



**IN THE EUROPEAN COURT OF HUMAN RIGHTS**

**Application Numbers 51168/15 and 51186/15**

**Stern TAULATS and  
Roura CAPELLERA**

**Applicants**

- and -

**Spain**

**Respondent**

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**THIRD-PARTY INTERVENTION SUBMISSIONS BY ARTICLE 19**

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**ARTICLE 19**

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**I. INTRODUCTION**

1. These written comments are submitted by ARTICLE 19, in accordance with the permission to intervene (with revised date of submission) granted by the President of the Chamber by letter dated of 15 September 2016, pursuant to Rule 44(3) of the Rules of Court. As directed, these submissions do not address the facts or merits of the Applicants' case.
2. The present case, *Taulats and Capellera v Spain*, concerns two issues: the degree to which freedom of expression may be restricted in order to protect public officials such as members of a royal family from "insult"; and the extent to which the Convention protects anonymous expression, including the use of masks in protests. The case raises critical issues which fundamentally affect the extent to which the Convention provides meaningful protection to individuals in the exercise of their freedom to express their opinions and views, including criticisms, of public officials. It also provides the Court with an opportunity to clarify the circumstances in which "insult" against public officials can be equated to, or distinguished from, the circumstances for legitimately restricting "hate speech". Finally, it provides the Court with the opportunity to clarify how the Convention protects anonymous expression during protests.
3. To assist the Court in the case, this brief addresses three key areas: a) application of laws prohibiting insult against heads of State or other senior public officials, including through criminal prohibitions, and their impact on freedom of expression; b) arguments on why prohibitions of "hate speech" need to be distinguished from "insult" against public officials; and c) international standards and comparative case law protecting anonymous expression, including the use of masks in the context of protests.

## **II. INTEREST OF ARTICLE 19**

4. ARTICLE 19 is an international human rights organisation which defends and promotes freedom of expression and freedom of information all over the world. It takes its name and mandate from Article 19 of the Universal Declaration of Human Rights, which guarantees the right to freedom of expression. Over the past two decades, ARTICLE 19 has gained significant legal expertise and international experience on protection of this fundamental right. It frequently submits amicus curiae briefs in important cases at national and regional courts, including at this Court, aiming to assist them to elaborate the specific meaning of freedom of expression in the context of the particular case in a manner which best protects this fundamental human right. ARTICLE 19 has advised national bodies on criminal reform regarding "insult" and sedition laws, including participating in the Australian Law Reform Commission's Review of Sedition Laws in 2006, advising the reform of sedition laws in Uganda, Tanzania, and Malaysia, and advising the reform of various hate speech and defamation laws.

## **III. INTERNATIONAL AND COMPARATIVE STANDARDS ON INSULTS OF HEADS OF STATE OR PUBLIC OFFICIALS**

### **a) International and regional standards**

5. Under international and European freedom of expression standards, restrictions on the right to freedom of expression apply not only to information and ideas generally considered to be useful or correct, but to any kind of fact or opinion which can be communicated. The UN Human Rights Committee (HR Committee) and this Court have emphasised that the right to freedom of expression encompasses "news and information, [...] commercial expression and advertising, [...] works of art, etc.; it should not be confined to means of political, cultural

or artistic expression.”<sup>1</sup> Moreover, the right to freedom of expression also extends to controversial, disturbing or even shocking material; the mere fact that an idea is disliked or thought to be incorrect cannot justify preventing a person from expressing it.<sup>2</sup>

