

# FREEDOM OF SPEECH, FREEDOM OF THE PRESS, AND THEIR LIMITS

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## I. INTRODUCTION

Nowadays, mass media, with its unstoppable and astonishing development, has reached a level of importance in our lives that was unimaginable few years ago. This new situation is inherent in modern societies. Without it, our lifestyle would be different; maybe better, maybe worse, but certainly different from the way we know it today. Digital newspapers, virtual reality experiences, digital signatures, and

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many other expressions of technology are all signs of the times, which show us the undeniable reality of the digital society. We, as witnesses to these deep, substantial transformations, must be prepared not only to enjoy the comfort and the other positive spin-offs of these developments, but also to solve the intricate ethical conflicts and legal questions that, undoubtedly, will arise.

We do not want to, nor can we deny the important role the media as well as freedom of speech and of the press play in a democratic society. First, from a political and institutional point of view, the media acts as a monitor of the governmental organs, legitimizing their actions; Second, from a social and scientific point of view, it allows huge masses the access to news and information, turning knowledge into humanity's heritage, hence permitting sensational scientific and cultural developments.<sup>1</sup>

However, in spite of the aforementioned advantages, we can not lose sight of the negative consequences often arising from the press' activities. These consequences must be both prevented and repaired by the law.

*A depersonalization* of information is occurring on all levels.<sup>2</sup> Facts and mere speculations frequently go to press without due corroboration. Bearing in mind that the value of this information is usually directly proportional to the immediateness of its broadcasting, we can understand the raw, ferocious battle currently fought by big media entrepreneurs. A large percentage of newspapers and television stations would rather publish news of dubious veracity than come in second place after taking time to check the validity of the information.

Moreover, the universality of the information, together with its public nature, renders the individual powerless and insignificant in comparison to the huge power structure of the media. As a consequence of the enormous influence the press has over people, not only are damages monumental, but also the effects are often irreparable. For instance, it is difficult to convince people that what appears in their news is wrong. Besides, editors seldom acknowledge the falseness of their assertions, and when they do (usually forced by judicial decisions), they do not place nearly as much emphasis as was placed on the original information.

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1. Umberto Eco believes that television is a cultural tool for underdeveloped countries, showing them what is happening around the world, quoted by, CARLOS FAYT, *LA OMNIPOTENCIA DE LA PRENSA SU JUICIO DE REALIDAD EN LA JURISPRUDENCIA ARGENTINA Y NORTEAMERICANA*. (Editorial La Ley 1994).

2. RAMON PIZARRO, *RESPONSABILIDAD CIVIL DE LOS MEDIOS MASIVOS DE COMUNICACIÓN*, HAMMURABI 253 (1991).

It is indispensable, in order to avoid obstructing a person's full development, to acknowledge the right to information as a fundamental right. It is impossible to create a civil conscience according to ethical rules, or for men to fully develop their intellectual capabilities if the right to be freely informed is not guaranteed. Therefore, it is necessary to give constitutional status to the right to information.

Nowadays, the right to choose and judge what one is going to read, watch, or listen to has become the most important freedom . . . a right which imposes on the government the duty of satisfying that same right . . . the passive right to be informed . . . that contains in itself the question of whether or not man will be able to have a thought of his own . . . .<sup>3</sup>

This does not imply unrestricted, irresponsible, or unlimited exercise of this right, but quite the contrary. We believe that besides the economic and moral injury that can be produced by the media's activities, legislation must prevent other kinds of injuries that are encroaching on us everyday, such as the injury caused to children by certain information.

## II. CONSTITUTIONAL MATTER AND COMPARATIVE LEGISLATION

In Spain, freedom of speech and the right to information are expressly acknowledged in the 1978 constitution, article 20, which forbids any kind of previous censorship. It also establishes limits to these rights: freedom of speech and of the press must be exercised respecting every other right contained in that constitution, especially the right to honor, intimacy, self-image, and youth and childhood's protection.

