

Public Officials' Lies and Their Effects on the Proliferation of Disinformation

Another Way to Approach the Crisis

Eduardo Bertoni

5.1 INTRODUCTION

State responses to the recent 'crisis' caused by misinformation in social media have mainly aimed to impose liability on those who facilitate its dissemination.¹ Internet companies, especially large platforms, have deployed numerous techniques, measures and instruments to address the phenomenon.² However, little has been done to assess the importance of who originates disinformation and, in particular, whether some originators of misinformation are acting contrary to their preexisting obligations to the public.³ My view is that it would be wrong to attribute only to social

The research for this chapter began in 2021 under the coordination of Agustina del Campo, Director of the Centro de Estudios en Libertad de Expresión y Acceso a la Información of University of Palermo. A different version was then drafted and published in Spanish. See 'La mentira de los funcionarios, ¿tiene patas cortas o efectos largos?', <https://dspace.palermo.edu/dspace/bitstream/handle/10226/2337/Desinformacion-y-funcionarios-publicos.pdf?sequence=1&isAllowed=y>. This chapter is a new and revised version that includes the feedback and comments provided during the workshop organized by the Global Freedom Program of Columbia University on 27 April 2023, and during the workshop hosted by the National Public Service University's Information Society Project, in Budapest, on 9 June 2023. Special thanks to my colleagues Charlotte J. Garden, Ronald Krotoszynski and András Koltay for their comments.

¹ See Agustina Del Campo, *¿La desinformación en democracia o la democracia de la desinformación?* CELE, 2020, [www.palermo.edu/Archivos_content/2021/cele/papers/Disinformacion-in-democracy%20\(2\).pdf](http://www.palermo.edu/Archivos_content/2021/cele/papers/Disinformacion-in-democracy%20(2).pdf).

² See, for example, Carlos Cortes and Luisa Isaza, *Noticias falsas en Internet: la estrategia para combatir la desinformación*, CELE, 2017, www.palermo.edu/cele/pdf/FakeNews.pdf; see also Carlos Cortes and Luisa Isaza, *¿La nueva normalidad? Desinformación y control de contenidos en las redes sociales con ocasión del covid-19*, CELE, 2021, www.palermo.edu/Archivos_content/2021/cele/papers/Moderacion-Covid-19.pdf; Álvarez Ugarte and Agustina Del Campo, *Noticias falsas en Internet: acciones y reacciones de tres plataformas*, CELE, 2021, www.palermo.edu/Archivos_content/2021/cele/papers/Desinformacion-y-acciones-de-plataformas-2021.pdf.

³ Among the few initiatives in this regard, in 2018 a bill was presented in the Chilean Congress aimed at incorporating a reform to Arts. 27, 60 and 15 of the Chilean National Constitution to

media a central or exclusive role in the new disinformation crisis that impacts the information ecosystem.⁴ I also believe that disinformation has different effects depending on who promotes it – particularly whether it is promoted by a person with a public role. Importantly, the law of many countries already reflects this distinction – across a variety of contexts, public officials are obligated both to affirmatively provide certain types of information, and to take steps to ensure that information is true. In contrast, private individuals rarely bear analogous obligations; instead, law often protects their misstatements, in order to prevent censorship and promote public discourse.

This chapter analyzes the obligations of public officials and electoral candidates to refrain from spreading disinformation and misinformation, in light of the legal obligations that loom over officials expressing themselves in the exercise of their office. To this end, Section 5.2 reviews Cass Sunstein’s ‘taxonomy’ of falsehoods, a useful tool for research on this topic. Section 5.3 draws on moral philosophy to discuss the particular harms that misstatements cause when the speaker is a public official. Then, the chapter turns to the Inter-American System, showing how that system, like the laws of various Latin American countries, already distinguishes between public officials and private citizens in criminal and administrative law, and codes of public ethics. Finally, I call for approaches to the problem of misinformation that focus on its origins, highlighting the obligations of public officials and emphasizing the role and duty of the government to avoid the proliferation of disinformation.

determine the cessation of the office of president, parliamentarians and other officials (respectively) when they have been convicted as perpetrators, accomplices or abettors in the dissemination, promotion or financing of false news about their electoral opponents during the campaign from the moment of the final judgment of the electoral court that decides in this regard. The clauses of the law establish the principles of freedom of expression concerning public officials and candidates in electoral periods, and provide real malice as the applicable standard in the case, <https://observatoriolegislativocele.com/chile-proyecto-de-ley-cesacion-de-cargo-por-difusion-de-noticias-falsas-2018>

⁴ In a recent work, Yochai Benkler, Robert Faris and Hal Roberts studied the actual influence of false claims that circulated on social media during the electoral campaign that ended with the election of former President Donald Trump. Starting with the hypothesis that technology is the main cause of the current crisis in the information ecosystem, the authors conclude that: ‘These putative risks are, for the near future, not the major causes of disruption. We have argued throughout this book that none of these actors – Russians, fake news entrepreneurs, Cambridge Analytica, Facebook itself, or symmetric partisan echo chambers – were the major cause of the epistemic crisis experienced within the U.S. media ecosystem during the 2016 election or since. Instead of these technologically driven dynamics, which are novel but ultimately less important, we see longer-term dynamics of political economy: ideology and institutions interacting with technological adoption as the primary drivers of the present epistemic crisis.’ See Yochai Benkler, Robert Faris and Hal Roberts, *Network Propaganda: Manipulation, Disinformation, and Radicalization in American Politics* (Oxford: Oxford University Press, 2018) p. 351. Though I do not deny the impact of fake news on the democratic process and other aspects of social life, in this chapter I suggest an approach to the problem from a different point of view.