6. Freedom to impart ideas is particularly important in the area of political speech. This Court has repeatedly emphasized that such ideas, which should be openly discussed, are protected in view of the values of pluralism, tolerance and broad-mindedness on which a democratic society is based. Healthy democracy requires exposure of the executive not just to internal scrutiny by legislative and judicial authorities, but by the public.<sup>3</sup> The HR Committee has also observed that the free communication of information and ideas about public and political issues between citizens, candidates, and elected representatives is essential for public life. It has highlighted that in “circumstances of public debate concerning public figures in the political domain and public institutions, the value placed by the [ICCPR] upon uninhibited expression is particularly high.”<sup>4</sup>
7. ARTICLE 19 believes that prohibitions of insult of heads of states and public officials in general - purely on account of their status - especially through criminal law, such as in the present case, invert the fundamental principle in a democratic system that the government is subject to public scrutiny. Such prohibitions tend to chill public debate by attaching a threat of penalty on legitimately critical speech. Heads of states and public officials should tolerate more, not less, criticism than ordinary citizens. By choosing a profession involving responsibilities to the public, officials knowingly lay themselves open to scrutiny of their words and deeds by the media and the public at large. This is also important in cases of unelected heads of states, such as monarchy. Moreover, vigorous debate about the functioning of unelected heads of states is an important aspect of democracy. For these reasons, ARTICLE 19 has repeatedly called for the repeal of laws that provide any special protection for public officials, whatever their rank or status.<sup>5</sup>
8. Consistent with this position, this Court has recognised that increased exposure to criticism is a natural consequence of a public figure's presence in the public arena, political participation, or representation of the State. The principle that politicians and public figures in the political arena face greater limits of acceptable criticism has been explicitly reiterated many times in the Court's jurisprudence.<sup>6</sup> In particular, in *Otegi Mondragon v Spain*,<sup>7</sup> the Court held that the institutional position of the King “should not shield him from all criticism in the exercise of his official duties or - as in the instant case - in his capacity as representative of the State which he symbolises, in particular from persons who challenge in a legitimate manner the constitutional structures of the State, including the monarchy”.<sup>8</sup>
9. Several international experts also recognise that laws should not confer special status upon heads of state and high-level officials and immunize them from criticism. For example, the UN Special Rapporteur on freedom of opinion and expression (Special Rapporteur on FOE) in January 2000 included the criminal slander of “high-level officials” in the list of repressive measures States used to restrict the right to freedom of expression.<sup>9</sup> He has also repeatedly called on individual States to repeal these types of offences; for instance, he urged Thailand to appeal its lèse majesté law (legislation prohibiting insult of the monarch), emphasizing that these laws “encourage self-censorship and stifle important debates on matters of public interest, thus putting in jeopardy the right to freedom of opinion and expression.”<sup>10</sup>
10. In their 2000 Joint Declaration, the Special Rapporteur on FOE, the OSCE Representative on freedom of the media, and the Organization of American States (OAS) Special Rapporteur urged countries to repeal criminal defamation laws “which unduly restrict the right to freedom of expression,” and also urged countries not to allow the State, its symbols, or public authorities to bring defamation actions which are often abused by public figures to chill speech.<sup>11</sup> This

principle was reiterated in their 2002 Joint Declaration calling for the abolishment of criminal defamation laws as “not a justifiable restriction on freedom of expression.”<sup>12</sup>

11. Similarly, the Inter-American Commission on Human Rights (IACHR) has deplored the use of laws criminalising “insult” of public figures and officials (often so-called 'desacato' laws in the region) as 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.”<sup>13</sup> The IACHR repeatedly held that such laws are not legitimate restrictions on expression and urged OAS members to repeal or amend the laws.<sup>14</sup>
12. Several decisions of the Inter-American Court have also addressed the criminal prosecution of persons expressing opinions critical of public officials. In these cases, the Court has consistently held that criminal measures were disproportionate, as even offensive or shocking opinions are protected under Article 13 of the American Convention (which guarantees freedom of speech).<sup>15</sup> Less-restrictive means exist for heads of state and public officials to defend themselves against criticism, such as replying by the media or bringing civil suits where appropriate. Therefore, even assuming these laws achieve a legitimate purpose, which the IACHR maintains they do not, the laws are still unnecessary to ensure public order in a democratic society. Nor do they meet a pressing social need.
13. Finally, the OAS Special Rapporteur for freedom of expression has consistently urged the OAS member States to abolish desacato laws.<sup>16</sup>