In Germany, similar norms are found (German constitution's article 5 is the source of the Spanish article 20). For many years, it was thought that whenever a conflict between honor and freedom of speech arose, it should be resolved in favor of the former. However, since the leading case of LUTH,<sup>4</sup> it is necessary to consider the conflict distinctly in each and every concrete case. In 1961, the constitutional court decided that "the reporter must fulfill the duty of veracity . . . but it is enough to have carried out what is reasonably necessary to verify the information's truthfulness . . ." to be exempted from liability.

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3. FAYT, *supra* note 1 (editorial note: translated from Spanish).

4. Diego Rosario, *El honor y la libertad de expresion* (lecture given at Salamanca University, Spain, Jan. 1996.)

5. FAYT, *supra* note 1 (editorial note: translated from Spanish).

Today, prevalent in European Union law, is the idea that freedom of speech is superior to honor, etc., whenever it contributes to forming public opinion.<sup>6</sup> Muñoz Machado states that "freedom of speech has virtually no limit. . . ."<sup>7</sup>

In the United States, freedom of the press is guaranteed in the First Amendment of the Constitution (1791) "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."<sup>8</sup> In addition, judicial thought is dominated by an interpretation that, undoubtedly, places the media in a privileged situation. Since the landmark case of *New York Times vs. Sullivan*,<sup>9</sup> the Supreme Court of the United States has been applying the *actual malice* doctrine, which relies on the principle that the injured party has to prove that the information was given either "with knowledge that it was false or with reckless disregard of whether it was false or not."<sup>10</sup>

The Argentinean constitution guarantees freedom of the press in article number 14 "[e]very inhabitant of the nation has the following rights, according to the laws that regulate their exercise . . . to publish his ideas in the press without previous censorship"<sup>11</sup> and "Federal congress shall make no laws abridging freedom of the press nor establishing federal jurisdiction on such matters . . . ."<sup>12</sup> The Agreement of San José, and the International Treaty of Civil and Political Rights article 19 also provide protection in such matters.

As far as the passive subject role is concerned, the Argentinean Constitution makes no mention of it, but newly-incorporated treaties (such as the Agreement of San José, Costa Rica, now holding constitutional status) certainly do, clearly stating that every person has the right to receive, without previous censorship, information and ideas of any kind and through different channels.

However, the Argentinean Supreme Court has said that "Freedom of the press has a meaning greater than the mere exclusion of censorship

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6. According to the European Union Treaty, 17th Declaration, the commission was to present a report by 1993 regarding possible measures to improve the public's access to information possessed by governmental institutions, SECRETARIA DE ESTADO PARA LAS COMUNIDADES EUROPEAS 319 (1992).

7. Rosario, *supra* note 4 (editorial note: translated from Spanish).

8. U.S. CONST. amend. I.

9. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

10. *Id.* at 254.

11. ARG. CONST. art. 14 (editorial note: translated from Spanish).

12. ARG. CONST. art. 32 (editorial note: translated from Spanish). This article's direct source is the First Amendment of the United States Constitution.

and, therefore, constitutional protection must impose a careful handling of rules and relevant circumstances in order to avoid obstructing the free press and its essential functions . . . .”<sup>13</sup>

But notwithstanding all these protective measures, “unfortunately state legislatures pass unconstitutional laws all the time . . . .”<sup>14</sup>

### III. CONFLICT BETWEEN RIGHTS

As was previously noted, many modern constitutions grant special protection to freedom of speech, as they do with other rights. This is seen especially in constitutions of western countries, which follow the liberal tradition of John Locke’s natural rights. However, they infrequently establish a hierarchy among the rights or give any kind of priority list with which to solve problems involving more than one constitutional right.

Argentina’s Supreme Court has tried to clarify this issue by stating that constitutional laws and the rights emerging from them differ from one another hierarchically. If we follow this line of thought, we can conclude that there is an axiological question; therefore, in each concrete case an appraisal of the rights must be carried out, resolving the conflict in favor of that right *ranked* higher in the hierarchy.

Bidart Campos understands that rules declaring rights have all, for they are part of the same constitution, the same position and hierarchy. But, the rights themselves, may have a different hierarchy.

