



MEMORANDUM  
On

**Paraguayan Criminal Defamation Provisions**

by

**ARTICLE 19**  
**Global Campaign for Free Expression**

**London**  
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***I. Introduction***

ARTICLE 19, The Global Campaign for Free Expression, has been asked to comment on the calumny, insult and defamation provisions contained in the Paraguayan Criminal Code. For the purpose of this analysis, the legal regime created by these provisions will be referred to as “criminal defamation” since each offence purports, at least at a *prima facie* level, to strike a balance between the right to free expression and reputation rights. Our comments are based on an unofficial English translation of articles 150 to 156 in the Criminal and Code.

ARTICLE 19 is of the view that all criminal defamation laws, regardless of what they are called, impose an unjustifiable restriction on free expression, and the provisions in the Paraguayan Criminal Code are no exception. Briefly stated, they protect illegitimate interests, criminalize the expression of opinions, violate basic principles of criminal law, provide insufficient means of defence to defendants and impose disproportionate sanctions. We urge the government of Paraguay to repeal these provisions and replace them with appropriate private law remedies if these do not already exist.

If the recommendation to repeal these provisions altogether is not accepted, at a minimum we recommend that the provisions be amended to decriminalise the expression

of opinions, to provide defendants with adequate defences, and to remove sanctions that constitute a disproportionate response to harm caused.

In Section II, we briefly describe international standards of freedom of expression and Paraguay's international and national obligations regarding the protection of freedom of expression. In Section III we set out the argument against criminal defamation laws from a freedom of expression perspective, with reference to declarations made by international bodies regarding the use of criminal defamation laws. In Section IV we analyse the Criminal Code provisions against the existing international standards. Our analysis draws upon the jurisprudence of the United Nations Human Rights Committee as well as upon that of the European Court of Human Rights in the area of defamation. These standards, as well as comparative standards in this area, have been encapsulated in the ARTICLE 19 publication, *Defining Defamation: Principles on Freedom of Expression and Protection of Reputations* ("Defining Defamation"),<sup>1</sup> to which we will frequently refer. These principles have attained significant international endorsement, including by the three official mandates on freedom of expression, the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression.<sup>2</sup>

## **II. International and National Standards**

Freedom of expression is a key human right, in particular because of its fundamental role in underpinning democracy. Article 19 of the *Universal Declaration on Human Rights* (UDHR),<sup>3</sup> a United Nations General Assembly resolution, guarantees the right to freedom of expression in the following terms:

Everyone has the right to freedom of opinion and expression; this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers.

The UDHR is not directly binding on States but parts of it, including Article 19, are widely regarded as having acquired legal force as customary international law since its adoption in 1948.<sup>4</sup>

The *International Covenant on Civil and Political Rights* (ICCPR),<sup>5</sup> ratified by Paraguay in 1992, elaborates on many rights included in the UDHR, imposing formal legal obligations on State Parties to respect its provisions. Article 19 of the ICCPR guarantees

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<sup>1</sup> London: ARTICLE 19, 2000.

<sup>2</sup> See their Joint Declaration of 30 November 2000. Available at: <http://www.unhchr.ch/huricane/huricane.nsf/view01/EFE58839B169CC09C12569AB002D02C0?opendocument>.

<sup>3</sup> UN General Assembly Resolution 217A(III), adopted 10 December 1948.

<sup>4</sup> See, for example, *Filartiga v. Pena-Irala*, 630 F. 2d 876 (1980) (US Circuit Court of Appeals, 2<sup>nd</sup> Circuit). Generally, see H. Hannum, 'The Status of the Universal Declaration of Human Rights in National and International Law', *Georgia Journal of International and Comparative Law* 1995-1996 25(1-2): 287-397.

<sup>5</sup> UN General Assembly Resolution 2200A(XXI), adopted 16 December 1966, in force 23 March 1976.

the right to freedom of expression in terms very similar to those found at Article 19 of the UDHR.

