



Suprema Corte
de Justicia de la Nación



DERECHOS
HUMANOS

This summary contains the cover page, the synthesis and the extract of a decision of Mexico's Supreme Court of Justice. Changes were made to its original text to facilitate the reading of the extract. This document has informative purposes, and therefore it is not binding.

**USE OF CRIMINAL LAW TO RESTRICT THE FREEDOM OF EXPRESSION
(USO DEL DERECHO PENAL PARA RESTRINGIR LA LIBERTAD DE EXPRESIÓN)**

CASE: *Acción de Inconstitucionalidad 29/2011*

REPORTING JUDGE: Jorge Mario Pardo Rebolledo

DECISION ISSUED BY: Plenary of Mexico's Supreme Court of Justice

DATE OF THE DECISION: June 20, 2013

KEY WORDS: right to freedom of expression, right to information, restrictions on the freedom of expression, limits on the freedom of expression, principle of legality, legal security, specificity, media, dissemination of "false" information.

CITATION OF THE DECISION: Supreme Court of Justice of the Nation, *Acción de Inconstitucionalidad 29/2011*, Plenary, Jorge Mario Pardo Rebolledo, J., decision of June 20, 2013, Mexico.

The full text of the decision can be consulted at the following link:

<https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/sentencia/2021-10/AI29-2011.pdf>

CITATION SUGGESTED FOR THIS DOCUMENT: Human Rights Office of Mexico's Supreme Court of Justice, *Extract of the Acción de Inconstitucionalidad 29/2011*, Mexico.

SUMMARY OF THE *ACCIÓN DE INCONSTITUCIONALIDAD* 29/2011

BACKGROUND: The president of the National Human Rights Commission [Comisión Nacional de los Derechos Humanos] (CNDH), filed an *acción de inconstitucionalidad* requesting the invalidity of article 373 of the Criminal Code of the State of Veracruz (CPEV). He stated that the challenged article violates the fundamental rights to freedom of expression and press, set forth in articles 6 and 7 of the Federal Constitution, 13 of the American Convention on Human Rights, 19 of the International Covenant on Civil and Political Rights, as well as 19 of the Universal Declaration of Human Rights; he also argued that it was contrary to the principle of legality in its criminal specificity aspect, established in articles 14 and 16 of the Federal Constitution.

ISSUE PRESENTED TO THE COURT: Whether article 373 of the CPEV is unconstitutional for directly violating the right to the freedom of expression, since it intends to penalize the expression of a “false” assertion, as well as the principle of legality in criminal matters.

HOLDING: Article 373 of the CPEV was invalidated essentially for the following reasons. It was held that the challenged article violates the human rights of freedom of expression and right to information, since the use of criminal law in this case represents a disproportionate restriction on the exercise of the right and it has an inhibitory effect on public debate and the dissemination of information. In turn, the terms used by the legislator lack clarity and give rise to imprecision, and therefore they violate the principle of legality. Thus, the invalidity of the entire article is declared, with retroactive effects in benefit of the persons to which the crime has been applied since it entered into force.

VOTE:

The votes cast may be consulted at the following link:

<https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=132774>

EXTRACT OF THE *ACCIÓN DE INCONSTITUCIONALIDAD* 29/2011

- p. 1 Mexico City. The Plenary of Mexico's Supreme Court of Justice (this Court), in session of June 20, 2013, issues the following decision.

BACKGROUND

- p. 1-2 On October 17, 2011, the president of the National Human Rights Commission [Comisión Nacional de los Derechos Humanos] (CNDH), filed an *acción de inconstitucionalidad* requesting the invalidity of article 373 of the Criminal Code of the State of Veracruz (CPEV), reformed by Decree 296, published in the Official Gazette of the entity on September 20, 2011.
- p. 4 He asserts that it constitutes a direct violation of the right to the freedom of expression since it intends to penalize the expression of a "false" assertion that causes a disturbance to public order, without specifying the means or parameters to qualify the "falseness" of the expression, which situation would also have an impact on journalism as well as the expression of ideas, given that information providers will be faced with the dilemma of whether or not to disseminate information on a possible threat to the security of society, given the fear of the challenged norm being applied to them.
- p. 5 Therefore, the suit argues that the challenged norm violates the fundamental rights to freedom of expression and press protected in articles 6 and 7 of the Federal Constitution, 13 of the American Convention on Human Rights, 19 of the International Covenant on Civil and Political Rights, 19 of the Universal Declaration of Human Rights and articles 1, 2, 5, 6, 8 and 10 of the Declaration of Principles on Freedom of Expression.
- Additionally, that the challenged norm violates the content of articles 14 and 16 of the Federal Constitution upon establishing an open crime, since it deviates from the guarantees of legality, legal security, exact application of the criminal law, given the ambiguity and imprecision of the elements that make up the crime.
- p. 7-8 The president of this Court ordered the formation and registration of the case on October 18, 2011. On October 19, 2011, the *acción de inconstitucionalidad* was admitted.

p. 15 By resolution of February 21, 2013 it was resolved to turn the court record over to Judge Jorge Mario Pardo Rebolledo, so he could prepare the respective draft decision.