### IV. CIVIL LAW AND ITS NEW ATTITUDE IN CONFRONTING THE PROBLEM

The new concept of civil law and consequently, the new attitude it takes when dealing with damage suits, can not be isolated from the aforementioned conflict of interests that is seen with increasing frequency everyday. The law must not limit itself to prevention and indemnity. Occasionally, it must assume a punitive function. It has been argued whether this punitive side of civil law is constitutional. We believe it is, as

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13. See generally opinion of the Supreme Court of Argentina interpreting the freedom of the press provisions of articles 14, and 32 of the Argentinean Constitution. ARG. CONST. arts. 14, 32 (editorial note: translated from Spanish).

14. Joshua Quittner, *The Supreme Court*, TIME MAGAZINE, March 31, 1997, at 4. The article refers to the controversial Communications Decency Act, which restricted freedom of speech in cyberspace. The Supreme Court declared it unconstitutional on June 26, 1997. See Fred Cate, *A Law Antecedent And Paramount*, (last visited 3/29/98) <<http://www.law.indiana.edu/FCLJ/v47/N02/Cate.HTML>> as available on the Internet, for examples of unconstitutional laws (concerning the First Amendment).

long as it is not arbitrary. And, in our opinion, helps to fulfill the preventive function, as will be noted in the conclusion.

## V. SOME TOPICS CONCERNING CIVIL RESPONSIBILITY OF THE MASS MEDIA

### A. *The Leading Case "Ponzetti de Balbin"*<sup>15</sup>

This case is a landmark in the evolutionary process of civil responsibility in Argentina. The facts will be described briefly, as well as the Court decision's most noteworthy points.

In September 1981, a popular magazine (similar to *People*, as far as style and theme are concerned) took, without permission, a picture of a well know Argentine politician, Mr. Balbin, who was struggling for his life in a hospital intensive care unit. A few hours later, the respected man passed away and, almost immediately, the picture made it on the cover of the magazine's next issue. The widow, Mrs. Ponzetti de Balbin, and her son sued the magazine for moral damages stating that their right to intimacy had been invaded.

Both the first and second verdicts condemning the publishers were appealed. The case finally went all the way to the Supreme Court, which upheld the previous decisions.

Justices Belluscio and Caballero said:

[F]amous people, public men have, as any other inhabitant, constitutional shelter for their private life . . . the public's interest in Mr. Balbin's health did not require or justify an intrusion into his most sacred sphere of privacy, as had occurred with the publishing of this picture. The picture's ignoble brutality conspires against responsibility, correctness, decency, and other estimable possibilities of the information labor. The freedom the defendant has taken to publish the picture, far exceeds the freedom protected by the constitution.<sup>16</sup>

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15. *Indalia c/Editorial Atalntida S.A. s/daños y perjuicios*, at 306 (1839); FAYT, *supra* note 1 (editorial note: translated from Spanish).

16. *Id.*

### B. *Extracontractual (non contractual) Responsibility*<sup>17</sup>

Different positions in South America:

1. Subjective imputability:<sup>18</sup> this position is based on the premise that responsibility is only precedent when the defendant acted with *negligence* or *malice*. It excludes *objective imputability*,<sup>19</sup> arguing that Article 1113 is only applicable to cases in which objects have played an important role.

The legal scholars and the courts supporting this position distinguish between *false information* (a deliberate, conscious act intended to hurt, to cause damage, or *dolus*) and *erroneous information* (unconscious act, not intended to hurt or damage; the journalist acts *de bonafide*). In the first case, the media is fully responsible both civilly and criminally. In the second, there would be no liability where the mistake was *excusable*.

This position seems very restrictive, especially when the newspapers and the journalist are not liable for *false news*, when the importance of the source exonerates them from checking the information's veracity or, when they reproduce the information exactly as it was given for broadcasting by public authority.

Nevertheless, Argentina's Supreme Court has established that *simple negligence* is enough to hold the media responsible, except when the information concerns public affairs or interest. In this case, the doctrine of *actual malice* is applicable.

