Current Trends in Argentina´s Freedom of Expression Jurisprudence

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Argentina has developed strong protections for the right to freedom of expression, especially through the Supreme Court´s rich and vast jurisprudence in this area. During the last three decades, the Supreme Court has progressively included distinctions between private and public individuals, as well as public and private interests to afford greater protection for public interest and government related debate. The Supreme Court has developed doctrines that protect journalists and the overall population from criminal and tort liability for defamation when dealing with public interest information as well as reproduction of information created by third parties. Still, most of the concrete protections developed to date are merely jurisprudential as opposed to legislative. Thus, the interpretation and relevance of such doctrines vary from case to case and there is no full adherence to the developed doctrines by lower courts.[2] Important is to bear in mind that Supreme Court decisions are not binding on cases other than the case decided and (although highly persuasive) are not binding on lower courts. Furthermore, the Supreme Court has not always been consistent in its rationale and although some doctrines are well established, their contents, scope and limitations, are not.[3]

This paper will discuss four recent cases that show accomplishments and setbacks in Argentina´s jurisprudence on free speech. The first case, *Sujarchuk v. Warley*,[4] deals with defamation through a blog; the second case, *Canicoba Corral v. Acevedo*,[5] deals with defamation through traditional press; the third case is *Grupo Clarin SA v. National State*[6], evaluating the constitutionality of Argentina´s recently passed telecommunications law (known as the media law); and finally, the fourth is *Artear v. National State*[7] discussing official advertising as an indirect restriction to freedom of expression and the press.

The decisions selected were rendered after July 2013 and present a wide array of topics, varying from traditional defamation to novel issues such as telecommunications. The selection intends to show some of the progress made in advancing free speech and expression and a few of the latest setbacks in an effort to identify trends for the future.

Normative Framework of the Right to Freedom of Expression

Freedom of speech and expression is recognized and protected under Argentine laws. Article 14 of Argentina´s National Constitution establishes the right to publish ideas

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[2] *See* A. Del Campo, Calumnias e Injurias: La Situación en el fuero civil después de la ley 26551, CELE, june 2013, available at: http://www.palermo.edu/cele/pdf/Calumnias-Injurias-Fuero-Civil.pdf.

[3] I*d.*

[4] CSJN, *Ariel Bernardo c/Warley, Jorge A. s/ daños y perjuicios, Fallos, S.755.XLVI., 01/08/13*

[5] CSJN, *Canicoba Corral, Rodolfo Arístides c/ Acevedo, Sergio Edgardo y otros s/ daños y perjuicios, Fallos: C. 1079; XLV, 14/08/13,*

[6] CSJN, *Grupo Clarín SA y otros c/ Poder Ejecutivo Nacional y otros/ acción meramente declarativa, Fallos, G. 439. XLIX. (REX); G. 445. XLIX.; G. 451. XLIX*

[7] CSJN, *Arte Radiotelevisivo Argentino S. A. c/ Estado Nacional – JGM – SMC s/ amparo ley 16.986.* Fallos, A. 925. XLIX., 11/02/14

without prior censorship[8] and article 32 prohibits Congress from passing laws limiting press freedom.[9] Finally, with the Constitutional reform of 1994, international human rights treaties, including the American Convention on Human Rights, acquired constitutional hierarchy under article 75.22.[10]

Argentina´s Criminal Code, on the other hand, criminalizes defamation but excludes non-assertive expression and the expressions related to public interest from liability.[11]

Jurisprudence

Argentina´s Supreme Court has developed an extensive jurisprudence on freedom of expression along its history. The Court has in fact recognized the necessary link between freedom of speech and democracy and has quoted and cited to international and regional jurisprudence and standards in its decisions.

The Court has traditionally distinguished public and private interest as well as public and private figures to afford wider protections for expression referring to public matters. This distinction was made and upheld jurisprudentially even prior to the legislative reform that led to the decriminalization of public interest speech and non-assertive expression in 2009.[12] Similarly, the Court had upheld the doctrine of actual malice in cases dealing with defamation of public officials and had developed protections for the reproduction of third party expressions through the *Campillay doctrine*.[13]

This section discusses four very different cases that show achievements and setbacks in FOE jurisprudence in Argentina.

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[8] Argentine Constitution, Article 14: " Todos los habitantes de la Nación gozan de los siguientes derechos conforme a las leyes que reglamenten su ejercicio; a saber: de trabajar y ejercer toda industria lícita; de navegar y comerciar; de peticionar a las autoridades; de entrar, permanecer, transitar y salir del territorio argentino; de publicar sus ideas por la prensa sin censura previa; de usar y disponer de su propiedad; de asociarse con fines útiles; de profesar libremente su culto; de enseñar y aprender."