STUDY OF THE MERITS

I. Violation of the rights to freedom of expression and access to information

- p. 21-22 The petitioner argues that the norm threatens the freedom of expression contemplated in articles 6 and 7 of the Federal Constitution, because the legality of restrictions on the freedom of expression depends on their orientation toward satisfying an imperative public interest and, if there are various options for achieving it, the one should be chosen that is least restrictive of that protected right proportionally to the interest that justifies it and with adherence to the achievement of that legitimate objective.
- p. 22 That in the case of putting limits, they must be established clearly, precisely and consistently, abiding by the guarantees of legality and legal security contemplated in articles 14 and 16 of the Federal Constitution, which does not occur in the case of the challenged norm since those requirements are not met.
- p. 23 In this respect it must be indicated that the fundamental rights of freedom of expression and to information have a double facet or dimension, which is: on the one hand, they ensure essential spaces for people to display their autonomy and, on the other hand, they enjoy a public, collective or institutional aspect that makes them basic components for the adequate functioning of a representative democracy.
- p. 23-24 Articles 6 and 7 of the Federal Constitution establish, in synthesis, the following: a) the manifestation of ideas will not be subject to any judicial or administrative inquisition, unless it threatens morality, privacy or rights of third parties, provokes a crime or disturbs the public order; b) the right to information will be guaranteed by the State; c) the right to disseminate opinions, information and ideas through any media in inviolable; d) This right cannot be restricted indirectly, such as through the abuse of official or private controls of paper for newspapers, of radio frequencies or fixtures and devices used in the dissemination of information or by any other media and information and communications technologies to impede the transmission and circulation of ideas and opinions; e) no law

or authority may establish the prior censure nor fetter the freedom of dissemination; f) the limits on the freedom of dissemination may only be those established in the first paragraph of article 6 of the Federal Constitution.

a) The different dimensions of the content of the freedom of expression can be explained and developed in multiple dimensions

- p. 27-28 The Inter-American Court of Human Rights, in the Advisory Opinion OC-5/85 and in the case *Olmedo Bustos and others vs. Chile*, has had the opportunity to emphasize repeatedly that this involves not only the freedom to express one's own thoughts, but also the right to seek, receive and disseminate information and ideas of all kinds. Together with the security of not suffering an arbitrary reduction in the capacity to manifest one's own thoughts, the guarantee of the freedom of expression also ensures the right to receive any information and know the expression of thought of others, which opens the door to the importance of the collective dimension of the exercise of this right. The freedom of expression is, in effect, a means for the exchange of ideas and information that protects both the communication to other persons of one's own points of view and the right to know the opinions, stories and news that others disseminate. Both dimensions must be guaranteed simultaneously.
- p. 28 This double dimension also explains the importance of fully guaranteeing the conditions of disclosure of the messages. It includes the right to use any media appropriate for disseminating thought and getting it to the greatest number of recipients. The expression and dissemination of thought and information are indivisible, such that a restriction on the possibility of disclosure directly represents a limit on the right of free expression. This has repercussions on many levels, but especially on the scope of social media. The right to free expression also requires that these media are reasonably open to all; the strategic position of the media, and the technical and economic complexity associated with expression through them justifies that they must maintain their activities within the parameters that allow them to continue to be qualified as true instruments of that freedom and not vehicles to restrict it.

