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Session: Hundred Twenty-Third Regular Session (11 – 28 October 2005)
Title/Style of Cause: Jorge Fontevecchia and Hector D'Amico v. Argentina
Doc. Type: Decision
Decided by: President: Clare K. Roberts;
First Vice-President: Susana Villaran;
Second Vice-President: Paulo Sergio Pinheiro;
Commissioners: Evelio Fernandez Arevalos, Jose Zalaquett, Freddy Gutierrez, Florentin Melendez.
Dated: 12 October 2005
Citation: Fontevecchia v. Argentina, Petition 775/01, Inter-Am. C.H.R., Report No. 51/05, OEA/Ser.L/V/II.124, doc. 5 (2005)
Represented by: APPLICANT: the Asociacion Periodistas
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I. SUMMARY

1. On November 15, 2001, the Inter-American Commission on Human Rights (hereinafter “the Commission” or “the IACHR”) received a petition filed by Jorge Fontevecchia, Héctor D’Amico and the Asociación Periodistas [the Association of Journalists] (hereinafter “the petitioners”) alleging that the Argentine Republic (hereinafter “the Argentine State,” “Argentina” or “the State”) had incurred international responsibility for violation of Articles 8 (right to a fair trial) and 13 (freedom of thought and expression), in relation to Articles 1(1) (the obligation to respect rights) and 2 (the obligation to adopt domestic legislative or other measures) of the American Convention on Human Rights (hereinafter “the Convention” or “the American Convention”) to the detriment of Jorge Fontevecchia and Héctor D’Amico.

2. The petition concerned a ruling of Argentina’s Supreme Court in the Carlos Saúl Menem v. Editorial Perfil S.A. et al. Case, in which Editorial Perfil S.A., Jorge Fontevecchia and Héctor D’Amico were ordered to pay damages to Mr. Carlos Saúl Menem, then-President of Argentina, following a series of articles published in three issues of the magazine Noticias.

3. The petitioners contend that the information reported about Mr. Menem was a matter of public interest. They further maintain that the court ruling ordering them to pay civil damages has a “dissuasive” effect, becoming a “means of intimidation and censure” that is contrary to the provisions of Article 13 of the American Convention.

4. The State, for its part, argues that the information concerned Mr. Menem’s private life and that the Supreme Court’s ruling was in no way dissuasive. The State further contends that

the Supreme Court's ruling was on a judgment handed down in a civil action, brought with regard to publication of information and photographs relating to the plaintiff's private life." The ruling ordered "subsequent imposition of liabilities" based on Argentine law and the article of the American Convention requiring such liability in order to ensure respect for "the reputations of others."

5. Under Articles 46 and 47 of the American Convention and Articles 30 and 37 of its Rules of Procedure, the Commission decided that the portion of the petition alleging violations of Article 13 of the American Convention, in relation to Articles 1(1) and 2 thereof, was admissible, but decided that the section alleging violation of Article 8 of the Convention was inadmissible. The Commission also decided to notify the parties of its decision, to make it public and to include it in its Annual Report to the OAS General Assembly.

II. PROCESSING BY THE COMMISSION

6. The petitioners filed the petition with the Commission's Executive Secretariat on November 15, 2001. At the same time, the petitioners also requested a precautionary measure in the form of suspension of execution of the judgment delivered by Argentina's Supreme Court on September 25, 2001. The Commission decided not to grant the request for precautionary measures.

7. On October 2, 2002, the petition was assigned case number 775/01. Then, on October 9, 2002, the Commission informed the State that Mr. Eduardo Bertoni had had been named Special Rapporteur for Freedom of Expression of the IACHR and had disqualified himself from participating in any phase of the processing of the petition inasmuch as he had served as the petitioners' sponsor when the petition was first filed.

8. On January 13, 2003, the State sent its response to the complaint lodged by the petitioners. On March 21, 2003, the Commission received the petitioners' observations on the State's response. On July 8, 2004, the State sent the Commission a communication restating the position it had taken in its earlier observations and requesting that the petition be declared inadmissible in all its parts.

