentenced him to a fine and to four months in prison. The background to this sentence was that on August 26, 1992, when Ricardo Canese was a candidate for Presidency of the Republic, in the midst of the election campaign, and during a political debate, he questioned the suitability and integrity of Mr. Juan Carlos Wasmosy, who was also running for President. Those questions included the suggestion that "Wasmosy was a stand-in (*prestanombre*) for Stroessner in Itaipu," through the business firm CONEMPA. Those statements, issued in the context of an electoral campaign, were published in the newspapers ABC Color and Noticias—El Diario on Aug. 27, 1992. On the basis of those statements, the partners in this firm, who had not been named by the Canese, brought a criminal action against him in October 23, 1992, for the alleged crimes of defamation and slander. The case was heard, after several appeals, by the Court of Appeals and by the Supreme Court. The latter tribunal examined the case again after the Inter-American Commission on Human Rights lodged a complaint against the State of Paraguay before the Inter-American Court. The argument here was that the complaint constituted a new factor that merited a further review.

94. Decision (pertinent paragraphs)

...What must be analyzed is the definition of the crime of defamation. We must necessarily start with the Constitution, noting that Article 26 protects the freedom of expression. This constitutional rule makes Article 13 of the American Convention Human Rights a valid rule of the Paraguayan criminal code.

...

From the foregoing we may state that: in accordance with the new positive legislation, no one can be convicted for statements of this nature, on issues of public interest, that involve public officials or personalities -- such as a candidate to the highest office in the land -- even though such statements may affect the honor or reputation of such persons.

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If the Court were to admit a solution under Article 151 (5) of the criminal code, this would be a severe violation of Article 13 of the American Convention on Human Rights.

95. Case decided by: The Third Chamber of the Supreme Court of Justice of Costa Rica, San Jose, Oct. 28, 2002. Exp.00-2000032-0288-PE, Res. 2002-01050.

96. Facts of the case. The Supreme Court was presented with the following evidence: a) because of complaints from local residents about the misuse of public property and in particular referring to vehicles parked in front of establishments selling liquor, the manager of the television channel Noti-Catorce decided to do a story on the problem. b) Prior to October 7, 1999, Noti-Catorce received complaints from neighbors in Cedral, who claimed that a vehicle of

the Ministry of Public Works and Transport was parked in front of the bar “Las Cañitas” and so, on October 7, the TV channel manager sent a cameraman, William Murillo Cordero, to take photos at the scene. Those photos confirmed that a vehicle of that ministry, bearing license plate 202-463, was parked beside the bar, which was open; subsequently it was learned that this vehicle was assigned to the plaintiff. c) After the photos were taken, and prior to November 1 and 2 1999, the defendants Jimenez Gonzalez, Herrera Masis and Luna Salas attempted to obtain testimony from Rene Quiroz Alpizar, chief engineer of zone 2-3 of the headquarters of the Ministry of Public Works and Transportation in San Carlos, and from the plaintiff Jose Francisco Vargas Nuñez; while they were unable to contact the latter person, they did speak with the first person, who said that the vehicle in question was assigned to Vargas. d) On Monday November 1, and Wednesday November 3, 1999, in introducing the defendants Jimenez Gonzalez and Herrera Masis, Noti-Catorce broadcast the pictures that had been taken on October 7, on its news program that is shown Monday to Friday between 7 PM and 8 PM, over television channels 14 and 16; these pictures, which show the ministry vehicle parked in front of the bar, were broadcast to illustrate the news story, which reported that, acting on complaints from neighbors of Cedral, Noti-Catorce had gone to record the scene and found a vehicle belonging to the ministry parked in that locale. On one of those two days, it was said that there were regulations governing the use of automobiles, and that on one occasion, after complaints by neighbors, two officials of the Ministry of Environment and Energy, who had been seen in the bar, were dismissed. e) Vargas Nuñez could not be found, despite a search, before November 3, 1999, at which time the issue was aired a second time by Noti-Catorce, but on November 4 he appeared at the TV channel offices to exercise his right of reply; he gave his version, maintaining that on the day the photos were taken he was conducting an inspection of a water tank that had backed up and was flooding a road, but he did not deny the location of the vehicle. f) On December 2, 1999, Noti-Catorce reported that the plaintiff was about to be fired from the Ministry of Public Works and Transport, and it illustrated this story with the photos taken on October 7.