The Supreme Court of the United States makes a distinction depending on the injured party:

If it is a regular citizen (John Doe), *simple negligence* is enough, but if the subject is a public official, then *actual malice* is necessary to convict the media.<sup>20</sup>

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17. This expression is used to convey the idea of civil responsibility linked to *torts*.

18. Subjective imputability means that the law makes a person responsible in the particular case, with special consideration given to the subject's actions. The distinction between *negligence* and *malice* is fundamental.

19. Objective imputability means that the law does not take into account the subject's action when it determines responsibility. It is completely irrelevant whether the person acted with negligence or malice. The responsibility rests on a different idea, such as created risk or the legal duty of care. For instance, in a tort case involving a car accident where a pedestrian has been run over by a car, the law makes the driver responsible regardless of whether he has acted with negligence or not. Instead, the responsibility is based on the driver's legal duty of care (*alterum non laedere*).

20. See *Gertz v. Welch*, 418 U.S. 323 (1974) for the distinction between the regular citizen and public figures.

2. Abuse of rights: Admits the subjective base of the responsibility, but emphasizes the fact that any abuse in the exercise of *freedom of the press* (exceeding the goals the law had in mind when it declared it) generates responsibility.

3. Another theory: Kemelmajer de Carlucci and Parellada believe that responsibility of the media is *objective*, based on the legal duty of care or in the risk created by its employees' activities, while the journalists have a subjective-based responsibility. The latter is indispensable in order to hold the media responsible.

### C. Minority Protection

The media's incessant hold over our private lives, taking up leisure time or spare time traditionally occupied by other activities, surrounds us with a rough sea of information, which many times we (the receptors) do not process or discern correctly. This constitutes an especially troublesome problem for children in their formative years. In turn, this influence commits us to a challenge we cannot neglect: to find the best way to harmonize the free exercise of the right to information and children's right to protection.

Should we allow children, who lack the ability to choose and judge the information they receive, to be exposed to harmful, and sometimes obscene manifestation that hinder their natural development and may affect their mental health forever?

We do not believe so. The consequences are, unfortunately, disastrous. For instance, in Germany most of the TV watching population finds it difficult to distinguish between *junk news* and important news. About fifty percent of children between the age of six and twelve believe that murder is man's natural way of dying. That grotesque example clearly illustrates television's reality-distorting influence on children.<sup>21</sup>

Before continuing further into this matter, it is of particular importance to determine the *active legitimization*, or in other words, to clearly establish whether or not someone can be a plaintiff in cases regarding child protection, and whether or not someone can sue the media on behalf of the child.

Basically there are, three possible scenarios:

1. Only those who have suffered moral damage (either directly or indirectly); example of the latter: the father suing on behalf of his child is *legitimized* by law to sue. This theory avoids some of the problems found in the second option (see below), but is unacceptably restrictive. It

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21. See FAYT, *supra* note 1.

significantly limits the possibility of effective exercise of the right for the benefit of children as a whole. There is no actual prevention, but, instead, a mere indemnity of the damage. It does not provide social protection.

2. Any person may sue in defense of *general interest*:

This scenario offers a chance at both prevention and indemnity. It obviously energizes the process of social protection, since surely at least one of the millions of adults will be watching out for the children's well-being. However, its strength is its weakness; its virtues are precisely its flaws.

How can it be so? Let us see. Up to what point can a subject (an individual, the church, moral, religious or any other sort of association) whose moral premises may not (in fact many times do not) coincide with those of the population, use this plaintiff power to restrict.

Implementing such open criteria for legitimization may generate a pathological situation in which an individual or, even worse (because of the bureaucracy and the conflict of interest in all entities of corporate character) an institution imposes censorship in defense of *supreme general interests* or *people's healthy morals*, etc.

3. Restrictive legitimization with presumed damages:

Our preferred scenario would combine elements from these two options *limited legitimization* (only those who have suffered injury may sue), but establish a presumption of damages that should be overcome by the media in order to be free from liability.

