

## Restrictions on freedom of expression

### I. Contributions of the Human Rights Center of the Universidad Católica Andrés Bello (CDH-UCAB), during the Universal Periodic Review March, 2011)

#### Right to freedom of expression

In March of 2005, the criminal code was amended to extend penalties and incorporate other public personnel subject of protection of their honour and reputation<sup>[8]</sup>. The reform of the criminal code<sup>[9]</sup> strengthens the regression in the content and guarantee of the right to freedom of expression and information, ratifies and deepens the contempt or vilification against public officials, increases the discretion of judges to decide if a conduct or expression falls within the respective criminal type, and is discriminatory to differentiate the officer with respect to the person, limiting the control by the citizens over the public management.

The criminal code affects the free exercise of freedom of expression in articles 141, 147, 148, 149<sup>[10]</sup>, 150, 151, 215, 222, 223, 224, 225, 226, 227, 228, 357, 442, 443, 444, 445, 448, 450 and 506 of the adopted text. Those articles maintain and broaden the scope of legal figures which are contrary to the content of the right to freedom of expression, as it is the vilification or contempt<sup>[11]</sup>.

Access to public information in Venezuela has significant restrictions, the Inter-American Commission on Human Rights (IACHR), documented those referring to the work of monitoring the human rights organizations<sup>[12]</sup>

In a study based on the follow-up of 157 applications for information<sup>[13]</sup> to 50 public institutions in the months of February and March of 2008, more than 70% of the agencies did not reply, by refusal or administrative silence, and only 10% of the answers were appropriate<sup>[14]</sup>.

In 2010 were adopted standards that are restrictive of the right of access to information such as the Presidential Decree number 7.454<sup>[15]</sup>, which ordered the creation of the Centre of Situational Survey of the Nation (CESNA), as a decentralized body of the Ministry of Popular Power for the Interior and Justice. Article 9 empowers the President of the CESNA to declare the nature of reserved, classified or of limited disclosure of any information<sup>[16]</sup>, without expressly establishing in what cases or circumstances the officer is empowered to declared the reserved nature of the information. An ambiguous rule is not permissible in a democratic society because

it grants excessive discretionary powers to the authorities, which is incompatible with international standards. The limitation on the right was not established by the law in a formal sense, but rather through a Presidential Decree in violation of the Constitution<sup>[17]</sup>.

<sup>[8]</sup> Before the Reformation the standard had a scope for the President of the Republic, the Executive Vice President, Government Ministers, Governors, the Major of the Metropolitan District of Caracas, the judges of the Supreme Court, the Presidents of the Legislative Councils and senior judges, to initiate criminal proceedings for the offence of contempt. Legal reform joined the members of the Parliament, officials of the National Electoral Council, the Attorney General, to the Ombudsman, the Comptroller-General and the members of the military high commander.

<sup>[9]</sup> Criminal Code of Venezuela. Official Gazette No. 5768E, August 13<sup>th</sup> 2005. Available at: <http://www.fiscalia.gov.ve/leyes/6-CODIGOPENAL.pdf>.

<sup>[10]</sup> Article 149. *Anyone who publicly vilipends to the Parliament, to the Supreme Court of Justice or the Cabinet or Council of Ministers, as well as any State Legislative Council or some of the higher courts, shall be punished with imprisonment from fifteen days to ten months.*

*In the middle of this penalty will incur those who committed the acts referred to in this article, with respect to the municipal councils.*

<sup>[11]</sup> Vilification or contempt is the criminal figure which punishes "offenses" and/or defamation towards officials.

<sup>[12]</sup> Inter-American Commission on Human Rights: democracy and human rights in Venezuela, 2010. Paragraphs 647 to 663.

<http://www.cidh.org/countryrep/Venezuela2009sp/VE09CAPVSP.htm#V.B>.

<sup>[13]</sup> Venezuelan constitutional rule enshrines the right of petition and through this resource it can be made requests for information to the public bodies.

<sup>[14]</sup> [http://espaciopublico.org/index.php/Biblioteca/doc\\_download/250-Acceso-a-la-Informacion-publica-en-Venezuela-2008](http://espaciopublico.org/index.php/Biblioteca/doc_download/250-Acceso-a-la-Informacion-publica-en-Venezuela-2008).