5.2 'TAXONOMY' OF 'FALSE EXPRESSIONS' TO JUSTIFY THEIR REJECTION

I adopt the conceptual framework presented by Yochai Benkler, Robert Faris and Hal Roberts in their book *Network Propaganda*.⁵ Their classification is important because, '[t]here is no universally accepted definition of disinformation. While the lack of agreement makes a global response challenging, the lack of consensus underlines the complex, intrinsically political and contested nature of the concept'.⁶ False statements may be (a) socially accepted; (b) socially rejected; (c) deemed harmful (anti-value) but deserving only of moral reproach; or (d) deemed harmful and deserving of legal consequences. But what considerations bear on the seriousness of a particular instance of false expression? Following Sunstein's recent work, I agree that four factors bear on this question, though I would also add a fifth factor.⁷ Sunstein's four relevant factors are:

- The state of mind of the person who is expressing themselves: are they (a) lying; (b) reckless; (c) negligent; or (d) mistaken, but reasonably so.
- The magnitude of the harm caused by their false expression: (a) grave; (b) moderate; (c) minor; (d) nonexistent. Grave harms would include wars begun under false pretenses, or excess pandemic deaths; importantly, harms at this scale are more often attributable to governments than to private citizens. But public officials can also cause moderate or minor harms, such as the termination of a beneficial (but not lifesaving) program, or the unjustified firing of a public employee, through their misstatements.

⁵ Ibid. 'Propaganda' and 'disinformation': manipulating and misleading people intentionally to achieve political ends. 'Network propaganda': how the architecture of a media ecosystem makes it more or less susceptible to disseminating these kinds of manipulations and lies. 'Bullshit': communications of outlets that don't care whether their statements are true or false, and usually not what their political effect is, as long as they make money. 'Misinformation': publishing wrong information without meaning to be wrong or having a political purpose in communicating false information. 'Disorientation': a condition that some propaganda seeks to induce, in which the target population simply loses the ability to tell truth from falsehood or where to go for help in distinguishing between the two.

⁶ Irene Khan, 'Disinformation and Freedom of Opinion and Expression', A/HRC/47/25, 13 April 2021, https://digitallibrary.un.org/record/3925306/files/A_HRC_47_25-EN.pdf.

⁷ Cass Sunstein, *Liars: Falsehoods and Free Speech in an Age of Deception* (Oxford: Oxford University Press, 2021). In this chapter, I am adopting Sunstein's explanation unchanged, although I would add as a fifth factor the 'speaker's level of obligation', which relates to the speaker's professional position. For example, professional speech – such as doctors' diagnoses or lawyers' advice to clients and representations to courts – often must comply with ethical guidelines, and can also give rise to malpractice liability. General obligations can be established about speech (of public officials); specific obligations according to professions (such as lawyers, doctors); ethical obligations (citizenship). In other words, the 'fifth element' would tend to focus on assessing who is issuing the expression and what obligations they have. In addition to the subject matter of the speech, a speaker's position can also matter.

- The likelihood that the harm will take place: (a) certain; (b) probable; (c) improbable; (d) highly improbable. Here, the position and credibility of the public official will again be relevant. A minister of health stating that drinking water with chlorine derivatives cures COVID-19 is not the same as that statement being spread on social media by an unknown person, or an advertiser that obviously has a vested interest in promoting their product.⁸
- How soon the harm will take place: (a) imminently; (b) in the near future; (c) reasonably soon; (d) in the distant future.

Sunstein summarizes this taxonomy in a useful table:

Relevant factors	A	B	C	D
1. State of mind	Lie	Reckless	Negligent	Reasonable
2. Magnitude of harm	Grave	Moderate	Minor	Nonexistent
3. Likelihood of harm	Certain	Probable	Improbable	Highly improbable
4. Timing of harm	Imminent	Near future	Reasonably soon	Distant future

Readers might have an intuition that false statements in column ‘A’ deserve harsh sanction, and statements in column ‘D’ deserve little or no sanction. But what about false statements that draw from both columns ‘A’ and ‘D’? Should a case of intentional lying that causes no harm be punished? What about an intentional lie that will cause grave harm to future generations, but little or no harm in the immediate future?