b) The centrality of the freedom of expression and legitimate limitations

- p. 29 The first of the rules on limits is the interdiction of prior censure. This implies that the State may not submit expressive or communicative activities of private parties to the need to request in advance a permit from the authority that, for reasons of content, has the power to prevent their development.
- p. 29-30 This implies that the limits cannot be asserted through a mechanism by which an authority simply excludes a particular message from public knowledge; they must be asserted through the attribution of subsequent liabilities. This does not mean, therefore, that the mode and manner of expression cannot be regulated, nor that rules cannot be imposed, including with respect to the content of messages. The mode of application of those limits, however, cannot consist of excluding the message from public knowledge.
- p. 30 The American Convention on Human Rights establishes an exception to the prohibition on prior censure. Only when the free expression conflicts with the rights of children and youth may a measure like prior censure of public shows be justified; in the rest, whatever the nature of the elements with which the free expression of ideas comes together, prior censure will never be justified.
- p. 32 For restrictions on the freedom of expression to be legal, they must be oriented to satisfying a compelling public interest and, when there are various options to reach that objective, the one that restricts the protected right the least must be chosen. The restriction must be proportionate to the interest that justifies it and strictly adapted to the achievement of that legitimate purpose.
- The strict standard with which restrictions on the freedom of expression —by any means— must be designed and constitutionally evaluated is also evidenced by the fact that our fundamental texts proscribe “indirect restrictions” on it.
- p. 33 Furthermore, this Court has held during the last few years that the freedom of expression constitutes a preferred right, since it serves as a guarantee for the realization of other rights and freedoms. In effect, to have full liberty to express, collect, disseminate and publish information and ideas is essential, not only as an essential instance of self-

expression and self-creation, but also as a premise to be able to fully exercise other human rights and as a functional element that determines the quality of the democratic life of the country.

In this regard, the freedom of expression and its aspect consisting of the right to information have a double facet, individual and social, which demand not only that individuals not be impeded from the possibility of freely manifesting themselves, but that their right as members of a class to receive any information and know the expression of others' thoughts be respected.

- p. 33-34 The principal consequence of this preferred position of the freedom of expression and the right to information is the general presumption of constitutional protection of all expressive or informative discourse, which is justified by the primary obligation of neutrality of the State regarding the contents of the opinions and information disseminated, as well as by the need to guarantee that, in principle, there are no persons, groups, ideas or means of expression excluded *a priori* from the public debate. This argument is consistent with the prohibition on prior censure. Therefore, "the abuse of freedom of expression cannot be subject to measures of preventive control but rather a basis for liability for those who have committed it". In other words, the liability that in any case could be generated from an improper expression is, as this Court has emphasized in its precedents, of a subsequent nature.
- p. 34 This idea confirms that these human rights have limits, among which the Constitution and the international treaties identify the public order.
- p. 35 According to the Inter-American Court of Human Rights, to be able to establish subsequent liabilities as limits on the freedom of expression, they must meet various requirements: a) they must correspond to causes of liability previously established; b) there must be an express and restrictive definition of those causes by law; c) the purposes pursued upon establishing them must be legitimate, and d) those causes of liability must be necessary in a democratic society to ensure the mentioned purposes. Any interference

that does not satisfy any of those requirements constitutes a violation of the freedom of expression.

In this case, it is necessary determine if the criminal sanction constitutes a subsequent liability that is harmoniously inserted in the legal order. The challenged provision is the following:

“Article 373. Anyone who, by any means, falsely asserts the existence of explosive or other devices; attacks with firearms; or chemical, biological or toxic substances that could cause harm to health; causing disturbance of the public order, will be sentenced to prison for one to four years and a fine of five hundred to a thousand days of wages, depending on the alarm or disturbance of public order actually produced”.

p. 37 The central phrase of the challenged provision is “to assert falsely”, and therefore the conduct constituting the crime is the expression, whether verbal, written or symbolic. From the above it is seen that, according to the conduct that is regulated (expression) and the legal interest protected (public order), article 373 of the CPEV corresponds to a limitation on the exercise of the human right to the freedom of expression in protection of the public order.

The challenged provision was created following the appropriate legislative process. In this regard, the requirement consisting of its prior establishment is fully complied with.

In the case of limitations on the freedom of expression imposed by criminal norms, the Inter-American Court of Human Rights has indicated that the requirements of the principle of strict legality must also be satisfied. This requirement has a double function; on the one hand, it reduces the competence of the State regarding the form in which it can restrict the freedom of expression; on the other hand, it indicates to the citizen what exactly is prohibited.

p. 37-38 As stated, the protection of the public order constitutes a purpose authorized by our legal order to limit the freedom of expression of citizens; in this regard it is clear that the cause of liability established in article 373 of the CPEV pursues a legitimate end.

p. 38 However, it should be specified that, in general, the “public order” cannot be invoked to suppress a human right, to denaturalize it or deprive it of its real content. If this concept is invoked as a basis for limitations on human rights, it must be interpreted in a manner strictly tied to the just demands of a democratic society, which takes into account the balance between the different interests at stake and the need to preserve the purpose and end of the Constitution and the international treaties Mexico is a party to.

