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"Right to compensation of immaterial damages due to an abusive or offensive exercise of the freedom of expression"

REPORT BY

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Introduction

Before I begin with my original presentation, which refers to other limits on the freedom of expression, I feel compelled to say something about blasphemy, although the Court I represent has not played a role in the following decisions.

"The Last Temptation of Christ? Ring your bell? That film directed by Martin Scorsese".

In 1989 – still under the dictatorship of Pinochet - a film distributor wanted to screen this film in Chilean cinemas and asked the administrative authorities, the Cinema Council, for authorisation to do so. They rejected the petition due to the inappropriate content of images and references to Christ. In the end, an appeal was granted, but rejected. At that time, prior censorship was not prohibited and all films were reviewed by that Council before public screening.

In 1997, the owner of the rights of the film in my country tried again – now under democracy - and obtained the authorisation, but a group of Catholics with strong beliefs submitted an action against that administrative act before the Court of Appeal and won. The Supreme Court confirmed the decision for two main reasons:

First, the Cinema Council had no attribution to revoke the previous administrative decision, because the decision taken back in 1989 was jurisdictional; there was no specific attribution to revoke a previous decision, and if there was, then there was no justification to revoke the decision because the film and the people are the same.

Second, the screening of a film, which shows Jesus Christ in a humiliated and denigrated way, inflicted harm to his honour and reputation and also to his true believers, who look to his life as an example.

After that, a group of lawyers submitted a request to the Inter-American Court of Human Rights. Briefly, the Court unanimously accepted that there was a breach to the freedom of thought and expression and condemned the Chilean State to modify our internal legislation in order to prohibit prior censorship. In the meantime, the Government presented a constitutional reform to introduce a complete prohibition of any kind of prior censorship and completely reformed the functioning of the Cinema Council. Both were approved in 2001. Today, films are merely rated on the basis of an international scale.

Presentation

Restrictions to the freedom of expression are contained in the Constitution. The first one is the possible responsibility that may arise from abuse or an offence committed through the exercise of the freedom of expression; the second is conferring on anyone who has been unfairly mentioned or offended, the right to a public and “free-of-charge” rectification through the social media. Prior censorship is not allowed.

The jurisprudence of the Constitutional Tribunal of Chile on the limitations to the freedom of expression is not as vast and rich as that on other topics.

A possible conflict between the freedom of expression and the right to the protection of one’s honour and reputation, and to private life, or the thin line that separates the two, has been indirectly resolved by the Constitutional Tribunal in several concrete cases, and more specifically, on the right of the offended person to claim compensation for non-pecuniary (immaterial or moral) damages.

Why is that? The general rule, contained in the Civil Code, is that every injury shall be fully compensated. This is also consistently recognised in the jurisprudence of our Tribunal. Nevertheless, difficulties arise with a specific provision – Article 2331 of the Civil Code – which prescribes that *"slanderous accusations against the honour or credit of a person shall not entitle to financial compensation, unless proven consequential damages or financial loss that can be valued in money, but even then there will be no monetary compensation, if the accusation is proved to be truthful."*

In plain words, ordinary courts cannot order the payment of non-pecuniary (immaterial or moral) damages to compensate someone who was injured by slanderous accusations. Such problems do not arise where slanderous accusations were committed through social media, because they are considered criminal offenses and a specific provision applied to broadcasters includes compensation for all kinds of inflicted harm.

At this point, I need to stop my presentation to explain to you how our constitutional and legal system works in such cases:

First, ordinary courts have the competence to solve cases of slander in order to determine if the slanderous remark by the accused has caused harm, and the verification of a possible application of the *exceptio veritatis* principle.

Second, the decisions of the Constitutional Tribunal merely state whether or not the application of a legal provision to a pending case could have unconstitutional effects i.e. they have *inter partes* effects. Therefore, the task of the Tribunal is to declare whether or not the application of the legal norm that denies non-pecuniary compensation in such cases is in line with the constitutional guarantees and principles. It also implies that the previous jurisprudence is not binding on the Tribunal, because the factual circumstances change from case to case and sometimes the weighing of the possible non-applicability of a legal norm depends on those facts.
The Constitutional jurisprudence on such cases is interesting in many ways:

First, there has been an evolution or involution, depending on the perspective taken;
Second, during that process, an *ex officio* procedure was initiated to declare the unconstitutionality of the precept, with *erga omnes* effects, and
Third, the different arguments presented at concurring and dissenting opinions of judges.