#### **b) Comparative national practices**

14. ARTICLE 19 notes that most modern democracies that have historically enacted laws prohibiting criticism or insult of heads of state or public officials have seen those laws go into disuse, be subject to judicial limitation, or face repeal.<sup>17</sup> Such laws go back to ancient Roman times, where iniuria (insult or injury) laws were in place to defend the honour of the emperor.<sup>18</sup> These laws included various “sedition” offences, which often punish insults of public figures. Countries that have abolished or judicially limited their laws prohibiting insult or criticism of public officials include Australia,<sup>19</sup> Argentina,<sup>20</sup> Canada,<sup>21</sup> Chile,<sup>22</sup> Costa Rica,<sup>23</sup> Czech Republic,<sup>24</sup> Honduras,<sup>25</sup> Hungary,<sup>26</sup> Guatemala,<sup>27</sup> India,<sup>28</sup> Ireland,<sup>29</sup> Moldova,<sup>30</sup> New Zealand,<sup>31</sup> Paraguay,<sup>32</sup> Peru,<sup>33</sup> South Africa,<sup>34</sup> Sweden,<sup>35</sup> the United Kingdom,<sup>36</sup> or the United States.<sup>37</sup> After seditious libel was abolished in England and Wales in 2009, the Parliamentary Under-Secretary of State at the Ministry of Justice said that “seditious and defamatory libel are arcane offences – from a bygone era when freedom of expression wasn't seen as the right it is today”.<sup>38</sup>

#### **c) Criminal sanctions in speech-related offences**

15. Even assuming arguendo that criminalisation of speech that insults heads of state and public officials is a legitimate aim, restrictions undertaken in pursuit of such an aim must still satisfy a proportionality test which assesses the severity of those restrictions against the necessity of sanctions. To be necessary, there must be a showing that a legitimate purpose cannot be reasonably achieved by less restrictive means.
16. ARTICLE 19 asserts that criminal penalties in freedom of expression cases – in particular where political speech and “insult” are concerned – are rarely proportionate. The criminalisation of a particular activity implies a clear State interest in controlling the activity and imparts a certain

social stigma to it. The threat of a criminal record, a penal sentence or even a suspended sentence, all impose a great and unnecessary burden on a potential critic. For example:

- 17.1. In its Report on the Compatibility of “Desacato” Laws With the American Convention on Human Rights, the IACHR noted the particular problem with sanctions of a criminal nature, stating: “the fear of criminal sanctions necessarily discourages people from voicing their opinions on issues of public concern.”<sup>39</sup>
  - 17.2. This has also been echoed by the HR Committee, which has made it clear that criminal convictions (for defamation) tend to be disproportionate to any damage caused, stating that, “the severity of the sanctions imposed on the author [a prison sentence and a fine] cannot be considered as a proportionate measure to protect ... the honour and the reputation of the President...”<sup>40</sup>
  - 17.3. Even where these are not applied, the problem of “chilling effect” remains, since the severe nature of these sanctions means that they cast a long shadow. For instance, in the case of Mr. Herrera Ulloa, whose conviction by the Costa Rican courts for criminal defamation was found to breach his right to freedom of expression by the Inter-American Court of Human Rights,<sup>41</sup> these included ineligibility for probation upon further conviction for criminal defamation, and being barred from adopting a child, holding a position in the civil service or practising a profession.
17. Criminal sanctions in speech related offences are also often not necessary as they are not the least restrictive effective remedy to secure the legitimate aim sought. For example, the Inter-American Court of Human Rights stressed that these should not be used: “if there are various options to achieve [a compelling governmental interest], that which least restricts the right protected must be selected.”<sup>42</sup> This is important in cases of “insult” of public officials as the officials can easily resort to other means and remedies, such as responses to criticisms via the media or official channels.