III. THE POSITIONS OF THE PARTIES

A. The petitioners

9. The petitioners state that issues 983, 984 and 985 of the magazine Noticias (dating from October and November 1995) carried reports to the effect that then-President Carlos Saúl Menem and Ms. Martha Meza had had a child out of wedlock in 1981, a child born of a relationship the two had while he was incarcerated in the province of Formosa. According to the petitioners, the magazine also reported details about the source of Ms. Martha Meza's assets and about her personal relationship with Mr. Menem.[FN1]

[FN1] Specifically, the petitioners assert that those issues of the magazine had reported that: (a) the child was received at the Olivos presidential residence and at the presidential retreat at Chapadmalal; (b) Ms. Meza had apparently received resources from Mr. Menem; specifically, that she had gone from living on a teacher's salary in 1984 to having assets valued at close to one million dollars ten years later; she had also been elected a national deputy; (c) Ms. Meza was threatened; (d) the relationship and the child's existence were a cause of conflict with Mrs. Zulema Yoma, who was at the time Mr. Menem's wife; and (e) posters were mounted in the city of Formosa concerning Mr. Menem's alleged failure to pay his supposed son's child support.

10. The petitioners contend that as a result of these articles, Mr. Menem filed a civil action against Editorial Perfil S.A (the publisher of Noticias), Jorge Fontevecchia (director of Noticias) and Héctor D'Amico (editor in charge of Noticias), seeking damages in the amount of \$ 1,500,000 (one million five hundred thousand pesos) as compensation for moral damages caused by what Mr. Menem called "arbitrary interference in his family and private life." The petitioners state that Mr. Héctor D'Amico then countersued Mr. Menem for the sum of \$10,000 (ten thousand pesos), as compensation for moral damages caused by the statements Mr. Menem had made regarding issue number 984 of Noticias.[FN2]

[FN2] The petitioners point out that Mr. Menem had called Noticias magazine "a real sewer that is a cover for a criminal organization" engaging in "dirty" journalism.

11. On July 10, 1997, the National Civil Court of First Instance delivered a ruling throwing out the suit and the countersuit. That ruling was appealed. On March 17, 1997, the judges in Chamber H of the Civil Court of Appeals of the Federal Capital decided to modify the ruling and ordered Editorial Perfil S.A. and Messrs. Jorge Fontevecchia and Héctor D'Amico to pay \$ 150,000 (one hundred fifty thousand pesos) as compensation "for [violation of the] right to privacy" and "inasmuch as none of the factors that would justify the invasion of privacy, especially the prevailing public interest or the consent of the interested party, was present." The petitioners filed an extraordinary appeal with the Supreme Court to challenge the ruling of the Court of Appeals. On September 25, 2001, the Supreme Court decided to uphold the bulk of Appellate Court ruling; it did, however, reduce the damages award to \$ 60,000 (sixty thousand pesos).

12. The petitioners contend that Noticias made these facts public "in exercise of its right and its duty [to] inform its readers of an unusual circumstance involving a public figure." They argue that in Formosa province, it was public knowledge that Mr. Menem was the father of Ms. Martha Meza's child and that the facts that prompted the article were very newsworthy at the time they were disclosed.[FN3] They also argue that another factor to consider is that the veracity of the information reported had never been challenged.

[FN3] The petitioners point out that Ms. Meza had made a television appearance in which she stated that her son's life was in danger, precisely because it was public knowledge that he was Mr. Menem's son.

13. The petitioners argue that the monetary damages ordered are dissuasive and discourage freedom of expression on "matters related to the public interest" and to "the expression of views and ideas that are critical of the behavior of certain State officials." They further point out that "if the amount ordered to be paid is not so much compensatory as it is punitive, intended to discourage practices," then Article 13 of the American Convention is being violated.

14. The petitioners likewise argue that in the instant case, the compensation set by the Court was two to three times the amounts ordered by the same Supreme Court in other cases and that the disproportionately large award calls attention to the fact that in the instant case, damages were not necessary according to the terms of Article 13(2) of the American Convention.

15. The petitioners argue further that the publication of true facts on matters of public interest must not be subject to State imposition of liabilities of this nature. They reason that the crux of the argument in the Supreme Court's ruling was a supposed conflict between freedom of information and protection of privacy; but, the petitioners argue, the ruling "completely disregarded the facts in this particular case: specifically, that the veracity of the information reported was never challenged and that the presence of actual malice or a reckless disregard for the truth was never shown." They further contend that the "ruling would also be a violation of Article 8 of the Convention."