Freedom of expression is also protected in the three regional human rights systems, including Article 13 of the *American Convention on Human Rights*<sup>6</sup> (American Convention) and ratified by Paraguay in 1989, Article 10 of the *European Convention on Human Rights* (European Convention)<sup>7</sup> and Article 9 of the *African Charter on Human and Peoples' Rights*.<sup>8</sup>

International jurisprudence has consistently emphasised the special importance of freedom of expression in a democratic society. For example, the Inter-American Court of Human Rights has stated:

Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a *conditio sine qua non* for the development of political parties, trade union, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its opinions, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.<sup>9</sup>

Furthermore, the guarantee of freedom of expression applies to all forms of expression, not only those which fit in with majority viewpoints and perspectives. The European Court of Human Rights has repeatedly stated:

Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man ... it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'.<sup>10</sup>

International law permits limited restrictions on the right to freedom of expression in order to protect various interests, including reputation. The parameters of such restrictions are provided for in both Article 19 of the ICCPR and Article 13 of the American Convention, which states at paragraph (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

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<sup>6</sup> Adopted 22 November 1969, in force 18 July 1978.

<sup>7</sup> Adopted 4 November 1950, in force 3 September 1953.

<sup>8</sup> Adopted 26 June 1981, in force 21 October 1986.

<sup>9</sup> Inter-American Court of Human Rights, *Compulsory Membership in an Association. Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85 of 13 November 1985. Series A No. 5, para. 70.

<sup>10</sup> *Handyside v. United Kingdom*, 7 December 1976, Application No. 5493/72, 1 EHRR 737, para. 49. Statements of this nature abound in the jurisprudence of courts and other judicial bodies around the world.

b. the protection of national security, public order, or public health or morals.

Any restriction on the right to freedom of expression must meet a three-part test. The test is a strict one and requires that any restriction must be (1) provided by law, (2) for the purpose of safeguarding a legitimate interest (including, as noted, protecting the reputations of others), and (3) necessary to secure this interest.<sup>11</sup> In particular, in order for a restriction to be deemed necessary, it must restrict freedom of expression as little as possible, it must be carefully designed to achieve the objective in question and it should not be arbitrary, unfair or based on irrational considerations. Vague or broadly defined restrictions, even if they satisfy the “provided by law” criterion, are unacceptable because they go beyond what is strictly required to protect the legitimate interest.

In addition to ratification of the ICCPR and the American Convention, Paraguay has also signed the Declaration of Chapultepec, a set of principles on freedom of expression.<sup>12</sup> Principle 2 of the Declaration states that: “Every person has the right to seek and receive information, express opinions and disseminate them freely. No one may restrict or deny these rights.” Principle 10 states: “No news medium nor journalist may be punished for publishing the truth or criticizing or denouncing the government.”

The Constitution of Paraguay addresses freedom of expression at articles 26 through 31. Article 26 states the following:

(1) Free expression and the freedom of the press, as well as the dissemination of thoughts and opinions, without any type of censorship, and with no more limitations than the ones established by this Constitution, are hereby guaranteed. In consequence, no law is to be passed that restricts or makes these rights unfeasible. There will be no press crimes; they will be considered common crimes committed through the press.

(2) Everyone has the right to generate, process, or disseminate information and to use any legal, effective instrument to achieve these goals.

Article 27 addresses the organisation of the press and prohibits discrimination against the press; Article 28 declares the public’s right to receive information and paragraph (3) grants members of the public a right of correction for the publication of “false, ambiguous or distorted information”; Article 29 guarantees the confidentiality of sources and paragraph (2) guarantees the right of journalists to publish their opinions without being censored; Article 30 deals with broadcasting, and; Article 31 relates to state media.

### ***III. Criminal Defamation and Freedom of Expression***

Consistent with international human rights law and practice, ARTICLE 19 is of the view that defamation should not be punished through the application of criminal laws but

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<sup>11</sup> Inter-American Court of Human Rights, Compulsory Membership in an Association. Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights), Advisory Opinion OC-5/85 of 13 November 1985. Series A No. 5, para. 39.

<sup>12</sup> Mexico City, 11 March 1994.

rather should be subject only to civil or administrative sanctions or dealt with through self-regulatory mechanisms.