#### **d) Summary**

18. As the above demonstrates, there is a high degree of international consensus that measures designed solely to shield heads of state or public officials from criticism, as well as criminal penalties in these cases, are incompatible with the guarantees of freedom of expression in a democratic society. Healthy democracy requires exposure of the executive to criticism of the public, and as a result insult laws will tend to violate Article 10(2) of the Convention. The potential chilling effect for criminal sanctions for the insult of monarch is even greater as it concerns discussion about these figures.

### **IV. DISTINGUISHING “HATE SPEECH” FROM “INSULT” OF HEADS OF STATE AND PUBLIC OFFICIALS**

19. “Hate speech” is a distinct category from the concept of “insult”.
20. Legislation protecting against “insult” typically provides protection to subjective feelings. Since feelings do not lend themselves to definition but are, rather, subjective emotions, respective laws can be interpreted flexibly to suit the authorities’ needs, including in order to prevent criticism. Moreover, the subjective nature of what constitutes an insult means that a charge of this sort is very difficult to defend against. “Hate speech” is also an emotive concept, and there is no

universally accepted definition of it in international human rights law. However, in the lowest common denominator, the term often refers to an expression of discriminatory hate towards certain people: it does not necessarily entail a particular consequence. In general terms, the underlying purpose of “hate speech” protections is to promote equality and protect individuals from discrimination and violence, and not simply to chill expression that may offend, shock, or disturb. The confusion between “insult” and “hate speech” often arises for practical and historical reasons; insult can have serious repercussions and in the past could, in fact, lead to violence, serious disturbances, violence or even war.

21. International human rights standards, however, provide a clear response to this confusion. The problems with “insult” laws and protection of heads of state and public officials has been outlined above. With regards to “hate speech,” international law mandates that restrictions should be limited to only those acts that reach a certain threshold. ARTICLE 19 has stressed that these prohibitions can be distinguished as follows:

21.1. States must prohibit certain severe forms of “hate speech”, including through criminal, civil, and administrative measures - namely direct and public incitement to genocide (under international criminal law)<sup>43</sup> and advocacy of discriminatory hatred that constitutes incitement to discrimination, hostility, or violence (under Article 20(2) of the ICCPR). “Prohibition” allows 3 types of sanction: civil, administrative or, as a last resort, criminal. As for the incitement, it is recommended that the severity of speech is assessed under the standards outlined in the UN Rabat Plan of Action, adopted in 2012.<sup>44</sup> Specifically, the Rabat Plan advises States to ensure the three-part test for restrictions on freedom of expression, articulated under Article 19, also applies in cases under Article 20(2) and it outlines a six-part test to assess whether expression reaches the level of severity prohibited under Article 20(2).<sup>45</sup>

21.2. States may prohibit other forms of “hate speech”, provided they comply with the requirements of Article 19(3) of the ICCPR.

Other speech - including speech that offends individuals or hurts their feelings - should not be restricted on the basis that it constitutes “hate speech”, although it can, nevertheless, often raise concerns in terms of intolerance and discrimination, and thus merits a critical response from the State.

22. ARTICLE 19 notes that the obligation under Article 20(2) of ICCPR to prohibit incitement does not recognise heads of states and public officials as characteristics requiring specific protection by States. While the protected grounds of national, racial or religious hatred in Article 20(2) may not be exhaustive, ARTICLE 19 argues that the list of protected characteristics should be considered in light of the right to non-discrimination as provided under Article 2(1)<sup>46</sup> and Article 26<sup>47</sup> of the ICCPR. Although both have been interpreted expansively to include characteristics such as sexual orientation and gender identity and disability, the criteria for differentiation should be objectively justified and reasonable. ARTICLE 19 finds that being a public official or a head of the state is not an objectively justifiable and reasonable criterion. Moreover, we are concerned that expanding such protection to public officials would allow the authorities to classify the criticism of any group as “incitement”.