My focus is on expression by public officials, whether that expression occurs in the course of carrying out an official obligation or in a less formal setting. The speaker’s role and the setting of the speech might affect the likelihood and severity of the harm that results from a false statement, and therefore also the appropriate consequence – whether moral condemnation, official sanction imposed by the state, or sanctions imposed by private third parties such as contracting partners⁹ or social media platforms.¹⁰ So far, I have assumed an unstated premise: that lying is always or

⁸ This example is not simply a hypothetical case, to the point that the Pan-American Health Organization had to publicly clarify the situation. See ‘La OPS advierte contra el uso de productos de cloro como tratamientos para COVID-19’, PAHO, 5 August 2020, www.paho.org/es/noticias/5-8-2020-ops-advierte-contra-uso-productos-cloro-como-tratamientos-para-covid-19.

⁹ Contracts may contain binding obligations regarding confidentiality among other limitations.

¹⁰ In addition, a public official might be subject to concrete sanctions from a private entity with which the official has a contractual relationship, such as when a politician is barred from posting on a social media platform because of a statement that violates the platform’s terms of service. The most obvious example is Facebook’s recent decision regarding former President Donald Trump. Nick Clegg, Vice President of Global Affairs at Facebook, said Trump’s actions ‘constituted a serious violation of our rules that deserve the highest penalty available under the new protocols’. For this reason, the account was suspended for two years. See ‘Facebook anuncia que suspensión a Donald Trump será de dos años’, France 24, 4 June 2021, www.france24.com/es/minuto-a-minuto/20210604-facebook-anuncia-que-suspensi%C3%B3n-a-donald-trump-ser%C3%A1-de-dos-a%C3%B1os.

nearly always a moral wrong. But in the next section, I turn to the harms that can result when public officials lie.

5.3 THE SOCIAL AND MORAL CONSEQUENCES OF LIES

Consider the following statement by a teacher to her six-year-old students: 'Students with good behavior in my class will surely receive a gift from an alien that will arrive from the planet Mars at the end of the year.' One can probably agree that this expression falls within taxonomy category 1(a) (intention to lie). Now, will it cause harm? Or, in truth, does it produce nonexistent harm 2(d), or at most, minor harm 2 (c) if, for example, one believes that it may have some psychological consequence on those who receive that information? (Especially if at the end of the year they do not receive any gifts). Assuming that this lie leads to better behavior in that class, is it still worthy of informal or official condemnation? Could it instead be considered to be praiseworthy? This section considers that question from the perspectives of the Utilitarian and Kantian schools of thought.

The father of utilitarianism, Jeremy Bentham, argued that lies should not be objectionable if they maximize the utility – happiness – of society: 'Falsehood, taken by itself, consider it as not being accompanied by any other material circumstances, can never, upon the principle of utility, constitute any offense at all.'¹¹ This is not to say that Utilitarians approve of lying. On the contrary: human relationships are based on communicative interactions, which can be degraded by lies. In other words, Utilitarians see lying as wrong because of the harmful consequences for interpersonal or social trust.

The moral obligation to communicate truthfully was approached in a similar way by Günter Jakobs in a work that is already several decades old.¹² Breaking with the statement that honor is protected insofar as it is necessary to protect the dignity of people, he argued that 'offenses of libel can no longer be conceived exclusively as crimes against persons, but must also be defined as crimes against public interests'. Jakobs's reasoning was as follows: first, he rightly understood that criminal law is not the only method of social control. In addition, institutions such as family, school, religion, associations and unions mete out various kinds of sanctions against members who violate community norms. But this works only in an environment where there is regular, truthful expression about norms and violations – that is, where true expression about a violation of a norm or rule is not suppressed, and untrue expression can be sanctioned in a formal or informal way. Still, Jakobs correctly says that there is no 'broad' right to hear the truth – the need for truth is greater in some settings than others; hence lying in court is a criminal violation, but

¹¹ Jeremy Bentham, *The Principles of Morals and Legislation* (1789), cited by Sunstein, *Liars* (n 7) p. 26.

¹² Günter Jakobs, *La Misión de la protección jurídico-penal del honor* (Madrid: Civitas, 1997), Vol. I, pp. 627–43.

lying in most other settings will give rise only to civil liability or informal social sanction.

Let us now briefly turn to our analysis of a Kantian view of ethical duty. If one agrees with Kant that human beings should be respected for their inherent dignity, then false expression is always to be condemned, even if it does not cause other harm. It matters only that a person has been treated without respect. Therefore, from a Kantian perspective, a public officer who lies about their opponent to win an election has been disrespectful and has affected the autonomy of the public. Similarly, Sunstein argues that political candidates who lie ‘deny the central premise of democracy: the sovereignty of the citizenry’ and that politicians who lie, ‘act as if citizens are merely instruments for their own use.’ From a Utilitarian perspective, Sunstein remarks that when citizens realize that politicians are lying, many are outraged, and after a while they become indifferent and may even stop listening.¹³

In sum, various philosophical traditions agree that lying is morally reprehensible, though they may differ about the appropriate response. But of course only some lies are actionable in civil or criminal legal systems, raising the question of when it is appropriate to regulate lies. The answer takes us back to the first column of Sunstein’s taxonomy: lies in contexts such as political elections or public health can cause enormous and readily identifiable harms. Therefore, we would expect to see legal obligations to tell the truth in these and similar contexts. Before delving into these two fields, I will first analyze the Inter-American human rights system’s guidelines on public officials’ ethics and expression.