<sup>[15]</sup> Fcheck on June 01, 2010, published in the Official Gazette number 39.436, dated June 1<sup>st</sup> 2010.

<sup>[16]</sup> The Chairman or President of the center of situational survey of the nation may declare the nature of reserved, classified or limited to any information disclosure that pursuant to its functions has knowledge that is processed by the Centre for situational survey of the nation, in accordance with article 59 of the

Administrative Procedures Act and article 171 of the Decree with value and strength of organic law of public administration.

<sup>171</sup> Constitution of the Bolivarian Republic of Venezuela, article 325: "*the National Executive reserves classification and disclosure of matters which relate directly to the planning and implementation of operations concerning the safety of the nation, in the terms established by law*"

#### Questions:

- Have you considered a way to reverse the expansion of so-called crimes of insult or vilification which have been extended to protect a greater number of public officials?
- What are the reasons for the declaration by the Situation Center of the Nation Survey (CESNA) of confidential or classified information in the hands of the administration?

#### Recommendations:

- Amend the Criminal Code and Code of Military Justice, eliminating the figures of contempt or slander.
- Implement laws and administrative and judicial mechanisms to enable citizens to easily access and effective public information and refrain from using laws that restrict access to public information.

## II. The inter-american human rights 2010 annual report Chapter IV Venezuela

### H. The of right of access to information

#### 1. The National Situational Study Center

794. The purpose of this agency, created invoking national security arguments,<sup>1</sup> is "to constantly compile, process and analyze information from the

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<sup>1</sup> See in this regard the *consideranda* to Decree 7,454 from the Office of the President of the Republic. Official Gazette 39,434 of June 1, 2010. Available at: <http://www.tsj.gov.ve/gaceta/Junio/162010/162010-2863.pdf#page=2> (where it is asserted that national security "is an essential authority and responsibility of the State" and that the National Executive has exclusive authority over "the collection, classification and dissemination of those matters that have a direct bearing on the planning and executions of operations that concern the security of the Nation.")

various situation rooms or similar bodies belonging to institutions of the State and of society, on any issue of national interest. The goal is to provide analytical and informational support to the Office of the Presidency, keeping it supplied with the up-to-date information needed to facilitate strategic decision-making and thus protect the Nation's vital interests and objectives, and to facilitate execution of public policy and fulfillment of the State's essential functions."<sup>2</sup>

### 2. Judgment 745 of the Constitutional Chamber of the Supreme Court

799. On July 15, 2010, the Constitutional Chamber of the Supreme Court decided an action seeking constitutional *amparo*. The action was brought by the Public Arena Civil Association [*Asociación Civil Espacio Público*] to challenge the refusal of the Office of the Comptroller General of the Bolivarian Republic of Venezuela to turn over information concerning the "base salary and other benefits that the Comptroller General of the Republic receives and the remunerations received by the rest of the staff at the Office of the Comptroller General of the Republic..."<sup>3</sup> By a majority vote, the Constitutional Chamber of the Supreme Court decided to deny the petition seeking *amparo* relief on the grounds that the request to have access to that information violated the right to privacy of the public officials.

800. As there was no specific law governing this matter, the Constitutional Chamber of the Supreme Court established binding jurisprudence to the effect that anyone requesting information of this type must "expressly state the reasons why the information is needed or purposes to which it will be used" and must prove that "the amount of information being requested is

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<sup>2</sup> Decree 7,454 from the Office of the President of the Republic. Official Gazette 39,434 of June 1, 2010. Article 3. Available at: <http://www.tsj.gov.ve/gaceta/Junio/162010/162010-2863.pdf#page=2>

<sup>3</sup> Constitutional Chamber of the Supreme Court of Justice. Judgment 745 of July 15, 2010. Available [in Spanish] at: <http://www.tsj.gov.ve/decisiones/scon/Julio/745-15710-2010-09-1003.html>

commensurate with the use to which the requested information will be put.”<sup>4</sup>