23. Status of a head of state or a public official on its own cannot be the basis for “hate speech” restrictions without a separate basis for discriminatory hatred such as race, nationality or religion. ARTICLE 19 imagines that there might be circumstances where statements targeting public officials may amount to advocacy of hatred that constitutes incitement to violence, as prohibited under Article 20 (2) of the ICCPR. However, this would have to occur on the basis of protected

characteristics. For instance, consider an individual making speeches exploiting religious intolerance prior to an election where one candidate is a Muslim politician. Suppose that in those speeches the individual extolls members of the opposition to use any means necessary, including violent ones, against Muslim supporters of the candidate. Such a case – meeting all other criteria – might arise to speech prohibited under Article 20(2) of the ICCPR.

24. ARTICLE 19 believes that the use of “hate speech” and “incitement” laws to shield public officials from criticism would distort the purpose of these laws and will tend to run afoul of Article 10(2) of the Convention.

## **V. INTERNATIONAL STANDARDS AND COMPARATIVE CASE LAW ON ANONYMOUS PROTEST**

25. ARTICLE 19 views the right to remain anonymous as a vital component of exercising the rights to freedom of expression and other rights. Individuals are far more likely to speak or disclose information knowing that their identity will not be revealed. This is true both in the context of protest and in the area of online speech. The imposition of sanctions for speaking anonymously therefore threatens to chill expression both online and offline. As such any restrictions on the wearing of masks for expressive purposes must therefore meet the tripartite test under restrictions on expression.

26. Standards in the area of anonymous speech are still developing, although commentary and authorities have developed more significantly in recent years. In particular:

1. The Special Rapporteur on FOE, in his 2015 report to the Human Rights Council stated that anonymity both safeguards and advances freedom of expression.<sup>48</sup> Restrictions on anonymity – as an enabler of free expression – must meet the three-part test for restrictions of freedom of expression under international law: they must be provided by law, they may only be imposed for legitimate grounds, and they must be necessary and proportionate.<sup>49</sup> The Special Rapporteur observed that these safeguards apply to both offline and online speech.
2. The OAS Special Rapporteur on freedom of expression stated in 2015 that “the right to freedom of thought and expression and the right to private life protect anonymous speech from government restrictions. Participation in public debate without revealing one’s identity is a normal practice in modern democracies. The protection of anonymous speech is conducive to the participation of individuals in public debate since – by not revealing their identity – they can avoid being subject to unfair retaliation for the exercise of a fundamental right”.<sup>50</sup>

26. In relation to anonymity in the context of protests:

- 26.1. In his 2014 report the Special Rapporteur on the rights to freedom of peaceful assembly and of association expressed concern over numerous jurisdictions banning peaceful protesters from covering their faces.<sup>51</sup> He pointed out that the pretext of such bans was that the use of hoods or masks would lead to illegal or violent activity, notwithstanding the fact that violent acts during peaceful demonstrations are already illegal under the laws of nearly all jurisdictions. The Special Rapporteur was concerned that “bans on face coverings during assemblies are in some circumstances used to target particular groups and improperly curtail their right to freedom of peaceful assembly”.<sup>52</sup> The Report went on to identify legitimate reasons for wearing a mask or face covering, including fear of retaliation. The

Special Rapporteur cited the use in Egypt of a law on protests and demonstrations prohibiting face masks during assemblies to discriminate against women who wear the niqab. Further, certain peaceful protest movements may adopt the use of specific symbols or masks as a political statement. In many parts of the Arab World, Western Europe, and North America the Guy Fawkes mask is popular among youth and student protest movements. Masks can also be used to identify with fellow demonstrators and a worldwide movement, in addition to being used to conceal identity.<sup>53</sup>

26.2. Moreover, in the view of the Venice Commission, the wearing of masks for expressive purposes at a peaceful assembly “should not be prohibited so long as the mask or costume is not worn for the purpose of preventing the identification of a person whose conduct creates probable cause for arrest and so long as the mask does not create a clear and present danger of imminent unlawful conduct”.<sup>54</sup>

26.3. ARTICLE 19 made similar arguments in the Right to Protest Principles,<sup>55</sup> in which we argued that States should refrain from prohibiting individuals from concealing their physical identity during protests.<sup>56</sup> It is ARTICLE 19's view, and that of the contributors to the Principles, that any limitations on anonymity should be justified “on the basis of an individualised suspicion of a serious criminal offence” as well as satisfy the requisite three-part test under restrictions of freedom of assembly under international law. Moreover, restrictions must be subject to strong procedural safeguards.