5.4 THE INTER-AMERICAN HUMAN RIGHTS SYSTEM AND FALSE EXPRESSIONS FROM THE GOVERNMENT AND PUBLIC OFFICIALS

In this section I include two distinct, though well-connected, ideas. I start with some general background standards coming from the Inter-American Court of Human Rights (IACHR) that protect freedom of expression, including the limits for lies. Then I highlight special obligations for public officials when they publicly inform people on public or general interest issues.

5.4.1 *General Freedom of Expression Standards and the Limits for Lies*

Advisory Opinion No. 5 (AO-5/85), issued by the IACHR in 1985 offered the Court’s first analysis of false expressions and their protection under Article 13 of the

¹³ Sunstein, *Lies* (n 7), p. 33.

American Convention on Human Rights (ACHR)¹⁴. In this Opinion, the Court considered whether a Costa Rican law that required journalists to belong to a professional association was consistent with Articles 13 and 29 of the ACHR. AO-5/85 had the virtue of responding far beyond the query that Costa Rica had submitted to the IACHR.¹⁵ The outcome is very well known: the IACHR determined that these laws violated freedom of expression. But to arrive at that answer, the Court left for posterity a complete analysis of Article 13, to be taken up by both the IACHR and the Inter-American Commission on Human Rights directly or indirectly when they had to resolve possible violations of Article 13 of the ACHR.¹⁶ Importantly, the IACHR stated that false expressions were protected, mainly because of the risk of censorship if government was free to decide whether a statement was true or false.

Fifteen years after this Advisory Opinion, the IACHR approved the Declaration of Principles of Freedom of Expression.¹⁷ In interpreting this principle, the IACHR Office of the Special Rapporteur for Freedom of Expression explained that false expressions cannot be sanctioned unless 'actual malice' is demonstrated: knowing or reckless disregard of the truth. It is important to mention that the actual malice doctrine taken by the Special Rapporteur has its origin in the US Supreme Court case law: false statements can also give rise to other kinds of liability, such as in tort cases. Under this

¹⁴ ACHR, Art. 13. [Freedom of Thought and Expression]:

1. Everyone has the right to freedom of thought and expression.

This right includes the freedom to seek, receive and disseminate information and ideas of all kinds, regardless of frontiers, either orally, in writing or in printed or artistic form, or by any other procedure of their choice.

2. The exercise of the right set forth in the preceding paragraph cannot be subject to prior censorship but to subsequent liabilities, which must be expressly established by law and be necessary to ensure:
 - a) respect for the rights or reputation of others, or
 - b) the protection of national security, public order or public health or morals.
3. The right of expression cannot be restricted by indirect means, such as the abuse of official or private controls of newsprint, radio frequencies, or of appliances and devices used in the dissemination of information or by any other means aimed at preventing communication and the circulation of ideas and opinions.
4. Public shows may be subject by law to prior censorship for the sole purpose of regulating access to them for the moral protection of childhood and adolescence, without prejudice to the provisions of subsection 2.
5. Any propaganda in favor of war and any defense of national, racial or religious hatred that constitutes incitement to violence or any other similar illegal action against any person or group of persons, for any reason, including those of race, color, religion, language or national origin are prohibited.

¹⁵ In the inter-American system, the Inter-American Court can exercise its advisory jurisdiction so that the states can ask it questions, such as the one formulated by Costa Rica regarding the compatibility of its legislation with the American Convention.

¹⁶ For those interested in the history and contents of AO-5/85, see *Libertad de expresión: A 30 años de la Opinión Consultiva sobre la colegiación obligatoria de periodistas* (Bogotá: Trust for the Americas, 2017), www.oas.org/es/cidh/expresion/docs/publicaciones/OC5_ESP.PDF.

¹⁷ Declaración de Principios sobre Libertad de Expresión, Principle 7, www.cidh.oas.org/basicos/basicos13.htm.

standard announced by the Supreme Court of the United States in *The New York Times v. Sullivan*,¹⁸ which has been incorporated to some degree into the law of free expression in various countries and, as I mentioned, in the Inter-American human rights system, a false statement about a public official or other person in the public eye can give rise to defamation liability only if the plaintiff can prove the false statement was made with actual malice. The actual malice standard encompasses statements that were knowingly false, or that were made with reckless disregard for the truth.