[9] Argentine Constitution, Article 32: "El Congreso federal no dictará leyes que restrinjan la libertad de imprenta o establezcan sobre ella la jurisdicción federal."

[10] Argentine Constitution, Article 75, inciso 22: "Corresponde al Congreso: (…) [a]probar o desechar tratados concluidos con las demás naciones y con las organizaciones internacionales y los concordatos con la Santa Sede. Los tratados y concordatos tienen jerarquía superior a las leyes. La Declaración Americana de los Derechos y Deberes del Hombre; la Declaración Universal de Derechos Humanos; la Convención Americana sobre Derechos Humanos; el Pacto Internacional de Derechos Económicos, Sociales y Culturales; el Pacto Internacional de Derechos Civiles y Políticos y su Protocolo Facultativo; la Convención sobre la Prevención y la Sanción del Delito de Genocidio; la Convención Internacional sobre la Eliminación de todas las Formas de Discriminación Racial; la Convención sobre la Eliminación de todas las Formas de Discriminación contra la Mujer; la Convención contra la Tortura y otros Tratos o Penas Crueles, Inhumanos o Degradantes; la Convención sobre los Derechos del Niño; en las condiciones de su vigencia, tienen jerarquía constitucional, no derogan artículo alguno de la primera parte de esta Constitución y deben entenderse complementarios de los derechos y garantías por ella reconocidos. Sólo podrán ser denunciados, en su caso, por el Poder Ejecutivo nacional, previa aprobación de las dos terceras partes de la totalidad de los miembros de cada Cámara. Los demás tratados y convenciones sobre derechos humanos, luego de ser aprobados por el Congreso, requerirán del voto de las dos terceras partes de la totalidad de los miembros de cada Cámara para gozar de la jerarquía constitucional."

[11] *See* E. Bertoni y A. Del Campo, *Calumnias e Injurias, A dos Años de la Reforma del Codigo Penal Argentino*, CELE, Sept. 2012, available at http://www.palermo.edu/cele/pdf/Calumnias-e-Injurias.pdf for a discussion on the history, application and effectiveness of the law that decriminalized public interest speech in 2009.

[12] *See Id*. Also *See*, CSJN, *Patitó, José Angel y otro c/ Diario La Nación y otros*, Fallos: 331:1530

[13] CSJN, *Campillay, Julio César c/ La Razón y otros*, Fallos: 308:789

Sujarchuck v. Warley

Argentina does not have specific laws governing liability for online intermediaries for third party posted content. In the absence of such laws, the jurisprudence of the Supreme Court, although not binding on other cases, acquires particular relevance.

The case involves Mr. Sujarchuk and Mr. Warley, two public officials at the School of Communications at Universidad de Buenos Aires (UBA). Upon Mr. Sujarchuk´s designation, Mr. Marcos Britos wrote an article entitled "*News regarding the presence of Ariel Sujarchuk at UBA*", criticizing his past performance, alleged dark businesses and reputation. Mr. Warley posted the article to his blog "Desde el aula" and added the word "Sinister" to the title, thus reading: "*News regarding the presence of "sinister" Ariel Sujarchuck at UBA.*" Mr. Sujarchuk thereafter initiated a torts claim for defamation against Mr. Warley arguing that hosting the article and changing the title constituted endorsements to the defamatory character of the article written by Mr. Britos.

The Supreme Court on its decision of August 2013 adopted the Attorney General´s (AG) opinion in its entirety, holding that there were no grounds for liability against Mr. Warley. In doing so, the AG used a standard developed in the 1980´s known as the *Campillay doctrine*, establishing that a person cannot be liable for the reproduction of information as long as there is clear attribution to the source and the contents are not substantially altered. The AG understood that adding the word "sinister" to the title did not substantially alter the content of the article drafted and clearly attributed to Mr. Britos.

The *Sujarchuk case* marks the first case where the Supreme Court reviewed the liability of intermediaries for third party contents posted to a blog. The case provides an insight into the AG and the Supreme Court´s rationale for future decisions where the intermediaries are not bloggers but important search engines (i.e.: Google and Yahoo). Several cases are in the pipelines and on their way to the Supreme Court dealing with this same issue and particular attention should be paid to what the Court decides then.[14]

Canicoba Corral v. Acevedo

The case of *Canicoba Corral v. Acevedo* came only two weeks after the *Sujarchuk v. Warley* case, on August 14, 2013. In this case the Court went into a substantial review of defamation law and the decision, unlike *Sujarchuk*, constitutes a major setback in freedom of expression jurisprudence.

Mr. Canicoba Corral is a federal judge appointed during the mandate of President C. Menem in the 1990´s. Mr. Acevedo is a former governor of Santa Cruz and former Chair of the Impeachment Committee in the House of Representatives. In a media interview Mr. Acevedo stated that Mr. Canicoba Corral, along with other judges appointed during the same presidential mandate, was "despicable" ("detestable"). Judge Canicoba Corral launched a civil law suit for defamation.