B. The State

16. Concerning the petitioners' argument to the effect that the information reported was accurate and a matter of public interest, the State contends that the purpose of the Supreme Court's ruling was to examine the facts presented in the complaint regarding disclosure of matters pertaining to the private life of the party who was plaintiff in the original action.

17. Specifically, the State contends that the subject matter of the articles does not fall under the umbrella of "public interest", and that the plaintiff in the original action filed had not given his consent to publicize his alleged paternity. The State reasons that "the private lives of public figures are to be protected under inter-American law; the newsmagazine has been unable to show the public's overriding need to know the information reported in the articles examined by the Court."

18. The Argentine State denies that the damages the petitioners were ordered to pay are dissuasive. It contends that the court ruling in question was not intended to impair the free circulation of ideas and was not used as a means of intimidation or censure, nor was civil liability imposed because the opinions or ideas expressed were critical of the conduct of certain State officials.

19. As for the dissuasiveness of the compensation that the petitioners were ordered to pay, the State argues that the Supreme Court stated clearly that payment of damages was ordered “inasmuch as the newsmagazine’s conduct was reckless” by the standards set in Articles 11 and 13 of the American Convention.^[FN4] The State contends that the Court’s intention was not to obstruct the free circulation of ideas. Indeed, the Supreme Court had ruled “[...]that the damages should be reduced to be proportionate to the conduct examined and to the case that the plaintiff [in the original suit] had made.” Accordingly, the State noted, the Supreme Court “reduced the damages to conform to the guidelines established by the American Convention.”

[FN4] In paragraph 17 of the preamble to its ruling of September 25, 2001, the Supreme Court held that

“In the matter of damages, the grievance of the parties filing this appeal has to be considered since it is self-evident that while the damages awarded should be an amount sufficient to discourage unlawful conduct, if carried to an extreme such an award can also ultimately weaken the practice of responsible journalism. The amount should not be a token or trifling sum but neither should it lead to the unwarranted enrichment of the plaintiff— who merely sued on his own behalf. The amount of the award should be proportionate to what the plaintiff [in the original suit] claims to be his protected interest, which in turn determines the extent to which the conduct of the newsmagazine was arbitrary.

Therefore, this one aspect of the appeal filed by the parties will be admitted: the amount of the award is ordered reduced to sixty thousand pesos, as of the date of the judgment, which will earn interest in the manner ordered by the lower court”.

20. Lastly, the State argues that nothing was said in the ruling to the effect that the damages were based on criticisms made of a public official, precisely because “the subsequent imposition of liabilities was done in accordance with the law and the liabilities were of a scope necessary to ensure respect for the rights or reputation of others.”

IV. ANALYSIS OF ADMISSIBILITY

A. Competence

21. Regarding the State, the Commission notes that Argentina has been party to the Convention since September 5, 1984, the date on which the respective instrument of ratification was deposited.

22. Under Article 44 of the American Convention and Article 23 of the Commission’s Rules of Procedure, the petitioners have standing to file petitions with the Commission with regard to the alleged violations of rights established in the American Convention. The alleged victims, Jorge Fontevecchia and Hector D’Amico, are natural persons whose Convention-protected rights the State pledged to guarantee. The Commission is, therefore, competent *ratione personae* to examine the complaint.

23. The Commission is competent *ratione materiae* because the petition alleges violation of human rights protected under the American Convention. The Commission is also competent *ratione temporis* since the obligation to respect and ensure the rights protected under the American Convention was already binding upon the State on the date the facts alleged in the petition were said to have occurred. Finally, the Commission is competent *ratione loci* because the alleged violations of Convention-protected rights were said to have occurred within the territory of a State party thereto.

B. Requirements for the petition's admissibility

1. Exhaustion of domestic remedies

24. The petitioners contend that the remedies under domestic law were exhausted with the Supreme Court's ruling of September 25, 2001. The State, for its part, has made no claim to the effect that other remedies remained to be exhausted or that the remedies reported were improperly asserted. The Commission therefore considers that the petitioners did exhaust the proper domestic remedies and that the requirements stipulated in Article 46(1)(a) have been met.