27. From a comparative perspective, for example, in the United States, an Ohio state appeals court overturned the conviction of a man for disturbing a public meeting by wearing a mask, relying upon the First Amendment of the US Constitution guaranteeing the freedom of speech and assembly. In *City of Dayton v Esrati* the appeals court upheld that the wearing of the mask was “passive, symbolic speech with a capacity to send a coherent political message”.<sup>57</sup> Therefore the government could not impose viewpoint-based restrictions on expression in a limited public forum unless those restrictions served a compelling interest and were narrowly drawn to achieve that end.

28. Taking the foregoing into account, ARTICLE 19 believes that the criminalisation using masks at protests is unnecessary and chills the right to freedom of expression. If criminal conduct is engaged in by masked protesters, such conduct can be addressed by existing criminal laws without separately abridging the right to anonymity.

## VI. CONCLUSIONS

29. In ARTICLE 19's view, insult laws protecting public officials are outdated, unnecessary, and chill legitimate expression. High-level officials have other means by which to respond to criticism, which is normal and necessary in a democratic society. Further, an individual's status as a high-level official is not in itself a protected characteristic by which any insult can necessarily constitute a “hate speech.”

30. Although the standards on the right to anonymity are still developing in international law, there is so far an emerging consensus that anonymity is an essential component to exercising the rights to freedom of expression. The use of masks during protests is an example of anonymity facilitating the exercise of this right. Therefore, any restrictions on wearing masks during peaceful protests must be subject to the requirements of the restrictions on freedom of expression under international law.

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ARTICLE 19

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<sup>1</sup> Ballantyne and Davidson v Canada, Communication No 359/1989 and McIntyre v Canada, Communication No 385/1989, UN Doc CCPR/C/47/D/359/1989 and 385/1989/Rev 1, 5 May 1993 Annex para 11.3.

<sup>2</sup> Handyside v the United Kingdom, judgment of 7 December 1976, Application No 5493/72; Giniewski v France, judgment of 31 January 2006, Application No 64016/00 para 43.

<sup>3</sup> Şener v Turkey, judgment of 18 July 2000, Application No 26680/95 para 40.

<sup>4</sup> Ibid. para 38.

<sup>5</sup> ARTICLE 19, Defining Defamation: Principles on Freedom of Expression and Protection of Reputation", London, July 2000.

<sup>6</sup> See, e.g., Eon v France, judgment of 14 March 2013, Application No 26118/10, para 58; Otegi Mondragon v Spain, judgment of 15 March 2011, Application No 2034/07 para 50; Vides Aizsardzības Klubs v Latvia, judgment of 27 May 2004, Application No 57829/00, para 40; Lingens v Austria, judgment of 8 July 1986, Application No 9815/82, para 42; or Colombani and Others v France, judgment of 25 June 2002, Application No 51279/99.

<sup>7</sup> Otegi Mondragon v Spain, op.cit., para 56 ("[T]he principles established in its own case-law in that regard are also valid in relation to a monarchy like Spain, where the King occupies a unique institutional position.") (citing Colombani and Others v France).

<sup>8</sup> Ibid., para 56.

<sup>9</sup> Civil and Political Rights Including the Question of Freedom of Expression, UN Doc. No. E/CN.4/2000/63, January 18, 2000, para 31.