The legal process should not necessarily end up in a monetary indemnity, but instead, whenever possible it should order preventive measures (such as changing times of broadcast, etc.). In cases where such measures are not possible, we propose a monetary indemnity (similar to a fine) which would be given to charity.<sup>22</sup>

Even though this problem is solved mainly by writ of mandamus, it fails in the preventive aspect because it does not generate liability, hence the media has no reason to avoid future broadcasting.

#### D. *The Controversy on the Extension of Redresses*

Over the years, there has been an exhausting discussion on whether judges should grant complete indemnities, fully comprehensive of the injury done or, instead, give limited, more company-friendly redresses.

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22. In Oregon, 60% of the amount of punitive damages must be paid to the state, up to 20% may be paid to the plaintiff's lawyers and the plaintiff himself cannot receive any portion of it if he is found partially responsible, OREGON REV. STAT. § 18.470 (1993), Gladys Alvarez et al., *Limitacion de la responsabilidad por daños. Un enfoque socio-economico*, LA LEY, May 6, 1997.

This question involves on one side the victim's right to receive exactly what has been taken from him/her, and, on the other side, the need for a standard and economically efficient system based on fixed valuations of damages.<sup>23</sup> So we wonder, is there a valid limit on indemnities? If so, what is that limit? What kind of criteria should we apply in our search for justice?

Granted, the victim is not entitled to a larger amount of money than the quantity determined by the extension of the injury suffered (otherwise, there would be an illicit enrichment). However, that is not the only factor to be taken into account. First of all, every time a judge grants an insufficient redress (covering the injury only partially, leaving the remainder unrepaired), the victim's rights are violated. Modern civil law imposes on the person responsible the duty of reestablishing the situation of the victim (prior to the harmful action.) The sentence must be *a return to balance*, neutralizing the *unfairly suffered* damage.<sup>24</sup> Second, we must not forget that civil law has a preventive function, and that the whole society is affected whenever this function is not fulfilled.

In comparative legislation, there are two opposing solutions to this problem:

### 1. Systems based on limited responsibility (liability)

Such solutions tend to standardize *damages*, according to various rules, in an attempt to avoid unfair indemnities.

After analyzing these *limited liability* systems, we quickly realize that they fail to serve their purpose. They are, in fact, arbitrary because they do not consider which factors have led to the injury in each specific case. Therefore, the victim may be injured not only once, but twice through unfair indemnity. The victim is the big loser of the process that supposedly was meant to help him/her. Of course the system does have some positive aspects. First, It allows insurance companies to make exact economic calculations based on probabilities and, in doing so, the limited responsibility system guarantees that the victim receives, at least, a portion of what is owed to him/her.<sup>25</sup> Second, it makes insurance policies cheaper, reducing costs for companies and lowering prices to the public.

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23. From the economic point of view.

24. It is completely irrelevant whether the damage has been *unfairly caused* or not. Whenever two people take part in a harmful action, one *innocently* causing it, the other *innocently* suffering it, we have two innocent people. It doesn't seem fair to make the one who unfairly suffered bear the damage (although the other person did not cause it unfairly).

25. Important authors have taken this position. For instance, Emilia Lloveras del Sto. Congreso Internacional de Daños, Universidad de Buenos Aires, (Apr. 25, 1997).

Nevertheless, we agree with Mosset Iturraspe that a system that establishes limited redresses, with a maximum amount to be given for each type of injury (regardless of its real entity) is odious, capricious and it breaks the general principles of law. Moreover, these systems take a materialistic approach to the problem, which dehumanizes such an important issue.

Pre-established maximum amounts (of money) seem to be unfair to the victim. They discourage preventive action (which is undeniably unfair to society); and, very likely, litigation levels will increase due to these limits (either their constitutionality will be attacked, or it will be tried under malicious or negligent conduct in order to avoid the limits).<sup>26</sup>

Such systems have been adopted in many legal systems around the world.<sup>27</sup> In Spain a law enacted on November 8, 1995 establishes that the total amount to be granted in moral damage cases is the same for every victim.