With respect to the development of the jurisprudence - the first decision dates back to 2008, and stated that Article 2331 of the Civil Code greatly restricted, including in its essence, the

right to the protection of one's honour and reputation and also affected important constitutional principles and values, such as the primacy of the human being and his or her dignity, and the respect, promotion and protection of fundamental rights. There was a dissenting opinion, maintained in all following rulings, based on the autonomy of the legislative branch to regulate different ways in which to compensate such loss or harm, such as through a public apology or the publication of the Tribunal's decision in full, and not necessarily through pecuniary compensation.

The first modification of that doctrine occurred in 2010. The Tribunal declared that just the part of Article 2331 of the Civil Code that absolutely impeded and *a priori* on the compensation for non-pecuniary damages provoked by slanderous accusations infringed the Constitution, and maintained the *exceptio veritatis* principle and the compensation for consequential damages and loss of profit. It also slightly changed the reasoning for the inapplicability declaration: the legal disposition affected the essence of constitutional guarantees, such as the right to the protection of one's honour and reputation and equality before the law. The latter, because there is no proportionate and objective justification in order to allow an exception to the general rule that permits the integral compensation of all kinds of damage suffered. Freedom of expression cannot be considered as affected by a rule that allows for damages to be paid for all kinds of loss or harm and therefore is no justification for such an exception.

In 2011, the reasoning of the decision and the extension of the declaration of inapplicability of the legal provision reverted to the original position; but there was a strong minority among the judges, who still advocated to restrict the unconstitutionality and to consider the breach of the principle of equal treatment before the law.

At that time (May 2011), the decision of the Tribunal about the unconstitutionality of Article 2331 of the Civil Code was published. A year before that, the lawsuit was filed *ex officio* after many accepted the inapplicability actions. Finally there was no quorum to estimate the unconstitutionality (4/5 of the judges, according to the Constitution), because of the divided opinions among the judges; the same situation happened with respect to the decisions rendered the previous years.

The first opinion followed the original reasoning for the declaration of unconstitutionality of the entire legal provision, i.e. the severe restriction of the right to the protection of one's honour and reputation and of the primacy of human being, his or her dignity, and the respect, promotion and protection of fundamental human rights.

Other judges were of the opinion that just a part of the Article should be declared unconstitutional, maintaining the compensation of consequential and loss of profit damages and the *exceptio veritatis* principle.

A third position based its vote for a partial unconstitutionality, but only keeping the *exceptio veritatis* principle, because the compensation of all kind of damages is sustained in the general rule of damage compensation, contained in another Article of the Civil Code.

And the fourth vote stated its constitutionality, due to the legislator's autonomy to regulate compensation and the fact that it does not necessarily have to be pecuniary damages.

The high quorum was not reached which led to the discussion of whether the decision is *res judicata* or not. Would it be possible for the Tribunal to review its constitutionality in the future? There was no doubt about the possibility to challenge article 2331 of the Civil Code through an "inapplicability action"; but is it another constitutionality review with *erga omnes* effects? The majority of the judges were of the opinion that *res judicata* did not apply to such procedures because it would restrict the competence of the Tribunal.

Back to the following “inapplicability actions”, during 2012 the minority turned into the majority. The reasoning was further developed until the last decision was rendered (April 2014), which provided a number of interpretational criteria on which the Tribunal founded its reasoning.

First, the Constitution does not establish a right to compensation for non-pecuniary damage;
Second, the legislation was slowly recognising compensation for non-pecuniary damage. At the time the legal provision was drafted and approved as law (end of 20th Century) there was a negative connotation for the compensation of such damages with money. Today, it is an exception to the general rule, that every loss or harm has to be compensated; it therefore needs a very good justification.

A breach to an equal treatment before the law was proven; also an unjustified and excessive restriction to the essence of the right to the protection of one´s honour and reputation, but not an infringement to the right itself.

A new and interesting dissenting vote appeared in the last decisions, arguing that the previous decision, which rejected the unconstitutionality of Article 2331 of the Civil Code, as sufficient reason to deny the action of inapplicability.

As you can see, our constitutional system of protection of the Constitution’s supremacy has shown some developments in these cases that could prove to be problematic, on some points, in safeguarding equal treatment before the law:

First, the problem that implies the non-binding character of the Tribunal’s jurisprudence, with relative effects (case-to-case-effects) often makes it too easy to change votes and opinions based on the “concrete circumstances” of every case.

Second, every change of integration (an ill judge or one who is on holiday) has the power of changing the doctrine set by the Constitutional Tribunal.