MEMORANDUM OF LAW

TO: Interested Persons

FROM: American Bar Association Center for Human Rights

RE: Criminalization of Statements Made in Regards to Legal Proceedings

DATE: August 22, 2012

This memorandum outlines international and comparative jurisprudence in the Americas regarding the criminalization of allegedly defamatory statements made in relation to legal proceedings. The criminalization of speech is generally disfavored on the grounds that criminal penalties are not proportional to any reputational harm caused by defamatory statements. The criminalization of statements made in the course of litigation is particularly threatening to freedom of expression and the right to a judicial remedy because it undermines the ability of legal counsel to present their clients without fear of criminal prosecution. Therefore, international law and comparative jurisprudence generally prohibits the criminalization of statements in the course of litigation and instead relies upon the adversarial process during the legal proceedings to determine the truth of statements made by the parties and their counsel.¹

International Law

Freedom of Expression

Article 13 of the American Convention on Human Rights protects the right to freedom of thought and expression. The Convention permits restrictions on the freedom of expression only where they are “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.”²

¹ The statements and analysis contained in this memorandum are the work of the American Bar Association’s Center for Human Rights, which is solely responsible for its content. The Board of Governors and House of Delegates of the American Bar Association has neither reviewed nor sanctioned its contents. Accordingly, the views expressed herein should not be construed as representing the policy of the ABA.

The Inter-American Court on Human Rights has explained the fundamental importance of this right to democratic society as follows:

[D]ifferent regional systems for the protection of human rights and the universal system agree on the essential role played by freedom of expression in the consolidation and dynamics of a democratic society. Without effective freedom of expression, exercised in all of its forms, democracy is enervated, pluralism and tolerance start to deteriorate, the mechanisms for control and complaint by the individual become ineffectual and, above all, a fertile ground is created for authoritarian systems to take root in society.\(^3\)

Further, the Court has stated that the freedom of expression must be guaranteed when the “diffusion of information or ideas . . . are received favorably or . . . are considered as inoffensive or indifferent, . . .” and when the result of that diffusion is unpleasant for the State or a part of the population.\(^4\) As a result, any restrictions on freedom of expression “must be necessary in a democratic society.” For a restriction to be necessary, it must “be justified by reference to governmental objectives which, because of their importance, clearly outweigh the social need for the full enjoyment of the right” to free expression.\(^6\)

The Court also imposes a proportionality requirement when weighing whether restrictions on speech are permissible. It has held that any restrictions “should in no way


\(^5\) Herrera-Ulloa, Inter-Am. Ct. H.R., at ¶ 120; see also Kimel v. Argentina, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R.,(ser. C), No. 177, ¶ 58 (May 2, 2008), available at http://www.corteidh.or.cr/docs/casos/articulos/seriec_177_ing.pdf (examining whether a criminal defamation law was compatible with the American Convention by “i) verify[ing] whether the legal definition of the crime of defamation affected the strict legality which is to be observed when restricting the freedom of thought and expression by means of criminal proceedings; ii) examin[ing] whether the protection of the reputation of judges serves a legitimate purpose, in accordance with the provisions of the Convention and determine, if appropriate, the suitability of a criminal penalty in order to achieve the purpose sought; iii) assess[ing] whether such measure is necessary, and iv) examin[ing] the strict proportionality of such measure.”).

limit, more than strictly necessary, the full scope of freedom of expression and become a direct or indirect means of prior censorship.” The Court has held that “[i]f there are various options to achieve this objective, the one which least restricts the protected right should be selected.” The Court explained that “it is not enough . . . to demonstrate that a law performs a useful or desirable purpose; to be compatible with the Convention, the restrictions . . . [cannot] limit the right established in this Article more than is strictly necessary.”

The Inter-American Court also affords greater protection to speech concerning public officials. While it has recognized that politicians are not without recourse to protect their reputation, the Inter-American Court has nevertheless found that “[t]hose individuals who have an influence on matters of public interest have laid themselves open voluntarily to a more intense public scrutiny and, consequently they are subject to a higher risk of being criticized in this domain, because their activities go beyond the private sphere and belong to the public debate realm.”