Criminal defamation laws pose a number of legal problems from the perspective of free expression. The first and most serious is the risk of a custodial sanction being applied to the peaceful exercise of the right to freedom of expression. The risk of imprisonment obviously poses a serious chilling effect on freedom of expression, even if this extreme sanction is rarely imposed. Suspended sentences, which come into effect if the crime is repeated, are particularly insidious as they serve as an ongoing threat. In addition, in most countries, the simple fact of having a criminal record can serve as an unwanted and sometimes quite unpleasant form of sanction.

A second legal problem with criminal defamation laws is that, despite their criminal status, a finding of guilt does not require proof of *mens rea*, or criminal intent. At a minimum, and consistent with fundamental principles of criminal law, plaintiffs should be required to prove an intention to cause harm to their reputation. In relation to statements of fact, this additionally requires proof of knowledge of falsity, or at least reckless disregard for the truth. Few criminal defamation laws respect these fundamental criminal standards.

A third and related problem is that many criminal defamation laws – notably injury and insult laws – are used to punish expressions of opinion. Under international law, expressions of opinion are granted greater protection than allegations of fact.<sup>13</sup> As stated by Principle 10 of *Defining Defamation*:

- (a) No one should be liable under defamation law for the expression of an opinion.
- (b) An opinion is defined as a statement which either:
  - i. does not contain a factual connotation which could be proved to be false; or
  - ii. cannot reasonably be interpreted as stating actual facts given all the circumstances, including the language used (such as rhetoric, hyperbole, satire or jest).

Fourth, few criminal defamation laws place the onus on the party claiming to have been defamed to prove all the elements of the offence. This placement of onus flows from the fundamental tenet that a person shall be presumed innocent until proven guilty.

Finally, criminal defamation laws are frequently drafted so as to provide special protection to public officials. All such provisions run counter to the obvious principle that officials should tolerate more, not less, criticism, a principle that has repeatedly been endorsed by international courts and other standard-setting bodies.

Notably, the Paraguayan provisions suffer from most of these defects.

Despite the significant implications for freedom of expression, criminal defamation laws remain in force in many countries worldwide. Nevertheless, a growing number of countries have either already repealed, or are in the process of repealing such laws,

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<sup>13</sup> See for example the European Court of Human Rights jurisprudence on this point, including: *Dichand and others v. Austria*, 26 February 2002, Application No. 29271/95.

because of the very problems outlined above. Argentina, Peru, Costa Rica, Sri Lanka and Ghana each repealed their criminal defamation laws in the period between 2000 and 2003. In addition, a number of U.S. States have repealed criminal defamation laws, following judicial findings of unconstitutionality. Finally, in January 2003, the government of Puerto Rico decided not to appeal a U.S. Federal Court ruling holding that the U.S. territory's criminal libel law is unconstitutional.<sup>14</sup>

Furthermore, in many of the countries that still have criminal defamation, prosecutions are rare. The United Kingdom, for example, has not prosecuted a criminal defamation action since the late 1970's.

The position taken within the UN system regarding criminal defamation laws is entirely unambiguous. The UN Human Rights Committee, the body responsible for overseeing the implementation of the ICCPR, has repeatedly expressed its concern about the use of custodial sanctions for defamation.<sup>15</sup>

The UN Special Rapporteur on Freedom of Opinion and Expression has stated unconditionally that imprisonment is not a legitimate sanction for defamation. In his 1999 Report to the UN Commission on Human Rights, he stated:

Sanctions for defamation should not be so large as to exert a chilling effect on freedom of opinion and expression and the right to seek, receive and impart information; penal sanctions, in particular imprisonment, should never be applied.<sup>16</sup>

In his Report in 2000, and again in 2001, the Special Rapporteur went even further, calling on States to repeal all criminal defamation laws in favour of civil defamation laws.<sup>17</sup> Every year, the Commission on Human Rights, in its resolution on freedom of expression, notes its concern with "the abuse of legal provisions on criminal libel".<sup>18</sup>

The three special international mandates for promoting freedom of expression – the UN Special Rapporteur, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression – have met each year since 1999 and each year they issue a joint Declaration addressing various freedom of expression issues. In their joint Declarations of November 1999, and again in December 2002, they called on States to repeal their criminal defamation laws. The 2002 statement read:

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<sup>14</sup> *Mangual v. Rotger-Sabat*, 317 F.3d 45.