The doctrine of ‘actual malice’ allows legislatures to negatively value false claims made intentionally or with reckless disregard for the truth. This standard reflects a balance between competing values: concern for how lies can damage individual reputations and the public trust, and an interest in protecting speakers who make reasonable mistakes while participating in public discourse. Thus, the actual malice standard means speakers have more ‘breathing space’ to discuss matters of importance to the public than when they are discussing mere private individuals or concerns. As one can see, at the dawn of the twenty-first century in the Inter-American Human Rights System (IAHRS), the so-called moral taboo prevailed regarding lies: intentionally false statements deserve reproach. But, as Catalina Botero Marino explains:

it is possible to argue that Inter-American jurisprudence offers at least two important standards applicable to any state effort aimed at prohibiting or regulating so-called ‘fake news’. In the first place, the simple objective falsehood of an expression cannot be object of prohibition or state sanction . . . Second, based on the decisions of the Inter-American Court, it is possible to argue that restricting freedom of expression is only justified as a means to protect the rights of third parties or public order understood from a narrowly defined democratic perspective.¹⁹

So far, the interpretation of the IAHRS fits quite well with the proposed taxonomy: if the expression is knowingly false and it causes harm (column ‘A’ of the table above), it could deserve state sanctions.

The Joint Declaration on Freedom of Expression and ‘Fake News’, Disinformation and Propaganda draws a similar distinction between knowing and accidental falsehoods.²⁰ It urges the ‘abolition’ of [g]eneral prohibitions on the dissemination of information based on vague and ambiguous ideas, including “false

¹⁸ *The New York Times Co. v. Sullivan*, 376 US 254 (1964). For those interested in a detailed history of the case, see Eduardo Bertoni, *La Libertad de Expresión en el Estado de Derecho* 2nd ed. (Buenos Aires: Editores Del Puerto, 2000), ch. ‘New York Times vs. Sullivan y la malicia real de la doctrina’; Anthony Lewis, *Make No Law: The Sullivan Case and the First Amendment* (New York: Vintage Books, 1992).

¹⁹ Catalina Botero Marino, ‘La regulación estatal de las llamadas “noticias falsas” desde la perspectiva del derecho a la libertad de expresión’ in *Libertad de Expresión* (n 16).

²⁰ Joint Declaration on Freedom of Expression and ‘Fake News’, Disinformation and Propaganda (2017), www.osce.org/files/f/documents/6/8/302796.pdf. This document was signed by the United Nations Special Rapporteur for Freedom of Opinion and Expression, the Representative for Freedom of the Media of the Organization for Security and Co-operation in Europe, the OAS Special Rapporteur for Freedom of Expression and the Special Rapporteur

news” or “non-objective information” (Article 2(a)), but also notes that ‘State actors should not make, sponsor, encourage or further disseminate statements which they know or reasonably should know to be false (disinformation) or which demonstrate a reckless disregard for verifiable information (propaganda)’ (Article 2(c)). The Declaration also contemplates harms of different magnitudes, stating that public officials should particularly ‘take care to ensure that they disseminate reliable and trustworthy information, including about matters of public interest, such as the economy, public health, security and the environment’ (Article 2(d)).

5.4.2 Freedom of Expression and Special Obligations of Public Officials

In 2009, the IAHRs, considered Advisory Opinion No. 5’s postulates in the context of criticism of certain media by private individuals, other media outlets and public officials. In *Ríos v. Venezuela*²¹ and *Perozo v. Venezuela*,²² the Inter-American Court wrote that while public officials have a ‘duty’ of expression under certain circumstances, they also have a special duty of care to make ‘reasonable’ efforts to tell the truth, especially during times of high conflict. That obligation is necessary both because of the ‘wide scope and eventual effects on certain sectors of the population’ of official statements, and to prevent citizens from ‘receiving a manipulated version of certain events’.²³ These ideas were again expressed by the IACHR in Resolution 1/2020 ‘Pandemia y Derechos Humanos en las Américas’.²⁴ The Court reiterated that government officials ‘should take special care’ when discussing the pandemic, including by ‘counter[ing]’ misinformation spread by private individuals.

In conclusion, the ‘moral taboo’ – lying is wrong – is limitedly compatible with the IAHRs. A statement’s falsity does not exclude it from the protection of Article

for Freedom of Expression and Access to Information of the African Commission on Human and People’s Rights.

²¹ *Ríos and Others v. Venezuela*, Series C no. 194, Preliminary exceptions, Merits, Reparations and Costs, judgment of 28 January 2009.

²² *Perozo and Others v. Venezuela*, Series C no. 195, Preliminary exceptions, Merits, Reparations and Costs, judgment of 28 January 2009.

²³ The main facts in *Ríos*, relevant for this chapter, were that ‘several people linked to the television channel Radio Caracas Televisión (RCTV) suffered a series of acts of harassment, persecution and physical and verbal attacks between 2001 and 2005 for exercising their freedom of expression. Additionally, several Venezuelan government officials made intimidating statements about these people and the television station’s journalistic activities. The Inter-American Court heard the case and determined that the totality of these acts constituted ways of obstructing, interfering and intimidating the exercise of the professional activities of RCTV journalists. It also noted that, due to the context in which the senior officials’ statements were issued, the individuals connected RCTV were put in more vulnerable circumstances and, further, the lack of diligence in the investigations constituted a breach of the state’s obligation to prevent and investigate the facts. It should be noted that this decision is very similar to *Perozo et al. v. Venezuela*’, <https://globalfreedomofexpression.columbia.edu/cases/rios-v-venezuela>.