Consistent with this framework, the Inter-American Court has found that “penal laws are the most restrictive and severest means of establishing liability for an unlawful conduct.” While the Inter-American Court has not held that criminal defamation statutes per se violate freedom of expression, it has held on several occasions that criminal sanctions have been unnecessary and disproportionate and therefore constituted an illegal restraint on both the individual and social aspects of freedom of expression when the statements concerned a person engaged in public activities. As the Inter-American Court has noted “criminal sanction regarding the right to inform or give one’s opinion . . . should be carefully analyzed, pondering the extreme seriousness of the conduct of the individual who expressed the opinion, his actual malice, the characteristics of the unfair damage caused, and other information which shows the absolute necessity to resort to criminal proceedings as an exception.”


10 Id. at ¶ 102.


12 Canese, Inter-Am. Ct. H.R., at ¶ 104.

13 See Kimel, Inter-Am. Ct. H.R., at ¶ 94 (invalidating criminal conviction as disproportionate); Palamara Iribarne v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C), No. 135, ¶ 65(e) (Nov. 22, 2005) (same); Canese, Inter-Am. Ct. H.R., at ¶¶ 106-108 (same)).

Article 13 prohibits restrictions “by indirect methods or means . . . or by any other means tending to impede the communication and circulation of ideas and opinions.” In particular, the Inter-American Commission has noted a pattern of wrongful criminalization of legitimate human rights activities in the region and has called on States to refrain from using “the punitive power of the State and its organs of justice to harass those like human rights defenders who are engaged in legitimate and lawful activities.”15 It has also recommended that States “take all measures necessary to prevent State investigations from being used to unjustly persecute persons who are legitimately demanding observance and protection of their human rights.”16

The Court has held that prosecutions themselves can constitute a form of punishment inconsistent with the right to freedom of expression. In Canese v. Paraguay, the Court found that prosecution for criminal defamation can violate the right to freedom of expression even where the defendant is ultimately acquitted.17 Similarly, the European Court of Human Rights has held that the imposition of disciplinary proceedings against attorneys for statements made in the course of representing a client can have a chilling effect that violates the right to freedom of expression. In Steur v. the Netherlands, the European Court held that, even where no sanction was imposed on an attorney accused of making defamatory statements, “the threat of an ex post facto review of his criticism with respect to the manner in which evidence was taken from his client is difficult to reconcile . . . an advocate to defend the interests of his clients and could have a ‘chilling effect’ on the practice of his profession.”18 The European Court noted that the imposition of disciplinary proceedings was inappropriate because the attorney’s statements were limited to criticism of a public official’s conduct and “did not amount to a personal insult.”19

The Importance of an Independent Legal Profession

Romania, 2004-XI Eur. Ct. H.R., ¶ 115 (Dec. 17, 2004), available at http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-67816 (explaining that “the imposition of a prison sentence for a press offence will be compatible with journalists’ freedom of expression . . . only in exceptional circumstances, notably where other fundamental rights have been seriously impaired, as, for example, in the case of hate speech or incitement to violence.”).


16 Id., at 233-34.


A just and democratic society cannot flourish without an independent and functioning legal profession. The independence of attorneys, which includes the ability to advocate for their clients without harassment or malicious prosecution, is fundamental to maintaining the international norms of equal justice and the rule of law.

The right to equality and to a fair and public hearing in the determination of one’s rights and obligations is established in international and regional human rights treaties and enshrined in the constitutions of democracies throughout the world. As an example, Colombia’s Constitution guarantees both the right to equality before the law (Article 13) and to due process of law (Article 29). Likewise, the Article 8 of the American Convention on Human Rights and Article 14 of the International Covenant of International Civil and Political Rights guarantee the right to a fair trial. This includes the right to due process of law, equality before the law, and the right to be heard by a competent and impartial tribunal.

The enjoyment of these basic rights is inextricably linked to the independence and impartiality of the judiciary and legal profession. As the United Nations High Commissioner for Human Rights has explained, “human rights and fundamental freedoms are all the better safeguarded to the extent the judiciary and the legal professions are protected from interference and pressure.” In Nikula v. Finland, the European Court of Human Rights held that “in certain circumstances, an interference with counsel's freedom of expression in the course of a trial might raise an issue under Article 6 of the Convention with regard to the right of an accused client to receive a fair trial.”