<sup>15</sup> This concern has been expressed in the context of specific country reports. For example in relation to Iceland and Jordan (1994), Tunisia and Morocco (1995), Mauritius (1996), Iraq (1997), Zimbabwe (1998), and Cameroon, Mexico, Morocco, Norway and Romania (1999).

<sup>16</sup> *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1999/64, 29 January 1999, para. 28.

<sup>17</sup> See *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 52 and *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/2001/64, 26 January 2001.

<sup>18</sup> See, for example, Resolution 2000/38, 20 April 2000, para. 3.

Criminal defamation is not a justifiable restriction on freedom of expression; all criminal defamation laws should be abolished and replaced, where necessary, with appropriate civil defamation laws.<sup>19</sup>

In October 2000, the Inter-American Commission on Human Rights adopted a Declaration of Principles on Freedom of Expression. Paragraph 10 of this Declaration states, among other things, “The protection of a person’s reputation should only be guaranteed through civil sanctions in those cases in which the person offended is a public official, a public person or a private person who has voluntarily become involved in matters of public interest.”<sup>20</sup>

As mentioned above, any attempt to restrict an individual’s right to free expression must be proven to be necessary in a democratic society. The test of necessity includes, *inter alia*, the notion of “proportionality” – in other words that the means chosen to pursue the aim do not go beyond what is necessary in the particular circumstances. In general, a particular measure will not be regarded as necessary where a less restrictive means could be employed to achieve the same end or where the sanction itself is so overwhelming that it cannot be regarded as a proportionate response to the harm done. In the case of *Castells v. Spain*, the European Court of Human Rights emphasised that States should have recourse to the criminal law to restrict expression only for compelling reasons, and as a last resort:

[T]he dominant position which the Government occupies makes it necessary for it to display restraint in resorting to criminal proceedings, particularly where other means are available for replying to the unjustified attacks and criticisms of its adversaries or the media.<sup>21</sup>

Criminal defamation laws are no longer necessary, if they ever were, in light of the evolution of other areas of law more carefully targeted to the protection of individual reputations and public order, and because of the disproportionately severe sanctions imposed for violations. Our primary recommendation, therefore, is that Paraguay’s criminal defamation laws should be repealed and, if necessary, replaced with appropriate civil law measures. We shall elaborate on this below.

#### ***IV. Paraguay’s Criminal Defamation Regime***

##### **Offences and Sanctions**

Article 150 of Paraguay’s Criminal Code sets out the offence of calumny. Paragraph (1) states that any person who knowingly makes a false declaration of fact regarding an individual that is capable of causing harm to the honour of that same individual may be fined. If the statement is made publicly or repeated over a prolonged period of time, then the sanction may be increased to two years imprisonment, or a fine (paragraph (2)).

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<sup>19</sup> Joint Declaration of 10 December 2002.

<sup>20</sup> Adopted at the 108<sup>th</sup> Regular Session, 19 October 2000.

<sup>21</sup> *Castells v. Spain*, 24 April 1992, Application No. 11798/85, para.46.

Under Article 59 of the Criminal Code, damages may be imposed, either instead of or together with the imposition of a fine or imprisonment (paragraph (3)).

Article 151, entitled “Defamation”, provides that whoever makes a statement about another person that is capable of damaging that person’s honour, whether false or not, is liable to a fine of 180 times the statutory daily amount.<sup>22</sup> The sanction for a defamatory statement that is publicly circulated or repeated over a prolonged period is a term of imprisonment of up to a year, or a fine (paragraph (2)). Paragraph (6) states that the application of Article 59 of the Criminal Code may either substitute or aggravate the penalties provided for in paragraphs (1) and (2).

Article 152 sets out the offence of injury, or insult, according to which any person who makes a statement of fact about an individual that can damage that person’s honour, or who expresses a negative opinion about an individual, is liable to a fine of 90 times the statutory daily amount (paragraph (1), subparagraphs (i) and (ii), respectively). If the statement is made in front of a third party, or repeated over a prolonged period, the fine can be increased up to 180 times the statutory daily amount. Article 59 of the Criminal Code also applies to this provision.