²⁴ Resolution 1/2020, Pandemia y Derechos Humanos en las Américas, IACHR, April 2020, www.oas.org/es/cidh/decisiones/pdf/Resolucion-1-20-es.pdf.

13 of the ACHR. But public officials' freedom of expression is distinct: for them, lying about important matters is reprehensible, and the obligation not to do so can be regulated, especially to prevent grave harms. The following are provisions of domestic law of administrative, criminal and ethical nature that explain the foundations and justification given in domestic law to public officials' obligation to tell the truth.

5.5 CRIMINAL LAW AND ADMINISTRATIVE LAW APPROACH: MUST PUBLIC OFFICIALS TELL THE TRUTH?

5.5.1 *Criminal Law in the Face of a Dishonest Act of a Public Official*

Imagine the following scenario: a high-ranking official is in charge of recording statistical data about criminal cases. To this end, they must fact-check that information against source documents. After some time, it becomes known that the official has entered false information, creating a problem for the statistical monitoring of the penal system. What is their responsibility? This case is not merely hypothetical. The Criminal Cassation Chamber of the Supreme Court of Justice of Colombia recently handled a similar situation.²⁵ The Court described the crime of 'ideological falsehood in a public document', which is committed 'by a public official who in the exercise of their duties, by issuing a public document that can serve as proof, expresses a falsehood or totally or partially conceals the truth'.²⁶

This case is illustrative of the approach taken in many Latin American countries.²⁷ It shows that some lies by public officials are sanctioned in the orbit of punitive law,²⁸ because of the public's need to have faith and trust in documents

²⁵ Supreme Court of Justice of Colombia, Criminal Cassation Court, SP154-2020 Filing 49523 (Passed Record No. 017), 29 January 2020. These types of rulings abound in Latin America.

²⁶ It is worth clarifying that the interpretation made by the Court of the crime of 'ideological falsehood in a public document' imposes a general obligation to tell the truth in public documents, and it is not limited to fraud cases.

²⁷ The Argentine Criminal Code includes the crime of ideological falsehood of a public instrument in its Art. 293. In Brazil the crime 'ideological falsehood' is provided for in the penal code in Art. 299. In Chile, Art. 193 refers to a special crime, committed by public officials, with various behaviors that involve falsehoods in an official document. In Costa Rica, the Penal Code includes the crime of ideological falsehood in Art. 360. The Guatemalan Penal Code includes the crime of ideological falsehood of a document in its Art. 322; in Mexico, the crime of ideological falsification is included in Art. 243 of the Federal Criminal Code. The Panamanian Penal Code contains in its Title XI on 'Crimes against the Public Trust' the crime of falsifying documents in general, specifically in Art. 366. Drafting unauthentic public documents in Paraguay is penalized in the Penal Code with law 1,160/97 in Title V of the 'Punishable Acts' against legal relationships. In Peru, Art. 428 of the Penal Code regulates the crime of ideological falsehood.

²⁸ Not all acts of public officials establish public trust. Acts of officials concerning their specific functions do establish public trust.

within the legal system. To be clear, criminal law may or may not be the right way to address these false public statements by public officials. My point is only to demonstrate the reasoning in support of this approach, which shows the high value placed on truthfulness when public officials are carrying out their mandate. What if a high-ranking public official's false claims are expressed on social media rather than in a document? Would the main argument justifying reproach change? I contend that it would not. In the same way that false expressions in a public document destroy public trust, so can public officials' false statements made in other circumstances.

It may be that a falsehood embodied in a public document can cause more damage than the same expression posted on a widely disseminated social media platform. But this is not necessarily the case. For example, imagine that a public official registers the wrong place of birth for a person. Suppose that same official lies about that person's birthplace on social media. Let us now add two facts: the person about whom the public official is lying is a presidential candidate, and the place falsely declared is a foreign state. Finally, assume that the statements on social media are made during an electoral campaign. Would anyone assert that the damage is greater in the case of the false written inscription than in the case of posting on social media?

In summary, punitive law recognizes an anti-value in falsehood in certain circumstances, especially in the case of public officials with a duty to tell the truth. The law of many Latin American countries reflects concern and protection for the 'public trust'. In addition to the ideological falsehood laws discussed above, countries in the region punish forgery and even in some cases malicious omissions of true data in public documents. The penalty increases when it is a public official who perpetrates such falsehoods. This increase seems to correlate to the public trust granted to public officials in the exercise of their functions.