For purposes of the limitations on the freedom of expression, the Inter-American Court of Human Rights defines “public order” as “the conditions that ensure the harmonic and normal functioning of the institutions on the basis of a coherent system of values and principles”. Under this definition, it is clear that the defense of the public order is intimately related to democracy, where the maximum circulation possible of information, opinions, news and ideas must be promoted, which is to say the maximum level of exercise of the freedom of expression.

p. 38-39 In this way, any impact on the public order invoked as justification to limit the freedom of expression must obey the real and objectively verifiable causes that pose a certain and credible threat of a potentially serious disturbance of the basic conditions for the functioning of the democratic institutions.

p. 39 Consequently, it is not sufficient to invoke mere conjectures on the eventual impacts on order, nor hypothetical circumstances derived from interpretations of the authorities of facts that do not clearly pose a reasonable risk. A broader or indeterminate interpretation would open an inadmissible window to arbitrariness.

In this case, the legislator pursued a legitimate end and was cautious in establishing subsequent liabilities for the improper exercise of the freedom of expression beginning from the harm actually produced, and not for the mere possibility of the impact. However, the mechanism it used was not the least restrictive of the rights involved and, therefore, it disproportionately restricts that human right.

The Inter-American precedent has been emphatic in indicating that the States that impose limitations on the freedom of expression are obligated to demonstrate that they are necessary in a democratic society to achieve the compelling objective they pursue.

- p. 40 In this regard, for the restriction to be legitimate, the certain and compelling need to impose the limitation must be established; this means that the purpose in question cannot reasonably be reached by a means less restrictive on the freedom of expression.
- p. 40-41 In addition, a restriction on the freedom of expression must be proportional to the legitimate end that justifies it and be strictly aligned with achieving that end without interfering in the legitimate exercise of that freedom. In order to analyze the strict proportionality of the limiting measure, it has to be determined if the sacrifice of the freedom of expression that it entails is exaggerated or excessive compared to the advantages obtained from it.
- p. 41 The first thing that should be emphasized is that the restrictions that interfere most severely with the freedom of expression are those in which the purpose thereof points to regulating the content itself of the message. In this case, article 373 of the CPEV sanctions particular expressions because it considers they have the potential to alter the public order. Upon doing so, the scope of the freedom of expression and the right to information is defined, establishing what constitutes protected language according to its content, and therefore the importance of revising with particular care its compatibility with the rights and values at stake.

This Court deems that while there is a compelling public interest in avoiding alarm, unease, panic or mobilizations of people in an uncontrolled or anarchic manner generated by intentionally false assertions of the existence of explosive devices, attacks with firearms or substances harmful to health, the measure implemented by the lawmaker for that purpose does not comply with the requirement of necessity.

- p. 42 It is considered that in order not to disproportionately restrict the freedom of expression, the offender must: 1) be fully aware that his assertion is false; and 2) have the deliberate

purpose of disturbing the public order through the use of this false assertion. In other words, the conduct that it is wished to sanction in this case must be malicious.

However, it is clear that the false assertions the crime refers to may be malicious, but also reckless, since the assertions, true or false, do not have, in principle, any connection with the intent to lie, which would represent malice. The lie is not equivalent to falseness, since the first necessarily has a volitional connotation, while the second does not. Thus, when someone commits an error and thereby produces a false assertion, their conduct cannot necessarily be considered malicious.

p. 43 The legislator of Veracruz drafted the provision as a mere causal relationship between the false assertion and the disturbance of public order, without having specified that this effect should have been produced through a malicious intent. In other words: he did not distinguish between a false assertion that provokes a disturbance of the public order, but that is not made for that purpose, and a deliberately false assertion having the purpose of disturbing the public order.

p. 44 In summary, not all the false assertions are necessarily connected to a malicious intent; it would have been more precise drafting to make clear that the norm is not directed toward the person in error but rather the malice to make false assertions.

The legal norm sanctions false assertions, without specifying the malicious intent to lie and generate harm. In this regard, it authorizes the authority to criminally punish persons who err or are mistaken in the information they provide.

p. 45 The challenged norm may generate the sanctioning of someone who reproduces exactly what is stated by its source, in spite of the fact that there is no malice in that reproduction. The central concept of the norm does not differentiate and, therefore, is over-inclusive.