<sup>10</sup> OHCHR, Freedom of expression: UN expert recommends amendment of lèse majesté laws, 10 October 2011, available at <http://bit.ly/2dAvP2w>.

<sup>11</sup> Joint Declaration, Current Challenges to Media Freedom, London, 30 November 2000, available at <http://bit.ly/2cFPLQL>.

<sup>12</sup> Joint Declaration, London, 9-10 December 2002, available at <http://bit.ly/2dghapD>, pp 27-29.

<sup>13</sup> Ibid. pp 197-212.

<sup>14</sup> IACHR, Report on the Compatibility of "Desacato" Laws with the American Convention on Human Rights, OEA/Ser. L/V/II. 88, doc. 9 rev., 17 February 1995, p. 209.

<sup>15</sup> See, e.g., Case of Herrera Ulloa, judgment of 2 July 2004, Series C No 107, IACtHR; Case of Ricardo Canese, judgment of 31 August 2004, Series C No 111, IACtHR; Case of Palamara Iribarne, judgment of 22 November 2005, Series C No 135; Case of Kimel v Argentina, Merits, Reparations and Costs, judgment of 2 May 2008, Series C No 177, IACtHR.

<sup>16</sup> See, e.g., Annual Report of the IACHR, 1998 Volume III, Chapter IV A. –OEA/Ser.L/V/II.102 Doc.6 rev. 16 April 1999; and Annual Report of the IACHR, 2000 Volume III, Chapter III A.2. –OEA/Ser.L/V/II.111 Doc.20 rev. 16 April 2001.

<sup>17</sup> See generally F.S. Siebert, Freedom of the Press, 1476-1776: The Rise and Fall of Government Control (Urbana: University of Illinois Press, 1965).

<sup>18</sup> World Bank, The Right to Tell: The Role of Mass Media in Economic Development (The Right to Tell), 2002, pp 209-210.

- <sup>19</sup> The crime of seditious libel remains in the Commonwealth Crimes Act of 1914, although the provisions have fallen into disuse and have been targeted for legal reform. In 1986 the Federal Parliament amended the Crimes Act Sections 24C and 24D to limit sedition to statements or actions carried out “with the intention of causing violence or creating public disorder or a public disturbance.”
- <sup>20</sup> Argentina repealed its law in 1993. *The Right to Tell*, op.cit., p 215.
- <sup>21</sup> Although seditious libel remains in Canada's Criminal Code, it has not been used since 1951, and a landmark case *Boucher v. The King* [1951] S.C.R. 265 held that provoking hostility to the government was insufficient to sustain a conviction for sedition.
- <sup>22</sup> Chile eliminated its insult law in May 2001. *The Right to Tell*, op.cit, p 215.
- <sup>23</sup> Costa Rica eliminated its *desacato* law in March 2002. *Ibid*.
- <sup>24</sup> *The Right to Tell*, op.cit.
- <sup>25</sup> Committee to Protect Journalists, Honduran high court strikes down *desacato* provision, 26 May 2005, available at <http://bit.ly/2deU2ty>. The Supreme Court struck down the provision for providing special protection to public officials and cited the 1995 IACHR report.
- <sup>26</sup> *The Right to Tell*, op.cit. The insult law was declared unconstitutional by the Hungary's Constitutional Law Court in 1994.
- <sup>27</sup> IAPA pleased with repeal of insult laws, 5 February 2006, available at <http://bit.ly/2dwjKMh>.
- <sup>28</sup> India contains a sedition law in 124A of the Indian Penal Code, although in *Kedar Nath v State of Bihar*, AIR (1962) SC 955, it was interpreted to require heightened intentionality of causing violence or disorder.
- <sup>29</sup> In 1991 the Irish Law Reform Commission recommended the abolition without replacement of the common law offence of seditious libel, stating that “As an offence it has an unsavoury history of suppression of government criticism and has been used as a political muzzle;” Irish Law Reform Commission, Consultation Paper on the Crime of Libel (1991), para 217.
- <sup>30</sup> *The Right to Tell*, op.cit.
- <sup>31</sup> Sections 80-85 of the New Zealand Crimes Act 1961 contained sedition provisions which were dropped in 1989 when a new Crimes Act was adopted.
- <sup>32</sup> Paraguay eliminated its *desacato* law in October 1998. *The Right to Tell*, op.cit., p 215.
- <sup>33</sup> Opinion of the Committee on Human Rights on bills 3573/2002-CR and 4054/2002-CR proposed for the abolition of Article 374 of the Criminal Code, Congress of Peru, 15 November 2002.
- <sup>34</sup> Even before the fall of the apartheid regime, the South African courts severely curtailed the scope of criminal punishment for political debate. See, e.g., *Argus Printing and Publishing Co. Ltd. v Inkatha Freedom Party*, 1992 (3) SA 579. Current interpretations suggest that nothing short of a direct and successful call to violence could be considered sedition under South African law.
- <sup>35</sup> *The Right to Tell*, op.cit.
- <sup>36</sup> In England and Wales seditious libel was abolished in 2009 by the Coroners and Justice Act 2009.
- <sup>37</sup> Past sedition laws in the United States including the Sedition Act 1798 and Sedition Act 1918 have been repudiated. In *Brandenburg v Ohio* the US Supreme Court held that punishment criticising government can only be punished where it is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action,” 395 U.S. 444, 447 (1969).
- <sup>38</sup> *PressGazette*, Criminal libel and sedition offences abolished, 13 January 2010.
- <sup>39</sup> IACHR, Report on the Compatibility of “*Desacato*” Laws With the American Convention on Human Rights, 1994, Part IV(B).
- <sup>40</sup> HR Committee, *Morais v. Angola*, 18 April 2005, Communication No. 1128/2002, para. 6.8
- <sup>41</sup> *Herrera-Ulloa v. Costa Rica*, 2 July 2004, Series C, No. 107 and *Ricardo Canese v. Paraguay*, 31 August 2004, Series C, No. 111.
- <sup>42</sup> Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion OC-5/85 of 13 November 1985, Series A, No. 5, para. 46.