5.5.2 *Administrative Law in the Face of a Dishonest Act of a Public Official*

Criminal law usually requires intentionality, and therefore is most likely to apply in cases that fall under column 'A' of the taxonomy. But administrative law and public ethics could have a broader scope. Parallel to the discussion in the previous section, administrative law specialists see harms to public trust – sometimes called 'legitimate trust'²⁹ – when public officials make decisions affecting groups or individuals based

²⁹ See Pedro J. J. Coviello, *La Protección de la Confianza del Administrado, Derecho Argentino y Derecho Comparado* (Buenos Aires: LexisNexis – Abeledo Perrot, 2004), p. 462.

on untrue information. These authors are referring to cases where administrative acts are signed with ‘false pretenses and legal ruses’ that can be misleading, in writing or orally in some cases.³⁰ In Latin America, for example, some laws and regulations allow the invalidation of administrative acts that are not truthful.³¹

A prestigious Latin American scholar, Agustín Gordillo,³² explains there is administrative liability:

If the person due to their work has access to public power [and] uses it in bad faith, through gimmicks or tricks – by action or omission, including silence – to carry out deceit or induce error; this type of conduct is certainly incompatible with the correct exercise of the administrative function. It is illegitimate even if the power exercised in the case was discretionary; in some of the rulings it is linked to the doctrine of personal acts and the prohibition of self-contradiction.

In the rule of law there is value when the public officer does not mislead citizens. Gordillo says that this is ‘incompatible’ with the public office. Thus, in administrative law there is also a particularly negative assessment regarding the falsehoods of public officials in the exercise of their functions, which extends, according to experts in the matter, not only to public documents but also to expressions, acts and other manifestations that may create rights and obligations or harm those who trusted them.

5.6 CONCLUSIONS

Criminal and administrative law of several Latin American countries establishes consequences when public officials lie, at least in some contexts. Moreover, there

³⁰ These authors are referring to acts carried out in writing, or in some cases orally. But if it is not appropriate to deceive citizens in writing, nor is it appropriate to deceive them orally or on social media. As discussed, the requirement of public officials to tell the truth in certain circumstances in the exercise of their functions cannot be different if it is expressed in a written act than if it is done *en masse* in a social media platform.

³¹ In Argentina, law 19,549 of administrative procedure establishes in its Art. 14 that the administrative act is null and void when the act is issued with ‘lack of cause due to the facts or the right invoked are false or non-existent’. In Colombia, the wording of Art. 88 of the Code of Administrative Procedure and Contentious Administrative Matters implies a presumption of veracity of administrative acts. In Costa Rica, the General Law of Public Administration expresses in its Art. 132: ‘1) The content must be lawful, possible, clear and precise and cover all questions of fact and law arising from the motive, even if they have not been debated by the interested parties.’ In Peru, one of the guiding principles of the Peruvian General Administrative Procedure is the presumption of veracity in all actions of the administrative procedure, regulated in Art. 51 of the General Administrative Procedure Law. In the Dominican Republic, Law No. 107 of 2013 describes the presumption of validity of administrative acts in Arts. 9 and 10.

³² Agustín Gordillo, *Tratado de Derecho Administrativo y obras selectas* (Buenos Aires: Fundación de Derecho Administrativo, 2017), Vol. 1, Parte General, 15.4. X-30.

exists a duty or obligation to tell the truth, which is reflected in some countries' codes of ethics.³³ Public officials who intentionally lie may face personal or professional sanctions, or their official decisions and the consequences of those decisions may be annulled.

The law reflects a highly contextual analysis that either implicitly or explicitly accounts for the various dimensions in Sunstein's taxonomy. In contrast, analysis that is focused narrowly on social media platforms sometimes fails to draw these distinctions. These initiatives do not always address the origin of false statements, or the specific obligations that certain people have due to their position or activity in a democratic society. I believe we should develop more context- and speaker-dependent approaches to regulating misinformation. In addition to delving into the study of our new media ecosystem, including social media, their business models, their scope and their potential liability (when appropriate), attention should be paid to the other actors who participate in the public debate and who have long had specific responsibilities regarding their speech.

The basic pillars of the rule of law, democracy and the republic are both the publicity of government acts and access to public information. The duty of truthfulness is a consequence of these rights, and it applies regardless of public officials' manner of expression.³⁴ Although there is a heated discussion in case law and academic discourse regarding the nature of the social media accounts of public officials, political parties and even public institutions, much of the information that

³³ According to these codes, in general, they consider the characteristics that should govern the public office include the qualities of probity, rectitude, integrity and honesty. These qualifications mean something simple: they are qualities of a person who can be trusted. And whoever lies cannot be trusted. Therefore we believe that all these regulations, demanding honesty, trustworthiness, probity or integrity, require from the public official that they be truthful in their statements. For examples of codes of ethics in the region see Argentina, Ley de Ética en el Ejercicio de la Función Pública, No. 25,188, www.argentina.gob.ar/normativa/nacional/ley-25188-60847/actualizacion; Uruguay, Declaración de interés general del Código de Ética en la función pública, www.impo.com.uy/bases/leyes/19823-2019; Chile, Law No. 20,880 on probity in public office and prevention of conflicts of interest, www.cmfchile.cl/portal/principal/613/articles-27838_doc_pdf.pdf; Colombia, Código de Integridad del Servicio Público Colombiano, www.funcionpublica.gov.co/documents/28587425/34877072/2019-08-21_Codigo_integridad.pdf/da1a074a-8390-a46e-11a5-cfffoa3279e9?t=1566404916392; Mexico, Código de Ética de las Personas Servidoras Públicas del Gobierno Federal, www.gob.mx/asa/acciones-y-programas/codigo-de-etica-de-los-servidores-publicos; Panamá, Código de Conducta de los Servidores Públicos de la Contraloría General, www.oas.org/juridico/PDFs/mesicic4_pan_cod_cond.pdf; Perú, Ley del Código de Ética en la Función Pública, No. 27,815, www.mimp.gob.pe/files/transparencia/CET/ley27815.pdf.