801. The jurisprudence established by the Constitutional Chamber of the Supreme Court in its ruling of July 15, 2010, disregards the principle of “maximum disclosure” which must govern access to information in the possession of the State. In effect, in its case law the Inter-American Court has established that “in a democratic society, it is essential that the State authorities are governed by the principle of maximum disclosure.”<sup>5</sup> The IACHR has also held that under Article 13 of the American Convention, the right of access to information must be governed by the principle of maximum disclosure.<sup>6</sup>

802. The Inter-American Court established that the principle of maximum disclosure “establishes the presumption that all information is accessible, subject to a limited system of exceptions.”<sup>7</sup> That limited system of exceptions must be set forth by law; in the event of any doubt or gap in the law, then access to information should be allowed. The Court also wrote that, living in a state, every person has a legitimate interest in knowing how public resources are being used. Therefore, persons interested in knowing how much a civil servant earns need not show and demonstrate what their specific interest in the information is.

803. Principle 4 of the IACHR’s Declaration of Principles on Freedom of Expression provides that “Access to

information held by the state is a fundamental right of every individual. States have the obligation to guarantee the full exercise of this right.”

## I. Criminalization of offenses against honor and the Case of *Usón Ramírez v. Venezuela*

### 1. The Penal Code

804. In its 2009 Annual Report, the Office of the Special Rapporteur made reference to the March 2005 changes in the Penal Code, which expanded the scope of the provisions on protection of state officials’ honor and reputation against criticisms aired publicly that may be deemed offensive to them.<sup>8</sup> Prior to the 2005 reform, the President of the Republic, the Executive Vice President, the ministers of government, the governors, the Mayor of the Caracas Metropolitan District, the justices of the Supreme Court, the chairpersons of the Legislative Councils and the superior court judges had the authority to institute criminal proceedings for the crime of *desacato* [disrespect]. The amendment of the law added the following to the list: the members

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<sup>4</sup> Constitutional Chamber of the Supreme Court of Justice. Judgment 745 of July 15, 2010, Section V. Operative paragraph two. Available [in Spanish] at: <http://www.tsj.gov.ve/decisiones/scon/Julio/745-15710-2010-09-1003.html>

<sup>5</sup> I/A Court H.R., *Case of Claude Reyes et al.* Judgment of September 19, 2006. Series C No. 151, para. 92.

<sup>6</sup> IACHR. Arguments made to the Inter-American Court of Human Rights in the case of *Claude Reyes et al.* Transcribed in: I/A Court H.R., *Case of Claude Reyes et al.* Judgment of September 19, 2006. Series C No. 151, para. 58 c).

<sup>7</sup> I/A Court H.R., *Case of Claude Reyes et al.* Judgment of September 19, 2006. Series C No. 151, para. 92. See also, the 2004 Joint Declaration of the UN Rapporteur for Freedom of Expression, the OAS Rapporteur for Freedom of Expression and the OSCE Representative on Freedom of the Media, where they explained that the principle of maximum disclosure establishes “a presumption that all information is accessible subject only to a narrow system of exceptions.”

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<sup>8</sup> In its 2005 Annual Report, the IACHR observed that: “The Commission and the Office of the Special Rapporteur also express their concern over the March 2005 amendment to the Criminal Code. The Office of the Special Rapporteur believes that this amendment strengthens and expands a legal framework that criminalizes forms of expression protected by the American Convention, by both journalists and private citizens. The Office of the Special Rapporteur observes that the amendment expands the reach of *desacato* laws in terms of the number of public officials protected, and in terms of content. It also observes that the new provisions increase the penalties for *desacato* and other forms of defamation, libel, instigation, outrage, and slander, among other criminal offenses. It also criminalizes new types of protest against the government, in both the public and private spheres, and increases the penalties for violating these laws.” IACHR. *2005 Annual Report*. Chapter IV, para. 357. Available at: <http://www.IACHR.oas.org/annualrep/2005eng/chap.4d.htm>. See also: IACHR. *2005 Annual Report: Volume II: Annual Report of the Special Rapporteur for Freedom of Expression*. Chapter II, para. 227. Available at: <http://www.IACHR.oas.org/relatoria/showarticle.asp?artID=662&IID=1>; Office of the Special Rapporteur – IACHR, March 28, 2005. *Press Release No. 118/05*. Available at: <http://www.IACHR.org/relatoria/showarticle.asp?artID=402&IID=1>; IACHR. *Report on the Situation of Human Rights in Venezuela*, paragraphs 451-466. OEA/Ser.L/V/II.118. Doc. 4 rev. 1. October 24, 2003. Available at: <http://www.IACHR.oas.org/countryrep/Venezuela2003eng/chapter6.htm>