97. Decision (pertinent paragraphs)

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According to the facts submitted in evidence to the Court (summarized above), this Court considers that the *a-quo* [or court from which the case has been removed] is right in deciding that no crime has been committed to the prejudice of the plaintiff Jose Francisco Vargas Nuñez, and therefore the acquittal is proper according to law. The conflict between the right to honor and the freedom of information and the press is one of the most difficult to resolve, because it involves fundamental rights of the individual, and obliges us to define very carefully when one of those rights should take precedence over the others. The problem cannot be resolved by simply applying the criminal code; instead we must look to the Constitution directly, and to international rules on human rights, in order to understand the scope of the criminal legislation. In this respect, the first thing that we must say is that honor is included as one of the moral interests referred to in Article 41 of the Constitution, and expressly mentioned in Article 11 of the American Convention on Human Rights, which declares that everyone has the right to have his honor respected. This is obviously a legal good that is essential to the human condition, and therefore its protection through the criminal code is consistent with legal principles. However, the freedoms of information and of the press, the latter emanating from the former, are equally fundamental to human beings. Both of these freedoms are recognized in the Constitution, specifically in Article 29, which recognizes the possibility of every person to communicate his thoughts by word or in writing, and to make them public. Moreover, they are included in Article 19 of the Universal Declaration of Human Rights, in Article 13 of the American Convention on Human Rights, and in Article 19 of the International Covenant on Civil and Political Rights. These are clearly legal goods that deserve equal protection by the legal system.

The problem to be addressed in this case, then, is to determine when the right to honor takes precedence over those freedoms. Consistent with constitutional and international humanitarian provisions, this conflict between fundamental rights can only be resolved in favor of the right to honor when it is clear that the freedoms of information and the press have been abused. This flows from the fact that Costa Rican legislation makes it a general rule (enshrined in Article 22 of the Civil Code) not to protect the abuse or antisocial use of that right. This is because a person who abuses that right has gone beyond the limits to which that right is protected. On the other hand, if there is no abuse, and if the freedoms of information and the press are exercised legitimately, then there is no possibility whatever of imposing criminal punishment on the communicator, because he has committed no crime against honor. This is explained in the rationale for the acquittal in this case.

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As will be seen, the Fundamental Law (as applied to the concrete case) clearly establishes that public servants are subject to the law, because they are simply "depositories of authority," in other words they are not above the law. We see from the Constitution (as amended in 2000) that public officials are bound both by permissive and prohibitive rules, and that they may do only what the law expressly authorizes. Therefore, in Costa Rica any public official (whether elected or appointed by a collegial body or through a competition, whether confirmed in his position or acting on an interim basis, whether appointed permanently or for a term, whether he enjoys tenure or holds office at pleasure, whether he is a career employee or not, etc.) is exposed, from the moment he takes office, to scrutiny of his acts in the performance in his duty. This flows from the fact that everything he does as a result of his public position is of interest to all inhabitants of the country, and therefore it must be ensured that he acts, as a servant, in strict compliance with the law. This constant scrutiny of his acts is one of the consequences of being a public servant, and anyone who accepts such position must accept implicitly that his actions will be subject to public examination. By the fact of his appointment, a public official is subject to the principle of legality, according to which he is authorized to do only what the law--in its broad sense, and consistent with the normative scale--expressly allows, and he is prohibited from doing anything else. Therefore, holding a public position means being subject to controls, which have been designed to ensure that the powers flowing from a position are properly exercised, and to avoid any failure to fulfill the duties inherent in the position. These controls include not only institutionalized controls (both administrative and judicial); in a democratic state (the Constitution defines Costa Rica as such in Article 1), but we must also consider the role of communicators. If every human being has the right to be informed, if there is also freedom to communicate thoughts and opinions, and to publish them, and if a communicator's profession is considered to be that of gathering information on issues of interest, analyzing it, and reporting it to others, then it is clear that the practice of journalism is a perfect manifestation of the freedoms of information and the press. It is therefore beyond argument that the collective communications media, journalists and other communicators have the right to inform the public, by disclosing the information they hold. This is the premise that must prevail in a democratic society. The foregoing requires certain clarifications when we are dealing with a matter of public interest concerning the activity of a public servant. The first is that any matter that may reasonably be assumed to involve the individual interest of the governed (Article 113(1) of the Public Administration Act) is a matter of public interest; note that in speaking of "the governed" we are speaking of issues relating to the conduct of the State (in its broad sense, i.e., the government of the Republic, as described in Article 9 of the Constitution, and other public entities) and the handling of its resources, aspects that may validly be assumed to interest all residents of the country, since it is they who must pay taxes to cover the expenses of the State. The second point is that, in cases of public interest, the rule normally applies to the activities of State officials, but it is also possible (as will be seen at the end of this *considerandum*) that there will be people not invested as public servants who perform a task that in itself is public, and so they will also be subject to scrutiny of their activities in the performance of that public function. Thus, in matters of public interest, the freedoms of information and of the press that protect communicators [are] so important, as constituting a means of control over public management in a democratic state, that if they conflict with the right to honor of persons fulfilling a public function they must take precedence over that right, as it relates to the public aspect of those persons' conduct. Consistent with this reasoning, it is only when a communicator is abusive in his reporting that the official can make his right to honor prevail over the freedoms of information and the press that protect the communicator, and over the right of all persons to be informed.

In summary, both the political Constitution and the international human rights instruments applicable in Costa Rica contain rules to affirm that public officials (but not private persons, except where they are fulfilling a public function) are subject to public scrutiny of their activities in the exercise of their duty, which means that the freedom to publish information about their acts in matters of public interest takes precedence over their right to honor, and therefore no communicator can be held criminally liable for information of this kind, unless he has acted abusively.