## 2. Systems based on *integral* responsibility

In these kinds of systems, the focus is moved from the cause of the injury to the injury itself and the person who suffers it. The main idea is that every injury that has been *unfairly suffered* must be fully repaired, regardless of whether it has been *unfairly caused* or not.<sup>28</sup>

The Constitution of Arizona, article 18, adopts this system: "The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation."<sup>29</sup> Some precedents of the International Court of Justice have imposed punitive damages, for instance: *Janes* (1926), 4 RIAA, 81; *Putnam* (1927), 4 RIAA, 151; *Kennedy* (1927), 4 RIAA, 194. These sentences seem to have been inspired by the same reasons found in other systems.

This solution seems to be more benevolent to the victim, providing relief for the injury, which is partially denied by limited liability systems.

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26. Malice or negligence avoids the limitation, giving place to integral indemnities. See generally FAYT, *supra* note 1.

27. For instance: S.C. CODE ANN § 15.78.120 (1987); WASH. REV. CODE ANN § 4.56.250 (Supp 1987); COLO. REV. STAT. § 13.21.102.5 (1987); and N.H. REV. STAT. ANN § 508: 4-d (Supp. 1987).

28. See Gertz, *supra* note 20.

29. ARIZ. CONST. art. 18.

We will not go deeper into these systems but it is this type of system we endorse.

### 3. Punitive damages

Before entering the final part of this article, let's make a brief review of the functions the redress must fulfill in today's civil law. First, It must repair the injury completely: Second, It must prevent harmful actions from happening again. Third, it must carry out a punitive function, which is closely related to the preventive function.

Our concerns are centered around this last function. In those cases where the injury has been caused *maliciously*, the amount of indemnity should be increased, regardless of any consideration as to the extent of the injury.<sup>30</sup> We will explain this idea in the conclusion.

## VI. CONCLUSION

Having previously explained how important the preventive function of law is in this matter, we dare to venture into a field that, for us, is particularly dark. Knowing that there is not a definite or perfect solution, our intent is to find a fair solution and new alternatives because "the big challenge of our time lies . . . not in determining which or how many rights there are . . . but in reaching suitable ways to guarantee them . . . ." (citation omitted)

In many cases, the pecuniary compensation set by courts does not adequately fulfill the laws preventive goal. This can clearly be seen through an example: a newspaper is faced with the option of publishing information known to be false, (or harmful to someone's honor), making large amounts of money (which usually greatly exceed the total amount granted by judges for damages) and paying the indemnity, or not publishing, which releases it from paying any compensation but also deprives it of immense earnings. In most cases the media will choose the second alternative. In the example, the conviction does not give the newspaper a reason to prevent it from repeating the same action in the future. The sentence does not provide what the old Italian master, Romagnosi, called 150 years ago, the *controspinta*.<sup>31</sup>

It would also be appropriate that in those cases where the injury (which may or may not be illegal) occurred with evident eagerness for

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30. Since it implies a punishment similar to criminal law's penalties, all guarantees acknowledged in criminal trials (*non bis in idem*, *in dubio pro reo*, etc.) must be assured.

31. The *spinta criminosa* is the driving force of crime. The *controspinta* is the reason that the punishment gives to the criminal to avoid a relapse. SEBASTIAN SOLER, DERECHO PENAL ARGENTINO II 381 (Tipografica Editora Argentina, Ba As., 1953).

economic gain and there is no criminal responsibility, to provide the *controspinta*, the judge should establish a *plus* over the damage's indemnity. He should take into account the probable profit the media may obtain. By doing so, the sentence not only gives the media a very good reason to avoid relapsing, but it becomes a warning for other members of the media as well.

The goal of this proposal is to prevent a person's most intimate rights from becoming profitable instruments of the powerful machinery represented by modern mass media, as well as to instill a necessary *minimum* standard of ethics in journalism, because, as Walter Williams said "Nobody can write as a journalist what a gentleman cannot say."<sup>32</sup> That, and nothing more, is our goal.

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32. PIZARRO, *supra* note 2. (editorial note: translated from Spanish).