The Supreme Court in a divided decision ruled in favor of the plaintiff. After following the traditional review in FOE cases, distinguishing between public officials and private individuals, public interest and public duties, the Supreme Court concluded that in this case Mr. Acevedo´s comments exceeded reasonable criticism and constituted an insult that affected Mr. Canicoba Corral´s professional reputation. The insult was heightened according to the Court in light of Mr. Acevedo´s prior positions as a public figure. This

[14] *See* for example, *Da Cunha Virginia c/Yahoo de Argentina SRL y Otros/ daños y perjuicios* –S.C., D.544, L.XLVI

marks the first case where the Court upheld a decision against criticism involving a public figure in exercise of his/her duties.

The Supreme Court had said in prior cases that the right to free speech did not create a right to insult but had never upheld a decision on liability based on this argument.[15] The decision in this case rejects the distinction between assertive and non-assertive expression as the basis for liability and lays a dangerous foundation for future defamation cases. Limitations on the right to criticize the judiciary and its members need to be restrictively interpreted. These and other arguments along these lines were the basis for the petition launched by Mr. Acevedo against Argentina in the Inter-American Commission on Human Rights in January 2014.[16]

Grupo Clarin SA v. National State

Very few Supreme Court cases have sparked such intense debate among ordinary citizens as the *Grupo Clarin S.A. v National State* case. This case was argued on the social, cultural and legal contexts simultaneously. And it gave rise to such polarization among scholars, professionals and the overall population, that the decision itself was overshadowed by expectation.

In 2009 the Argentine Congress passed law 26.522 known as the media law. Article 45 set a cap on the number of radio frequencies and TV licenses any one company or person can own. Per article 161 any company who at the time of the enactment of the law exceeded the number of permitted licenses had a one year period to sell, divide or reformulate their companies to comply with the regulation. Grupo Clarin SA was among the companies that exceeded the number of permitted licenses and questioned the constitutionality of the law on several grounds. The most important for this paper being that reducing their structure could compromise the profitability of the company and force them to close, therefore creating an indirect restriction to freedom of expression.

The Supreme Court issued its decision in October 2013 holding that the media law was constitutional. The Court first addressed the importance of freedom of expression and the press in a democratic society. It then evaluated the State´s means to protect freedom of speech and expression in its social and individual dimensions; and finally reviewed the constitutionality of the law in light of the interests being balanced.

The decision held that freedom of expression in its social dimension is necessary to guarantee freedom of information and the development of public opinion. Unlike the individual dimension of free speech, the Court said, guaranteeing the social dimension of this right requires the State´s active involvement and participation.[17] Therefore, the Court stated that the State has an unquestionable interest in regulating mass media, as it is through mass media that freedom of expression is materialized.[18]

Having established the duty of the State to intervene (*a priori* through regulation or *a posteriori* through sanctions) in order to protect free speech in its social dimension, the Court moved to evaluate whether the law constituted an indirect restriction to freedom of expression in the particular case. Plaintiffs had argued that the cap on the number of

[15] *See* CSJN, *Patitó, José Angel y otro c/ Diario La Nación y otros*, Fallos: 331:1530

[16] http://www.cels.org.ar/common/documentos/PETICION%20%20FINAL%20Denuncia%20Acevedo.pdf.

[17] CSJN, *CSJN, Grupo Clarín SA y otros c/ Poder Ejecutivo Nacional y otros/ acción meramente declarativa, Fallos, G. 439. XLIX. (REX); G. 445. XLIX.; G. 451. XLIX*, Considerando 25.

[18] CSJN, *CSJN, Grupo Clarín SA y otros c/ Poder Ejecutivo Nacional y otros/ acción meramente declarativa, Fallos, G. 439. XLIX. (REX); G. 445. XLIX.; G. 451. XLIX*, Considerando 23.

licenses jeopardized the economic sustainability of the company, thus constituting an indirect restriction to freedom of expression.

The Supreme Court held that unlike the leading case *Editorial Rio Negro v. Neuquén (2007),*[19] dealing with discrimination in the attribution of public advertising, in this case there was, a priori, no differentiated treatment against the plaintiff that could justify shifting the burden of proof against the constitutionality of the law. It then concluded that based on the evidence provided in the case (including expert witnesses), implementing the law would not impair the economic sustainability of the group to constitute an indirect restriction.