Finally, Article 153 criminalizes the denigration of deceased persons through either calumny, defamation, insult or invasion of privacy. The sanction is imprisonment for up to one year. The provision does not apply if the subject of the impugned statement has been dead for more than ten years, “except when it independently constitutes another punishable act.”

Article 154 allows for the imposition of penalties in addition to those already specified. Paragraph (1) repeats that Article 59 of the Criminal Code may apply to the offences listed in Articles 150 to 152. When the offence has been committed publicly or disseminated in a publication, paragraph (2) of Article 154 allows the imposition of additional sanctions, including community service or even forced medical treatment,<sup>23</sup> at the request of either the victim or the Public Ministry.

## **Defences**

Paragraphs (3) to (5) of Article 151 set out the defences available to defendants charged under Articles 151 and 152 (but not for Articles 150 and 153). Paragraph (3) states that no sanction will be imposed if the defamatory or insulting statement was made in a confidential manner to a person with whom the speaker has a “close” relationship, or if the statement does not exceed the “limits of acceptable criticism”. Paragraph (4) provides that there will be no sanction when, given the interests of the author and his or her obligation to investigate the facts, the alleged fact(s) provide a proportional means of defending a public or private interest. Paragraph (5) states that truth of the impugned statement will only be admitted when application of paragraphs (3) and (4) require it. Otherwise it appears that truth itself is not an absolute defence.

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<sup>22</sup> Under Article 52 of the Penal Code, the actual amount of the fine is calculated on a daily basis, taking into account such matters as the defendant’s income.

<sup>23</sup> See Article 62 of the Criminal Code.



Article 155 applies to the offences listed in Articles 150-152 and provides that the sentence may be reduced if the statement was made ‘by his or her motives’ or as a result of emotional upheaval of some sort (‘por sus motivos o por una excitación emotiva’).

No separate defence is provided to Articles 150 and 153(1).

## **Analysis**

### Offences

As stated above, our primary recommendation is that all criminal defamation provisions should be repealed and, if necessary, replaced with appropriate civil law measures. However, in recognition of the fact that this may be a longer term project, Principle 4 of *Defining Defamation* calls for the following standards to be respected immediately in relation to such laws:

- i. no-one should be convicted for criminal defamation unless the party claiming to be defamed proves, beyond a reasonable doubt, the presence of all the elements of the offence, as set out below:
- ii. the offence of criminal defamation shall not be made out unless it has been proved that the impugned statements are false, that they were made with actual knowledge of falsity or recklessness as to whether or not they were false, and that they were made with a specific intention to cause harm to the party claiming to be defamed.

The concept of criminal intent is a key requirement in these standards. Failure to require criminal intent constitutes a violation of a basic due process right to which all defendants are entitled barring compelling policy reasons. Internationally, it is exceedingly rare for criminal laws to impose strict liability except in cases involving gross negligence resulting in bodily harm. Articles 150-153 are each highly problematic in this regard. While Article 150 requires the intent to make a false statement of fact, there is no requirement that there be an intention to cause harm. Articles 151-153 fail even to require that minimum level of intent.

The second key element is knowledge of falsity. Article 151-153, again, are highly problematic in this regard, failing to require that the statement be false. Under Article 151, an individual could be sentenced to a prison sentence for making a true statement, something which is unacceptable. Article 152 goes even further, criminalising the expression of a negative opinion about a person. For reasons discussed above, to criminalize expressions of opinion is a violation of international standards regarding freedom of expression and appears to contradict Article 26(1) of the Paraguayan Constitution which explicitly guarantees freedom of opinion in very broad terms. It also contradicts Principle 10 of the Declaration of Chapultepec, discussed above in Section II.

Last, the drafting of Article 152 suggests that the “negative opinion” need not even cause harm to a person’s reputation in order for the statement to be actionable. If there is no harm, then there is no need to protect the reputation interest, and indeed there is no insult. Taken literally, “negative opinion” appears to offer a very low standard of protection for critical expression.