<sup>43</sup> The Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, UN Treaty Series, vol. 78, p. 277, Article 3(c); The Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, Article 6, Article 25(3)(e).

<sup>44</sup> Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence, Rabat, Morocco, adopted 5 October 2012, pp 4-5.

<sup>45</sup> Ibid. p 6 (including context, speaker, intent, content or form, extent of the speech, and likelihood, including imminence).

<sup>46</sup> Article 2, para 1 of the ICCPR provides: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

<sup>47</sup> Article 26 of ICCPR provides: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

<sup>48</sup> Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, David Kaye, 22 May 2015, A/HRC/29/32.

<sup>49</sup> Ibid. para 31.

<sup>50</sup> See Organization of American States, press release 17/15, 25 February 2015. The statement was in reference to threats received by an Ecuadorian commentator after posting anonymous criticism online through Facebook and Twitter.

<sup>51</sup> Report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association, Maina Kiai, 14 April 2014, A/HRC/26/29.

<sup>52</sup> Ibid. para 32.

<sup>53</sup> Ibid. para 33.

<sup>54</sup> Venice Commission Guidelines on Freedom of Peaceful Assembly, 2nd Edition, Adopted at the 83rd Plenary Session (Council of Europe, June 2010), para 98 (citing the Polish Constitutional Court judgment of 10 July 2004 (Kp 1/04); City of Dayton v. Esrati, 125 Ohio App. 3d 60, 707 N.E.2d 1140 (1997)).

<sup>55</sup> ARTICLE 19, The Right to Protest: Principles on protection of human rights in protest, 2015, available at <http://bit.ly/2cQeKiK>.

<sup>56</sup> Ibid. Principle 9(3)(c).

<sup>57</sup> City of Dayton v Esrati, 125 Ohio App. 3d 60, 707 N.E.2d 1140 (1997).