Finally, the Supreme Court reviewed the constitutionality of the law balancing the right to ownership and property alleged by the plaintiff against the right to freedom of expression in its social dimension as alleged by the State. The decision upheld the constitutionality of the law applying a non-strict level of scrutiny, concluding that the alleged restriction was reasonable and proportionate to the need to regulate social media in a democratic society. The Court did not evaluate the necessity of such law, nor did it enter into its efficiency or effectiveness in achieving its declared purpose. Instead it deferred to Congress, recognizing them a wide margin of appreciation in these regards.

The decision in *Grupo Clarin S.A. v. National State* developed the social dimension of the right to freedom of expression. Although the Court had cited to this aspect of FOE in prior cases, the analysis always pivoted around the individual dimension of this important right. Interestingly, the Court avoided the contrast between the individual and social dimensions of FOE and took a different approach confronting economic rights against FOE instead. Furthermore, the decision raised a number of issues that could lead to further litigation. The Court stated that the Constitutionality of the law rested upon its purpose- i.e. the promotion of the social dimension of freedom of expression- and that said purpose could be trumped 1) by discriminatory use of government advertising; 2) by not guaranteeing an independent control authority.

ARTEAR v. National State

The case of *Artear* does not bring novel issues on FOE to the Supreme Court for review. Instead, it brings an old issue that remains unsolved: the issue of government advertising and the lack of objective and transparent criteria to distribute it. The decision, however, is important for its analysis of the value and force of the Court´s own precedents and decisions and the importance of state compliance with judicial orders to uphold the rule of law.

Artear dealt with government advertising as an indirect restriction to freedom of expression. The plaintiff filed a complaint stating that the distribution of government advertising was discriminatory and discretional. They also stated that their quota for government advertising had been limited and reduced to virtually non-existent in an attempt to control their editorial contents.

The Supreme Court on its decision of February 2014 referred the issue of government advertising entirely to *Editorial Rio Negro* as the leading case in this area. Instead of re-addressing the FOE issue, the decision was centered around the value of prior Supreme Court decisions on other branches of government as well as lower courts; and the dangers created by the Executive´s non-compliance with judicial decisions.

[19] CSJN, *Editorial Río Negro S.A c/Neuquén, Provincia del s/acción de amparo, Fallos, 330*:3907

The cases of *Editorial Rio Negro*[20] and *Editorial Perfil*[21] are examples for the Executive´s utter disregard for judicial decisions. In both cases the Court ordered the State to eliminate discriminatory practices in the distribution of government advertising and even gave the State a peremptory timeframe to do so. The State failed to comply in both cases in a clear attitude of complete disregard.

The Supreme Court noted the lack of compliance with prior decisions regarding the distribution of government advertising and concluded that it constituted a clear affront to the separation of powers, endangering the basis of Argentina´s democracy. Although the case does not bring new elements in analyzing FOE, it does strengthen the understandings developed in prior decisions and raises awareness around the lack of State compliance, which endangers not only FOE protections in government advertising, but the overall rule of law.

Preliminary Conclusions

Sujarchuk v. Warley is a promising precedent that suggests the direction of the Court in reviewing similar cases dealing with liability of intermediaries. However, the Court´s analysis of defamatory content and its interpretation of what constitutes insult in *Canicoba Corral v. Acevedo* endanger the structure upon which FOE protections were developed to date.

The *Grupo Clarin S.A.* case, although legally sound and well-grounded on inter-American standards on the social dimension of FOE, showed some of the Court´s self-imposed limitations in reviewing the legality and necessity of the media law and the recognition of an increasing margin of appreciation afforded to the legislative and executive powers in framing and defining restrictions on the right to free speech and expression.

Finally the decision in *Artear* should be interpreted as a warning from the Supreme Court to Congress, the Executive and international supervisory bodies, that judicial decisions in Argentina are at risk of becoming obsolete absent State compliance and execution.

As a corollary to this review and among the lessons learned and steps for the future:

1) Defamation is not to be overlooked: Attention should be paid to the cases reaching the Supreme Court in traditional areas including defamation law. Although activists and litigators have moved past defamation conflicts to more complex issues in the understanding that jurisprudential standards were protective enough to guarantee FOE, recent developments show that they need to revisit that position.
2) Margin of Appreciation: The increasingly wide margin of appreciation afforded to Congress and the Executive in defining and evaluating FOE restrictions arising out of the *Grupo Clarin S.A.* case are cause for certain concern.
3) Rule of Law: Efforts should be combined to supervise and achieve the State´s full compliance with decisions arising out of the Supreme Court as well as other bodies, international and regional. The prevalence of the rule of law in Argentina and the enforcement of FOE protections depend on it.

[20] CSJN, *Editorial Río Negro S.A c/Neuquén, Provincia del s/acción de amparo, Fallos, 330:3907*

[21] CSJN, *Editorial Perfil S.A. y otro c/E.N. – Jefatura Gabinete de Ministros – SMC s/amparo ley 16.986, Fallos, 334:109*