of the National Assembly, officials on the National Electoral Council, the Prosecutor General, the Attorney General, the Ombudsperson, the Comptroller General and the members of the Military High Command.<sup>9</sup> The March 2005 reform retained the article criminalizing the offense known as “*vilipendio*” (contempt or scorn), which is a kind of offense against the institutions of the State.<sup>10</sup>

805. The 2009 Annual Report criticized the fact that these laws were still on the books. The Commission and the Special Rapporteur pointed out that, as the Inter-American Court has stated, “defense of freedom of expression includes the protection of affirmations that could be offensive, disturbing or unpleasant for the State, since this is the requirement of a democratic order founded on diversity and pluralism. In addition, the doctrine and jurisprudence have been consistent and repetitive in indicating that

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<sup>9</sup> “Article 147. One who offends by word or in writing, or in any other manner disrespects the President of the Republic or whoever is taking his or her place, shall be punished with imprisonment of six to thirty months if the offense was grave, and with half that period if it was minor.//The penalty will be increased by one-third if the offense was committed publicly”.

“Article 148. When the acts specified in the previous article are carried out against the person of the Executive Vice President of the Nation, one of the Judges of the Supreme Court of Justice, a Cabinet Minister, a Governor of a state, a deputy of the National Assembly, the Metropolitan Mayor, a dean of the National Electoral Council, the Human Rights Ombudsman, the Solicitor General, the Attorney General, the Comptroller General of the Republic, or some members [sic] of the High Military Command, the penalty indicated in that article will be reduced to one half, and to one third in the case of municipalities”. Penal Code of Venezuela. Official Gazette No. 5768E of August 13, 2005. Available at: <http://www.ministeriopublico.gob.ve/web/guest/codigo-penal>

<sup>10</sup> “Article 149. Whoever publicly denigrates the National Assembly, the Supreme Court of Justice, or the Cabinet, or the Council of Ministers, as well as one of the legislative councils of the states or one of the superior courts, shall be punished with imprisonment for a period of fifteen days to ten months.

The penalty will be half that period in the case of those who commit the acts referred to in this article with respect to municipal councils.

The penalty will be increased by half if the offense was committed while one of the enumerated bodies was exercising its official functions”. Penal Code of Venezuela. Official Gazette No. 5768E of August 13, 2005. Available [in Spanish] at: <http://www.ministeriopublico.gob.ve/web/guest/codigo-penal>

critical expressions that question public authorities or institutions deserve a greater – not lesser- protection in the inter-American system. This has been affirmed by the Inter-American Court in each and every case resolved in the area of freedom of expression.”<sup>11</sup>

## **2. The Organic Code of Military Justice.**

809. As happens in the case of laws criminalizing disrespect, contempt, defamation, and slander, the language of Article 505 is so imprecise as to make it impossible to foresee with any degree of certainty precisely what behaviors can be punishable offenses. The text of the provision blurs the line between the permissible exercise of freedom of expression with respect to the armed forces and the realm in which the legal prohibition applies. Since there can be no certainty as to what behavior or conduct is deemed to be unlawful, any statement that someone can interpret as criticism of the Armed Forces could be covered in the description of the offense in the article in question.

## **III. The inter-american human rights 2010**

### **Democracy and Human Rights in Venezuela<sup>12</sup>**

#### **Chapter V December 30, 2009**

#### **V. The defense of human rights and the freedom of association**

### **3. Lack of access to public information**

647. The State has noted that under Venezuelan law, information about public administration is universal; consequently it does not discriminate between nongovernmental organizations and other private individuals.<sup>[549]</sup> The State mentions that “in Venezuela there is complete access to information by citizens, and in the case that an official should arbitrarily refuse to provide it, the citizen has legal avenues with which to

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<sup>11</sup> IACHR. 2009 Annual Report. Volume II: Annual Report of the Special Rapporteur on Freedom of Expression, Chapter II (Evaluation of the State of Freedom of Expression in the Hemisphere), para. 550.