In 1990, the United Nations promulgated the Basic Principles on the Role of Lawyers in recognition of the unique role of lawyers and the legal system in preserving and vindicating all human rights and fundamental freedoms. The Principles clearly state that States shall ensure, among other obligations, that “lawyers are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference” and that lawyers “shall not suffer or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with

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20 CONSTITUCIÓN POLÍTICA DE COLOMBIA [C.P.] art. 13 and art. 29, available at http://pdba.georgetown.edu/Constitutions/Colombia/vigente.html,


23 Nikula, Eur. Ct. H.R., ¶ 49..

recognized professional duties, standards and ethics.”

Further, “where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities.” Finally, the Principles make clear that “lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority.”

**Comparative Jurisprudence**

By way of example, the ABA Center for Human Rights offers a brief summary of relevant jurisprudence in the United States. In the United States, there is an absolute privilege that attaches to statements made in the course of judicial proceedings. For attorneys, the common law rule is that “[a]n attorney at law is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding, or in the institution of, or during the course and as a part of, a judicial proceeding in which he participates as counsel, if it has some relation to the proceeding.” An absolute privilege provides immunity from all defamatory statement, even those that are intentionally false. The underlying rationale for the absolute privilege is that “a balance must be established between ensuring a free flow of information in order to achieve justice and protecting individuals’ reputations from character attacks.”

As stated by the Court of Appeals of Maryland:

> The question whether a defamatory statement should be absolutely privileged involves a matter of public policy in which the public interest in free disclosure must be weighed against the harm to individuals who may be defamed. The

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25 *Id.*

26 *Id.*, at ¶ 17.

27 *Id.*, at ¶ 20.

28 *See, e.g.*, Ginsburg v. Black, 192 F.2d 823 (7th Cir. 1951); *see also* Kelly v. Albarino, 485 F.3d 664 (2d Cir. 2007).

29 **Restatement (Second) of Torts** § 586 (1977).

30 *See, e.g.*, Binkewitz v. Allstate Ins. Co., 222 N.J. Super. 501, 508 (App. Div. 1988) (“Words uttered by judges, witnesses, attorneys, parties or jurors in the course of judicial . . . proceedings, which have some relation thereto, are absolutely privileged, even if made with bad motive or knowledge of their falsity.”) (citing Citizens State Bk. of N.J. v. Libertelli, 215 N.J. Super. 190, 197 (App.Div.1987)).

underlying rationale for according an absolute privilege to the defamatory statements made in court by participants in judicial proceedings or to such statements published in documents which have been filed is that such a privilege is necessary to the proper administration of justice. The ultimate purpose of the judicial process is to determine the truth. The investigation, evaluation, presentation and determination of facts are inherent and essential parts of this process. If this process is to function effectively, those who participate must be able to do so without being hampered by the fear of private suits for defamation.\footnote{Adams v. Peck, 288 Md. 1, 5 (Md. 1980) (citations omitted).}

Courts have justified this balance in favor of absolute immunity by referring to the safeguards in place during formal proceedings, such as the oath and the threat of perjury charges for false testimony, which serve to protect individuals from malicious defamatory statements.\footnote{See, e.g., Engelmohr v. Bache, 401 P.2d 346, 347 (1965) (noting that the absolute privilege is only extended to administrative proceedings with safeguards similar to a judicial proceeding); Rohrbach v. Charbonneau, 2000 U.S. Dist. LEXIS 2778, 27 (D. Me. Mar. 1, 2000) (“The possibility of perjury prosecution must remain as a remedy for the most egregious defamatory statements in this context. While a perjury prosecution is a severe and rarely employed remedy, it must be present as a deterrent to defamatory statements that would otherwise be absolutely immune from a civil suit.”).}

Conclusion

The criminalization of statements made by legal counsel in the course of litigation is inconsistent with the right to freedom of expression enshrined in the American Convention on Human Rights. Criminal penalties are neither necessary nor proportionate to any legitimate aims that may be served by such penalties. Any concerns about the truth of statements made by counsel during the course of proceedings can and should be dealt with by the court during the litigation.