³⁴ It is relevant at this point, for example, to name the lawsuit of the Knight Center of Columbia University against former President Donald Trump to request that the President be banned from blocking followers on his Twitter account. The Knight Center argued and the court agreed that the President disseminated public and government information and thus the account constituted a public forum. See *Knight First Amendment Institute at Columbia University v. Trump*, No. 1:17-cv-5205 (S.D.N.Y.), No. 18-1691 (2d Cir.), No. 20-197 (Supreme Court).

the government disseminates today comes from official accounts on social media and other digital media, with an increasing number of people who are informed by these means.³⁵

This chapter began with a conceptual classification of false claims. I focused on the intent of the author and the possible harm in order to evaluate the cases where they deserve a reproach and what type of reproach they deserve. The first conclusion was that, despite the existence of what I, along with Sunstein, call the ‘moral taboo’ of lies, there may be cases that do not deserve any consequence. However, neither the IAHRs nor the regulations in force in the countries of the region ignore false statements by public officials, or allow them to exist without consequences. The study described a mandate and an expectation – explicit in some cases and tacit in others – that officials must take special care to ensure (within reason) that their statements are true, at least when they fall into certain categories. Failure to do so in certain circumstances can have consequences ranging from criminal to ethical. On the other hand, other categories of false speech – including many unintentionally false statements – are protected under Article 13 of the ACHR, and law that incorporates a version of the ‘actual malice’ standard.

Many false claims circulated on social media platforms have a wide reach in the population. But there is no consensus on the effect that social media alone has in these types of cases. Expressions do not happen in a vacuum; when public officials misspeak on social media, it is often then amplified in traditional media outlets. When that happens, it is extremely difficult to tease apart the effects of one versus the other – but the potential for amplification (and therefore likely amplified harm) is another reason to more closely regulate statements by public officials than private citizens.

It is important to mention that the UN Secretary-General submitted to the UN General Assembly the report ‘Countering Disinformation for the Promotion and Protection of Human Rights and Fundamental Freedoms’.³⁶ In it, the Secretary-General notes that countering the different manifestations of disinformation requires addressing underlying societal tensions, fostering respect for human rights, online and offline, and supporting a plural civic space and media landscape. Among the recommendations to the states, the Secretary-General makes the following recommendations:

Discourage public officials from disseminating disinformation through measures such as professional codes of conduct, and adopt measures aimed at holding them accountable for expressions amounting to advocacy of national, racial or religious

³⁵ See Ines Mergel, ‘Implementing Social Media in the Public Sector’ (2013) (Fall) *State & Local Energy Report* 16–23.; ‘It is therefore not surprising that according to a recent Fels Institute report, 90% of all local government organizations are using Facebook and 94% have set up a ‘Twitter account’, *ibid.* at 16.

³⁶ A/77/287, 12 August 2022.

hatred that constitute incitement to discrimination, hostility or violence, as prohibited under international human rights law, in line with the United Nations Strategy and Plan of Action on Hate Speech. Public officials should never denigrate, intimidate or threaten the media.

However, taking seriously the above conclusions – such as that the duty of truthfulness is a consequence of fundamental rights and it applies regardless of public officials' manner of expression, but, at the same time, some lies are insignificant – one might object that my approach is not realistic: laws and rules mentioned here will never be enforced against powerful public officials, because judges will not be willing to do so.³⁷ Or worse: the necessity to adapt and reform those laws and regulations will never happen because policymakers want to protect the scope of their own speech. This might be true. But many proposals to regulate misinformation are subject to the same critique; for example, social media platforms may be unwilling to police the false speech of powerful individuals or prominent companies.³⁸ For that reason, this chapter urges that we look beyond the messenger and focus on the substance and context of misinformation, and the speakers who disseminate it. This targeted approach is better suited to dealing with the grave threats posed by certain kinds of misinformation.

³⁷ However, former Brazilian President Jair Bolsonaro was convicted in June 2023 and banned from running as a candidate because a panel of judges at Brazil's electoral court voted to bar him from office until 2030 because of his conduct during the previous year's presidential election campaign. Five of the court's seven judges ruled that Bolsonaro abused his power and misused the media on 18 July 2022 when he used government staff members, the state television channel and the presidential palace in Brazil for a meeting in which he insisted to foreign ambassadors that the country's election system was rigged, the Associated Press reported. My point is that he was convicted because he lied using state resources. And this is just an example that regulation could be used against powerful people.

³⁸ I would like to thank Agustina Del Campo for this observation.