<sup>12</sup> <http://www.cidh.oas.org/countryrep/Venezuela2009eng/VE09CHAPVENG.htm#B>.

challenge the official's decision, save for the exceptions established in Venezuelan law."[\[550\]](#)

648. Nevertheless, as the Commission has been informed, "the lack of systematic access to public information is one of the principal problems faced by human rights defenders in Venezuela, and a practice of State silence has developed that keeps nongovernmental organizations and human rights activists from finding out public information available on issues [such as] operational plans to control public order, data on homicides and injuries inflicted by State functionaries, and on prison conditions, among other things."[\[551\]](#)

649. The IACHR has indicated that creating a system of access to information that meets the requirements of the American Convention on Human Rights is a task that is more complicated than simply declaring that the public can have access to information that is in the hands of the State.[\[552\]](#) Any system for access to information must recognize the principle of maximum disclosure, the presumption of the public nature of meetings and basic documents, broad definitions of the type of information to which access is available, reasonable fees and timeframes, an independent examination of denials of access, and sanctions for noncompliance.[\[553\]](#)

651. With regard to laws and mechanisms designed to promote and guarantee, without undue restrictions, the work of human rights defenders and their contributions to the investigation of cases having to do with alleged human rights violations, the State notes that according to Article 304 of the Organic Code of Criminal Procedures, the Office of the Human Rights Ombudsman can participate in the review of a case file when it is presumed that there has been a violation of human rights.

657. In this regard, the Commission is concerned about information received indicating that, despite the constitutional and organic provisions summarized by the State, human rights defenders continue to face obstacles in practice to gain access to information that would allow them to carry out their functions. A study done by PROVEA, based on a follow-up to 157 requests for information presented to 50 public institutions in February and March of 2008, found that more than 70% of the bodies did not provide

responses, either through denial of the request or through administrative silence, and only 10% of the responses obtained were adequate.[\[560\]](#)

658. As an example of the foregoing, on July 17, 2009, the human rights organization PROVEA stated that, in contradiction to the provisions of Articles 51 and 143 of the Constitution, executives of the Mental Health Program of the Ministry of Popular Power for Health refused to provide information on statistics, incidences of cases, and the mental illnesses most common in 2008, as well as on budgetary performance. According to the information the IACHR received, the officials alleged that such information was confidential; they also allegedly said that they had orders not to give any information to PROVEA.[\[561\]](#) PROVEA's intention was to use such information as input to the annual report it prepares on the Situation of Human Rights in Venezuela, particularly the chapter on the Right to Health—a report that, in the judgment of the Commission, constitutes a valuable exercise of social oversight in the area of human rights.

659. In its 2007 Annual Report, the IACHR already called attention to a similar case, which took place in March 2007, when the Health Director of the Ministry of Popular Power for Health refused to provide PROVEA staff with public information about the country's mental health service and facilities, alleging that the general coordinator of that human rights organization had, in an interview, compared the government of President Hugo Chávez with that of Rafael Caldera. According to the available information, before he would give PROVEA access to the information, the Health Director demanded that PROVEA rectify that opinion, also arguing that he could not provide the information because he did not know how PROVEA would use it.[\[562\]](#)

660. The IACHR recalls that the Inter-American Court has stated that in a democratic society, it is essential for State authorities to be governed by the principle of maximum disclosure, which establishes the presumption that all information is accessible, subject to a limited system of exceptions. Thus, it corresponds to the State to show that it has complied with the requirements of legality, necessity, and proportionality when establishing access restrictions to the

information it holds.<sup>[563]</sup> In the judgment of the Commission, to deny public information to human rights organizations based on the authorities' perception of that organization's political position constitutes an undue restriction to the right of access to information and an impediment to the effective exercise of its functions in defense of human rights.

663. The Commission understands that the State may have in its power information of a sensitive nature, and in this regard it underscores that Article 13.2 of the American Convention on Human Rights establishes the only circumstances in which the states may legitimately deny access to information. According to this standard under the convention, restrictions must be strictly defined by law and must be 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.