In this regard, the omission in the challenged provision with respect to malice as a necessary part of the criminal conduct generates a very relevant inhibitory effect, in which well-intentioned people may feel inhibited or cowed from expressing necessary alerts with respect to the “true” existence of those elements.

p. 45-46 Especially since, in this case, such information would be valuable in terms of caution and precaution and essential in security matters. With its discouragement and obstruction not only the freedom of expression is affected but also the right to information, where the greater the public interest is (which is obvious in this case), the greater degree of protection it should enjoy.

p. 48 While it is recognized that the information protected by the Federal Constitution should be true, there are two aspects that specifically cover the operative conditions of article 373 of the CPEV and that the legislator should have taken into account. The first aspect arises from the urgent context in which the information referring to explosive devices, attacks with firearms or substances harmful to health is generated. The person who genuinely is convinced of its existence will attempt to disseminate it as soon as possible, and the one that has doubts, will probably also do so after doing a quick calculation of the harm. It cannot be required, for the simple fact of having doubts, to ignore the relevant information that could prevent greater harm. This is strengthened when the fact is not known directly, but indirectly, which situation, by its nature, would be devoid of any possibility of absolute certainty.

The second aspect that the legislator should consider is that the same diligence cannot be demanded of a common citizen as an information professional.

p. 49 However, the provision does not reflect those conditions, does not explain malice and, instead, creates an inhibitory effect on the flow of information. In this regard, it causes a greater harm than the harm it is attempting to prevent.

Based on the explained premises, the legislative measure is disproportionate and, therefore, does not meet the requirement of necessity. The genuine freedom of expression necessitates a broad space to develop and a sphere of security sufficiently extensive so that whoever makes use of it can calculate the consequences of what they say or write. If a dissuasive instrument such as the criminal sanction is projected on conduct too close to what constitute legitimate exercises of the freedom of expression and the right to information, both human rights are being unduly limited.

p. 49-50 As explained above, this Court considers that article 373 is not carefully designed to interfere the least amount possible in the freedom of expression and the right to information, and it does not adequately comply with the requirement of necessity mandated for all subsequent liability for the unlawful exercise of expression. In effect, the fear of serious harm does not justify by itself the inhibitory effect generated by the criminal threat nor the seriousness of the sanction. Thus, it is considered that the silence imposed by the State ends up blocking the informational flow more than necessary in a democratic society, and with that violates articles 6 and 7 of the Federal Constitution.

II. Violations of the principle of criminal specificity

p. 50-51 In criminal matters, there is a requirement of linguistic rationality that is known precisely as the principle of specificity. This principle constitutes an important limit on the criminal legislator in a democratic State under the rule of law in which two fundamental values are underlying: legal certainty and impartiality in the application of the Law. It can be defined as the requirement that the texts of the sanctioning norms describe with sufficient precision what conduct is prohibited and what sanctions will be imposed on whoever engages in them.

p. 51 Commonly the principle of specificity is understood as one of the three formulations of the principle of legality, which also covers the principles of retroactivity and reservation of law. Article 14 of the Federal Constitution contains this principle.

p. 52 The idea is for the degree of imprecision to be reasonable, which means that the provision is sufficiently precise to be able to declare its validity, in that it is considered that the legislative message essentially complied with its assignment addressing the essential core of cases regulated by the norm. The other extreme would be excessive or irrational imprecision, which is to say a degree of indetermination that provokes confusion or uncertainty in recipients who are not sure how to act.

p. 53 The expression included in the challenged norm that suffers from imprecision is “or others”. It allows for at least two possible interpretations, which refer to: 1) other types of devices analogical to explosives; or 2) another type that is not a device, that is, not

explosives. This double possibility is another example of potential vagueness, since it is not clear to which of the two aspects the legislator refers. The question is relevant in the case of a crime, which cannot allow for the imposition of penalties by analogy or by compelling logic (article 14 of the Constitution). This problem can produce cases of over-inclusion, in which it would not be unreasonable for a legal operator to consider conduct related to the false assertion of the existence of a non-explosive device that results in a disturbance to public order as falling under the norm.

DECISION

- p. 53-54 In summary, the arguments expressed by the president of the CNDH are essentially grounded, in which he indicates, respectively, that the challenged norm violates the human rights of freedom of expression and right to information, and that it does not comply with the guarantees of legality, legal certainty and exact application of the criminal law.
- p. 54 This decision will have retroactive effects in benefit of the persons to which the challenged provision has been applied since September 21, 2011, on which date article 373 of the CPEV entered into force; this is because it is a criminal norm.
- p. 55 Thus, the invalidity of article 373 of the CPEV must be declared. This is due to the fact that the constitutional defects detected in that provision are found in the core phrase or the conduct penalized, as well as the material object. Therefore, it is considered that the possibility of declaring the invalidity of such phrases would be impractical because the norm would lose all meaning, given that a message found to be moderately clear could not be communicated. Therefore, it is considered the entire provision must be declared invalid.