Article 153 extends protection to the reputation of deceased persons. As stated at Principle 2(b) of *Defining Defamation*:

In particular, defamation laws cannot be justified if their purpose or effect is to:  
...  
iv. enable individuals to sue on behalf of persons who are deceased.

This is because the harm from an unwarranted attack on someone's reputation is direct and personal in nature. Unlike property, it is not an interest that can be inherited; any interest surviving relatives may have in the reputation of a deceased person is fundamentally different from that of a living person in their own reputation. Furthermore, a right to sue in defamation for the reputation of deceased persons could easily be abused and might prevent free and open debate about historical events. Article 153 constitutes a clear violation of these standards.

### Defences

The defences provided by the Criminal Code also present significant problems.

First, the fact that truth does not serve as a complete defence to charges of defamation, except in the very narrow circumstances set out in Article 151(5),<sup>24</sup> runs counter to international standards and national best practice. As stated by Principle 7 of *Defining Defamation*:

- (a) In all cases, a finding that an impugned statement of fact is true shall absolve the defendant of any liability.
- (b) In cases involving statements on matters of public concern, the plaintiff should bear the burden of proving the falsity of any statements or imputations of fact alleged to be defamatory.
- (c) Practices which unreasonably restrict the ability of defendants to establish the truth of their allegations should be revised.

That truth of an impugned statement should be a complete defence is derived from the basic idea that one cannot defend a reputation one does not deserve. Measures that protect the other interests that can be affected by the dissemination of a true statement, such as privacy interests, should be considered. Many jurisdictions have laws that impose some limitations on the publication of confidential personal information.

Second, we note that Paragraph (4) of Article 151 provides some form of "reasonableness" defence, according to which the interests and the duties of the author are taken into account, provided the alleged facts defend a public or private interest. While we support the inclusion of this defence, we are of the view that purpose of this provision needs to be made clearer and must be extended to all defamation provisions. For instance, it is not obvious whether it precludes liability where a journalist or another has merely reproduced a speech, or findings of an official report. Nor is it obvious whether a concept of "due diligence" or "good faith" on the part of the speaker will be

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<sup>24</sup> This states that the veracity of a statement will be taken into account only if the statement was made in a private conversation, or if the defendant is running a "reasonableness defence" under Article 151(4).

taken into consideration, as is the case in a number of jurisdictions. Principle 9 of *Defining Defamation* sets out the elements of an effective “reasonableness” defence as follows:

Even where a statement of fact on a matter of public concern has been shown to be false, defendants should benefit from a defence of reasonable publication. This defence is established if it is reasonable in all the circumstances for a person in the position of the defendant to have disseminated the material in the manner and form he or she did. In determining whether dissemination was reasonable in the circumstances of a particular case, the Court shall take into account the importance of freedom of expression with respect to matters of public concern and the right of the public to receive timely information relating to such matters.

In addition to providing a defence of “reasonableness” (known as qualified privilege or good faith in some countries), a number of jurisdictions also explicitly exclude from liability any defamatory statements that constitute faithful reproductions or summaries of official documents, speeches, reports, and so forth. This defence is lacking from the Paraguayan provisions, and we would recommend that it be included.

Third, regarding the defence provided in the first part of paragraph (3) of Article 151, ARTICLE 19 is of the view that this relies on a concept that is extremely difficult to establish in law. To successfully rely on the defence requires that there be a “close” relationship between the speaker and listener, which we submit is a very elastic term. We consider, furthermore, that a private conversation could rarely pass the threshold of what is considered ‘defamation’ under international standards: that it causes injury by lowering the person to whom the statement relates in the esteem in which they are held within the community, by exposing them to public ridicule or hatred, or by causing them to be shunned or avoided.

Finally, under the second part of Article 151(3), it is a defence is “judging [a statement’s] form and content, it does not exceed the limits of acceptable criticism.” While we agree that this is something to be taking into account in deciding whether or not a statement is defamatory, it is simply too vague a concept to form a meaningful defence on its own. We also note that this relates only to Articles 151 and 152, and not to the more generic ‘defamation’ offence stated in Article 150, or in Article 153 relating to defamation of the deceased.