2. Timeliness of the petition

25. Article 46(1)(b) of the Convention states that a petition must be lodged within a period of six months from the date on which the petitioner is notified of the final judgment exhausting domestic remedies. In the petition under study, the date of the final judgment is September 25, 2001. The petitioners filed their complaint with the Commission on November 15, 2001. The Commission therefore considers that the petition was filed within the time period stipulated in Article 46(1)(b) of the Convention.

3. Duplication of international proceedings and international *res judicata*

26. It is the Commission's understanding that there is nothing on record to indicate that the petition is pending in any other international proceeding for settlement; nor has the Commission received any information indicating the presence of a situation of that kind. It is also the Commission's understanding that this petition is not substantially the same as any petition or communication previously examined by it. Hence, the requirements set forth in Articles 46(1)(c) and 47(d) of the Convention have been met.

4. Characterization of the facts alleged

27. In the instant case, the Commission's view is that this is not the proper phase in the proceedings to determine whether the alleged violations of the supposed victim's right to freedom of expression did or did not occur. For admissibility purposes, all the Commission need establish at this phase of the proceedings is whether the facts alleged, if proven, tend to establish a violation of rights guaranteed by this Convention, as stipulated in Article 47(b) of the American Convention, or whether the petition is, in the language of Article 47(c), "manifestly groundless or obviously out of order."

28. The standard for evaluating these admissibility requirements is different from the standard for deciding the merits of a petition. The Commission must conduct a *prima facie* evaluation to determine whether the petition establishes grounds for the apparent or potential violation of a right guaranteed by the Convention, but not to establish the existence of a violation. This examination involves a summary analysis that does not imply a prejudgment of the merits; neither does it suggest any opinion on the merits. By establishing two separate phases -one for admissibility and the other for the merits- the Commission's own Rules of Procedure make the distinction between the examination the Commission must make to determine whether a complaint is admissible and the examination required to determine whether a violation has in fact occurred.

29. It is the Commission's opinion that the arguments made by the petitioners and by the State regarding the alleged violation of freedom of expression pose a legal question that could tend to establish a violation of the rights guaranteed under Article 13 of the American Convention, in relation to Articles 1(1) and 2 thereof. To settle these arguments, the merits of the case have to be examined.

30. When it examines the merits, the Commission will have to determine whether the imposition of a monetary liability in the case of Messrs. Jorge Fontevecchia and Héctor D'Amico was in keeping with the obligations set forth in Article 13 of the American Convention, the obligation to ensure the exercise of that right to all persons subject to the State's jurisdiction and the obligation to adopt the domestic legislative and other measures to ensure the Convention-protected rights, as provided in Articles 1(1) and 2 thereof. The Commission will examine this matter from the standpoint of the dispute between the parties as to whether the information reported was public or private and the fact that one of the persons mentioned in the articles was the President of the Nation.

31. The Commission finds that since the petitioners' claim alleging violation of Article 8 of the American Convention has not been properly substantiated, it will be declared inadmissible.

V. CONCLUSION

32. The Commission concludes that it is competent to take cognizance of this case and that the petition fulfills the admissibility requirements prescribed in Articles 46 and 47 of the American Convention, and Articles 30, 37 and related provisions of the Commission's Rules of Procedure. Based on the arguments of fact and of law set forth above, and without prejudging the merits of the case,

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS,

DECIDES:

1. To declare the petition admissible as regards the alleged violation of Article 13 of the American Convention, in relation to Articles 1(1) and 2 thereof, and to declare the claim made regarding Article 8 of the Convention inadmissible.
2. To notify the State and the petitioners of this decision.

3. To proceed with its examination of the merits of the case.
4. To make this decision public and include it in its Annual Report to the OAS General Assembly.

Done and signed at the headquarters of the Inter-American Commission on Human Rights, in Washington, D.C., on the 12th day of October 2005. (Signed): Clare K. Roberts, President; Susana Villarán, First Vice-President; Paulo Sérgio Pinheiro, Second Vice-President; and Commissioners Evelio Fernández Arévalos, José Zalaquett, Freddy Gutiérrez and Florentín Meléndez.