### Sanctions

The regime of sanctions set out at articles 150 to 155 of the Criminal Code primarily depends on the use of fines and imprisonment. Principle 4(b)(iv) of *Defining Defamation* provides that:

[P]rison sentences, suspended prison sentences, suspension of the right to express oneself through any particular form of media, or to practise journalism or any other profession, excessive fines and other harsh criminal penalties should never be available as a sanction for breach of defamation laws, no matter how egregious or blatant the defamatory statement.

Criminal sanctions – both fines and imprisonment – represent a disproportionate response to defamation, and thus fail to meet the tree-part test for the legitimacy of restrictions under international law. Indeed, even where the harsh sanctions are rarely applied this mitigates the problem only slightly since the severe nature of these sanctions means that they have an impermissible chilling effect on expression. The threat of criminal sanction necessarily inhibits healthy public debate, thus seriously undermining democracy by stifling important political speech.

The European Court of Human Rights, which has had the occasion to address this issue on numerous occasions, has never upheld a prison sentence and more often than not, has struck down criminal convictions for defamation for want of proportionality. Even where sanctions have been financial, the Court has still held these to be, in a number of cases, illegitimate restrictions on freedom of expression. In the very first defamation case brought before it, *Lingens v. Austria*<sup>25</sup>, the Court stated that:

...the penalty imposed on the author...amounted to a kind of censure, which would be likely to discourage him from making criticisms of that kind again in the future...In the context of political debate such a sentence would be likely to deter journalists from contributing to public discussion of issues affecting the life of the community. By the same token, a sanction such as this is liable to hamper the press in performing its task as purveyor of information and public watchdog.<sup>26</sup>

The Paraguayan Criminal Code allows not only for the imposition of fines of indeterminate amounts and imprisonment for lengthy terms, but also for the concurrent imposition of damages (Article 59). Such harsh sanctions cast a long shadow and will certainly have an inhibitory effect on the development of the public debate and dialogue necessary in healthy democracy.

The existence of such a harsh regime is even more problematic in light of the fact that the Constitution already provides individuals with a right of correction in order to address possible slights to individual reputation (Article 28(3)). None of the criminal defamation provisions require the availability of such an alternative remedy to be taken into account.

ARTICLE 19 is of the view that these sanctions are a wholly disproportionate response to harm caused by defamatory statements and that they cannot be justified in a democratic society.

**Recommendations:**

- All of the articles in the Criminal Code dealing with defamation or protection of reputation should be repealed and replaced, where necessary, with appropriate civil defamation laws.
- Until such time as the criminal defamation provisions are completely repealed from the criminal law, the following amendments should be made immediately:
  - Articles 152 and 153 should be repealed and not replaced with a civil remedy.
  - Articles 150 and 151 should be amended to clarify that no one should be

<sup>25</sup> 8 July 1986, Application No. 9815/82.

<sup>26</sup> *Ibid.*, para. 44.

convicted unless it has been proved that the statements are false, that they were made with knowledge of such falsity or reckless disregard for the truth and that they were made with the intention of causing harm.

- Articles 150 and 151 should make it clear that the plaintiff should bear the onus of proving, beyond all reasonable doubt, all the elements of the offence;
- Proof of truth should be a complete defence to allegations of defamation. Where a statement involves a matter of public interest, the plaintiff should bear the burden of proving the falsity of the statement.
- Articles 150 and 151 should incorporate a full reasonableness defence, incorporating concepts of 'due diligence' and 'good faith', as well as a defence of privilege for the accurate reproduction or summary of official statements, reports, etc. should be provided in the law.
- All sanctions must be proportionate to the harm caused and incarceration should be removed as a possible sanction. The law should require that alternative remedies should be prioritised over pecuniary remedies. Actual damages should correspond to the level of actual harm caused, and the level of compensation which may be awarded for non-material harm to reputation – that is, harm which cannot be quantified in monetary terms – should be subject to a fixed ceiling.
- The relationship between Article 154 and the existing sanctioning provisions must be clarified. It should not operate in conjunction with the other sanctions.